



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-078

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Vida M. Alvy, Esq., of counsel

Skyer, Castro, Cutler & Gersten, attorneys for respondent, Sonia Mendez-Castro, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's)¹ son and ordered it to reimburse the parent for her son's tuition costs at the Mary McDowell Center for Learning (MMCL) for the 2008-09 school year. The appeal must be sustained.

At the time of the impartial hearing, the student attended an ungraded upper elementary school class at MMCL (Tr. pp. 171, 177; Parent Ex. B at p. 1). MMCL has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with a learning disability is not in dispute in this appeal (Dist. Ex. 4 at p. 1; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record reflects that the student attended preschool and a district public school from kindergarten through third grade (Tr. p. 282; Dist. Ex. 8 at p. 1). According to the parent,

¹ The underlying impartial hearing in this matter was captioned with both parents as parties; however, in this appeal only the student's mother is named as the responding party. Unless otherwise noted, this decision will not further address the distinction and will refer to both parents in the singular.

there were concerns regarding reading, math and academic progress and the student was referred to the Committee on Special Education (CSE) (Tr. pp. 247-48).

The hearing record indicates that in March 2006, the parent obtained one or more private evaluations of the student which were provided to the district (Tr. pp. 247, 279; see Dist. Ex. 8 at p. 1).² A private psychoeducational evaluation was conducted in March 2006 (Dist. Ex. 8 at p. 1). Administration of the Wechsler Intelligence Scale for Children- Fourth Edition (WISC-IV) yielded a full scale IQ score of 77 in the borderline range, a perceptual reasoning index of 82, a verbal comprehension index of 85, a processing speed index of 88 in the low average range, and a working memory index of 71 within the borderline range (id. at pp. 1-2). Academically, administration of the Kaufman Test of Educational Achievement (KTEA) revealed below average scores on all subtests, except for two subtests where the student performed well below average (id. at p. 2). Results of the KTEA reportedly reflected that at that time, the student was functioning within the early to mid-first grade level in reading, mathematics, written expression, and spelling (id.).

A private complete audiological evaluation conducted in March 2006, indicated that the student's hearing and middle ear function were within normal limits bilaterally (Dist. Ex. 8 at pp. 1-2). Testing of the student's central auditory processing revealed positive results for an auditory decoding deficit, tolerance fading memory problems, and an auditory integration deficit (id. at p. 2).

In April 2006, a private speech-language evaluation of the student was conducted (Dist. Ex. 8 at p. 2). The results of the speech-language evaluation indicated that the student presented with moderate language deficits in listening, speaking, reading, and writing; particularly in regard to vocabulary and complex syntax (id.).

A July 2006 psychoeducational reevaluation was conducted by the district's school psychologist upon the parent's request to "clarify the nature of [the student's] difficulties" during the previous school year (second grade) (Dist. Ex. 8 at p. 1). In addition to reviewing the evaluations previously discussed above, the school psychologist administered additional testing, conducted a clinical interview and projective assessment, and reviewed teacher reports (id. at p. 2). The school psychologist indicated that although the student tried to present himself as a "happy-go-lucky" youngster, he was actually prone to social anxiety (id.). The school psychologist described the student as concerned about succeeding academically (id.). The school psychologist reported that the student's failure to adequately understand material presented in class and keep up with his peers aroused his anxiety and left him feeling inadequate and incapable at times (id.).

The school psychologist indicated that, based on previous evaluation results and in addition to the student's speech-language and central auditory processing deficits, the student's reading, writing, and arithmetic skills were not at the level required to support third grade work (Dist. Ex. 8 at pp. 2-3). The student's decoding and reading comprehension skills were below grade level (id. at p. 2). Although the student memorized many site words, he had difficulty reading unfamiliar words (id.). Below grade level skills were noted for calculation, retention, and problem solving ability for orally presented arithmetic (id.). Written language skills were also below grade level,

² The private evaluation(s) are not included in the hearing record; however, a district psychoeducational reevaluation report provides a synopsis of the results of the private evaluations (Dist. Ex. 8 at pp. 1-3).

characterized by the student's slow work speed and lack of depth of information (*id.* at p. 3). The evaluator indicated in the report that with remediation the student might be able to improve his skills in the aforementioned areas (*id.*).

According to the parent, the CSE determined that the student was eligible for special education services when the student was in third grade (Tr. p. 248). In third grade (the 2006-07 school year), the student attended a district special class in his elementary school building where the parent indicated that he experienced attention and behavioral problems in addition to auditory processing and academic difficulties (Tr. pp. 248-52).

In approximately September 2007, the hearing record indicates that the student began attending MMCL, where he remained during the 2007-08 school year (Tr. p. 177; Dist. Ex. 7 at p. 2; Parent Ex. F). In December 2007, the district conducted a classroom observation of the student at MMCL as part of the CSE annual review process (Parent Ex. D). The observation report indicated that the particular room in which the student was observed was not wired for sound amplification (*id.*). The observer noted that two classes sat around a large rectangular table and there was a "white board" used in the front of the classroom for a lesson regarding literacy (*id.*). The observation report indicated that the student participated in the lesson by raising his hand in response to questions regarding the main idea, setting, and details of a story (*id.*). The student read aloud with minimal assistance from the teacher and followed along when another student was reading (*id.*). During a dictation task, he exhibited difficulty with capitalization (*id.*). The observation report indicated that the student displayed some fidgety behaviors and he was prompted to refocus and sit up (*id.*). The observer noted that the student related well to his teacher and classmates (*id.*). The student's teacher reported to the observer that the student was a hard worker, put a great deal of effort into his homework, and had great difficulty with encoding because "he doesn't hear the sounds" (*id.*). According to the observation report, the student used various strategies and contextual clues to determine the meaning of unknown words (*id.*). The observation report described the student's reading comprehension at the time of the observation as "good" (*id.*).

A January 2008 elementary school mid-year report from MMCL indicated that the student successfully transitioned to MMCL insofar as he learned class routines, easily understood class and school expectations, and made many new friendships (Dist. Ex. 7 at p. 2).³ The mid-year report noted that in the small, highly structured classroom at MMCL, the student was attentive and able to focus during whole class and small group lessons (*id.*). The student often required movement breaks to release energy (*id.*). He actively participated in the classroom and was proud of his work (*id.*). The mid-year report also noted that the student attended a reading group four days per week for one hour, with five other students (*id.* at p. 3). The mid year report indicated that the group used a combination of both the Orton-Gillingham/PAF⁴ reading program and the comprehension skills curriculum (*id.*). The main focus of the reading group was to develop and strengthen comprehension skills and to develop spelling skills (*id.*). The student worked on strengthening decoding skills in isolation, as well as during his reading group (*id.* at p. 4). When reading aloud, the student required reminders to read words more slowly, break words down into

³ One page of the mid-year report is dated January 2007 instead of January 2008; however, this appears to be a typographical error (Dist. Ex. 7 at p. 2).

⁴ Although the hearing record is unclear, presumably, "PAF" is an acronym for "Preventing Academic Failure."

syllables, and to use a bookmarker when decoding words, rather than skip words in a sentence or substitute one word in place of another (id.). The mid-year report indicated that at that time, the student was functioning at a beginning second grade level for encoding and a mid-second grade level for decoding and reading comprehension (id.). The mid-year report further noted that nightly homework assignments reinforced comprehension, encoding, and decoding skills (id.). Regarding writing skills, the student wrote in a journal daily and used phonetic spelling when he was unable to correctly spell a word (id. at p. 5). Grammar was taught through the "Basic Writing Skills" program (id.). The student was able to write a complete sentence, but struggled in his use of conjunctions to expand sentences (id. at p. 6). The hearing record indicates that by mid-year, the student had joined a new math group that was working at a third grade level (id. at pp. 8-9).

The January 2008 mid-year report indicated that the student received "language" therapy two times per week in a group of three students (Dist. Ex. 7 at p. 15). The mid-year report indicated that the student was polite, cooperative, and hard working, and that he demonstrated a good rapport with the therapists and other students in his group (id.). Some distractibility was noted, but the student was easily redirected back to task with minimal verbal prompts from the therapist (id.). Receptive language goals focused on the student's comprehension and internal organization of word relationships including antonyms, synonyms, categories, associations, and multiple meaning words (id.). Additional goals focused on the student's critical thinking skills regarding making inferences, predicting outcomes, identifying the main idea of the story, and comparing and contrasting (id.). According to the mid-year report, the student's weaknesses in auditory processing skills appeared to affect his receptive language skills (id.). The report noted that specifically, the student demonstrated weakness in auditory attention, listening in the presence of background noise, auditory word and sentence memory, and auditory interpretation of directions (id.). The mid-year report noted that the use of an FM amplification system in the classroom and therapy room appeared to improve the student's ability to focus and attend to auditory information (id.). In addition to auditory strategies presented during his language therapy sessions, the student appeared to benefit from visuals such as pictures (id. at pp. 15-16). The mid-year report indicated that the student's expressive language at the time was characterized by word retrieval difficulties, sentence formulation difficulties, reduced vocabulary, and verbal organization difficulties (id. at p. 16). According to the mid-year report, targeted areas addressed in the student's language therapy included question and sentence formulation, vocabulary, ability to follow directions, ability to provide specific and accurate information, and critical thinking skills (id.). Word retrieval skills were addressed through tasks that involved describing objects by attributes, naming word associations and category members, as well as using visualization and phonemic cuing techniques (id.).

The occupational therapy (OT) section of the January 2008 mid-year report indicated that the student presented at that time, with visual perceptual deficits that may have had an "impact" on his work in the classroom (Dist. Ex. 7 at pp. 17, 19). At the time of the mid-year report, the student demonstrated neat and well formed manuscript handwriting, and was ready to transition to cursive writing and develop his signature (id. at p. 19). The mid-year report reflected that the student demonstrated "severe difficulty" in spatial relationships, visual memory, visual sequential memory, and visual closure (id. at p. 17). The student demonstrated "moderate difficulty" in figure ground and form perception performance components (id.). According to the mid-year report, the student demonstrated "mild difficulty" in his ability to copy from a far source on a vertical plane, as well as in his gross motor performance regarding upper extremity strength and endurance,

core/trunk strength and endurance, bilateral coordination, eye-hand coordination, balance, and motor planning (id. at p. 18).

The CSE convened on April 16, 2008 to conduct the student's annual review in preparation for the 2008-09 school year (Dist. Exs. 4 at pp. 1-2; 5). Participants at the CSE meeting included the parent, the school psychologist who also acted as the district representative, a regular education teacher, and a school social worker (Dist. Ex. 4 at p. 2). An additional parent member and the student's special education teacher from MMCL participated in the CSE meeting by telephone (id.). The April 2008 CSE meeting minutes indicated that the parent was given a copy of her due process rights and that "independent evaluation, copies of [student's] records, appeal classification or placement, and legal counsel was discussed" (Dist. Ex. 5). In the resultant individualized education program (IEP), the CSE recommended that the student be placed in a 12:1+1 special class in a community school with related services of individual speech-language therapy one time per week for 30 minutes, and group speech-language therapy two times per week in a group of three (Dist. Ex. 4 at pp. 1, 13). The CSE also recommended that the student be given additional support in the form of preferential seating near the teacher, additional time to process verbal/nonverbal information, repetition of directions, and use of an FM (amplification) unit (id. at pp. 3, 5, 11). The IEP included testing accommodations such as extended time, administration in a special location, questions read aloud, directions read and reread aloud, and use of an FM unit (id. at p. 13). The CSE also recommended modification of the standard promotional criteria (id.). The IEP indicated that the student would be expected to meet 80 percent of the elements of the third grade ELA standards, 80 percent of the fourth grade math standards, and 90 percent attendance (id.).

The district sent a Final Notice of Recommendation (FNR) dated August 4, 2008 to the parent which set forth the recommendations of the CSE as enumerated in the April 2008 IEP and identified a specific school location for the student for the 2008-09 school year (Dist. Ex. 3). The FNR identified an individual whom the parent could contact if she wanted to discuss the CSE's recommendations or if she wanted to meet with the CSE again, and indicated that the student's IEP was attached (id.).

In a letter to the district dated August 18, 2008, the parent notified the district that she was rejecting the IEP as invalid, as well as the placement offered by the district and intended to place the student at MMCL for the 2008-09 academic year and seek funding for the unilateral placement from the district (Parent Ex. B at pp. 1-2). The parent further requested that the district provide transportation for the student to MMCL (id. at p. 1).

In a due process complaint notice dated October 13, 2008, the parent, through her attorney, alleged that the district failed to offer the student a free appropriate public education (FAPE) on procedural and substantive bases (Dist. Ex. 1). The parent alleged that there were procedural defects in the composition of the April 2008 CSE and in the formulation of the student's 2008-09 IEP (id.). Specifically, the parent alleged that the student's then current private school teacher and an additional parent member participated in the CSE meeting by telephone; that the teacher only participated for 15 minutes of the 40 minute meeting; that the additional parent member had no information available to her to assure that her participation was meaningful; and that the participant attending in the role of a regular education teacher did not comply with federal or State

requirements (id. at pp. 1-3).⁵ Substantively, the parent alleged that the placement recommended by the district for the 2008-09 school year was inappropriate for the student because the classroom was functioning at a wide range that would not provide a suitable and functional peer group for the student and that the placement was not reasonably calculated to enable the student to make educational progress (id. at pp. 1, 3). As a resolution, the parent requested that the district reimburse the parent for the student's tuition at MMCL for the 2008-09 school year (id. at p. 3).

In a response to the parent's due process complaint notice dated November 4, 2008, the district alleged that the CSE recommended a special class with a 12:1+1 ratio in a community school and that the recommendation was based on the student's psychoeducational evaluation, a classroom observation, related service progress reports/evaluations, and teacher progress reports (Dist. Ex. 2 at pp. 2-3). The district alleged that it alternatively considered placing the student in a collaborative team teaching (CTT) program and a 12:1 special class, but that neither was "supportive enough" for the student (id. at p. 3). The district further alleged that the 12:1+1 special class placement was reasonably calculated to enable the student to obtain "meaningful educational benefits" (id.).

An impartial hearing convened in April 2009 and concluded on May 22, 2009, after three days of testimony (Tr. pp. 1, 18, 121).⁶ The district called four witnesses and submitted nine documents into evidence (Tr. pp. 25, 58, 87, 127; Dist. Exs. 1-9). The parent called four witnesses and submitted six documents into evidence (Tr. pp. 167, 196, 233, 246; Parent Exs. A-F).

In a decision dated June 5, 2009, the impartial hearing officer determined that the student was not offered a FAPE for the 2008-09 school year for both procedural and substantive reasons (IHO Decision at p. 17). Procedurally, the impartial hearing officer found that the student's 2008-09 IEP was developed without the "full participation" of an additional parent member because the additional parent member participated in the April 16, 2008 CSE meeting by telephone and did not have any documents regarding the student, which the impartial hearing officer determined significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (id. at pp. 15-16). The impartial hearing officer further found that the goals set forth on the student's 2008-09 IEP did not relate to the student's individual needs and that assumptions made by the district with respect to the student's anticipated progress were general and not based on any reports, evaluations or discussions regarding the student (id. at p. 17). The impartial hearing officer also determined that the student's unilateral

⁵ The due process complaint notice cites to a prior version of federal regulations that were promulgated under the 1997 reauthorization of the Individuals with Disabilities Education Act (IDEA) (Dist. Ex. 1 at p. 2). However, the Code of Federal Regulations (34 C.F.R. Parts 300 and 301) was amended to implement the changes resulting from the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006 and, among other things, reorganized and renumbered the former regulations.

⁶ I note that the hearing record contains no explanation whatsoever for the inordinate delay in convening the impartial hearing. While the parent's due process complaint notice is dated October 13, 2008, the hearing record indicates that the impartial hearing did not convene for over six months (Tr. p. 1; Dist. Ex. 1). I caution the impartial hearing officer to comply with State regulations with regard to granting extensions and rendering a timely, final decision (8 NYCRR 200.5[j][3][xiii], [5]).

placement at MMCL for the 2008-09 school year was appropriate and that equitable considerations favored reimbursement of the tuition to the parent (*id.* at p. 19).

This appeal by the district ensued. The district contends that the impartial hearing officer erred in determining that the district did not offer the student a FAPE for the 2008-09 school year. The district alleges, among other things, that no additional parent member was required to attend the April 16, 2008 CSE meeting because: (1) subcommittees on special education, rather than full committees on special education, do not require the participation of an additional parent member; (2) even if an additional parent member was required to participate in the CSE meeting, the telephonic participation of the additional parent member at the CSE meeting in this case was adequate and did not prevent the parent from participating in the CSE process; and (3) even if the additional parent member's participation by telephone was a procedural error, the impartial hearing officer erred in holding that the lack of an additional parent member denied the student a FAPE. The district further argues that it was improper for the impartial hearing officer to make a finding relating to the adequacy of the goals on the student's IEP because the parent did not assert a claim about the goals in her due process complaint notice and, alternatively, that the impartial hearing officer's determination regarding the goals lacks merit because the student's goals and short-term objectives on his IEP were tailored to meet the student's individual needs and were based on a psychoeducational evaluation, a classroom observation, teacher reports, and related service reports.

The district further asserts that the parent failed to meet her burden to establish that the student's unilateral placement was appropriate because MMCL was not appropriate to meet the student's individual needs, denied the student the opportunity to interact with his typically developing peers in the least restrictive environment (LRE) and failed to provide the student with all of the services mandated by his IEP.⁷

The parent submitted an answer denying many of the allegations made by the district and requesting that the June 5, 2009 decision of the impartial hearing officer be upheld. The parent asserts in her answer that the adequacy of the goals on the student's 2008-09 IEP was raised at the impartial hearing and that the district did not object to the raising of that issue; therefore, the impartial hearing officer did not err in making a finding with regard to the goals.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (*Rowley*, 458 U.S. at 206-07; *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors

⁷ The district does not appeal the impartial hearing officer's finding with respect to equitable considerations.

render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

I will first address the parties' arguments regarding the participation of the additional parent member at the April 2008 CSE meeting. Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.344), New York State law requires the presence of an additional parent member at the CSE meeting that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-105; Application of the Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). New York law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]). New York State law further provides that when a district is permitted to convene a CSE subcommittee, the subcommittee need not include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]-[5]).

In this case, the hearing record does not support the impartial hearing officer's conclusion that the lack of an additional parent member resulted in a denial of a FAPE (IHO Decision at p. 16). The hearing record indicates the student was initially placed by the district in a 12:1+1 special class prior to his attendance at MMCL (Tr. pp. 238, 246-49). Consequently, the district was not required to convene a full CSE that included an additional parent member because the student was not being considered for initial placement in the following: a special class, a school primarily serving students with disabilities, or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4][i]-[iii]). Moreover, although the parent notes that the district characterized the April 2008 meeting as a CSE meeting (Answer ¶ 40), the parent concedes that an additional parent member was included in the meeting by telephone (Tr. p. 260; Answer 7), albeit without making comments during the meeting (Tr. pp. 48, 67, 108, 259-60).⁸ The parent

⁸ The district cites a June 1992 State Education Department field memo entitled, The Use of Teleconferencing to Ensure Participation in Meetings to Develop the Individualized Education Program (I.E.P.); however, I note that the State regulations were subsequently amended, in pertinent part, effective December 29, 2005, and provide that "[w]hen conducting a meeting of the committee on special education, the parent and the representative of the school district appointed to the committee on special education may agree to use alternative means of meeting participation, such as videoconferences and conference calls" (8 NYCRR 200.4[d][4][i][d]). The regulation does not incorporate the requirements for telephone participation as set forth in the 1992 field memo (Application of a Child with a Disability, Appeal No. 05-129).

testified that she was looking for guidance and support from the additional parent member; however, the parent also testified that she had previously attended a CSE meeting when developing a previous program for the student and that she did not ask questions during the April 2008 CSE meeting (Tr. pp. 261, 279, 290). I also note that upon providing the parent with the student's IEP and FNR in August 2008, the district offered to reconvene the CSE at the parent's request (Dist. Ex. 3). The hearing record does not reflect that the parent requested that the CSE reconvene. Here, the hearing record reveals the following: an additional parent member participated in the meeting by telephonic means (Tr. p. 260; Parent Ex. C at p. 2); the hearing record does not persuasively show that the telephonic participation significantly impeded the parent's participation in the CSE meeting; the parent was familiar with the CSE meeting process, having previously formulated the student's third grade IEP at a CSE meeting (Tr. p. 248); and the parent did not seek to reconvene the CSE when offered the opportunity to correct or address any of the perceived procedural inadequacies in the formulation of the IEP. In view of the forgoing, the hearing record does not support the impartial hearing officer's determination that the inclusion of the additional parent member by telephone at the April 2008 CSE meeting was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]; Mills, 2005 WL 1618765, at *5; see also E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

With respect to the impartial hearing officer's finding that the student's goals as set forth on his 2008-09 IEP did not relate to his individual needs and that assumptions made by the district with respect to the student's anticipated progress were general and not based on any reports, evaluations or discussions regarding the student, the district alleges that the impartial hearing officer improperly made a finding relating to the goals on the student's IEP as the parent did not raise a claim about the goals in her due process complaint notice. Alternatively, the district alleges that the finding by the impartial hearing officer lacks merit because the student's goals and short-term objectives on his IEP were based on a psychoeducational evaluation, a classroom observation, teacher reports, and related service reports, and they were tailored to meet the student's individual needs.

Pursuant to the 2004 amendments to the IDEA, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process request unless the original request is amended prior to the impartial hearing or the other party otherwise agrees (20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see Application of the Bd. of Educ., Appeal No. 09-054; Application of the Dep't of Educ., Appeal No. 08-131; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of the Bd. of Educ., Appeal No. 09-054; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; see Lago Vista Indep. Sch. Dist. v. S.F., 50 IDELR 104 [WD Tex. Oct. 24, 2007]; see also John M. v. Bd. of Educ., 502 F.3d 708, 713 [7th Cir. 2007]).

As noted above, the parent alleged in her October 13, 2008 due process complaint notice that the composition of the CSE was improper, that the offered placement for the 2008-09 school year was inappropriate for the student as the classroom was functioning at a wide range that would not provide a suitable and functional peer group for the student, and that the placement was not reasonably calculated to enable the student to make educational progress (Dist. Ex. 1 at pp. 1, 3). The parent did not raise any issues in her due process complaint notice with respect to the goals and objectives set forth in the student's IEP (id. at pp. 1-3), and the hearing record does not contain an agreement with the district to expand the scope of the hearing. I also note that nearly all of the testimony in the hearing record regarding the goals in the student's IEP was focused on the process by which the goals were developed, rather than the adequacy of the content of the goals (see, e.g., Tr. pp. 40, 46-47, 49-50, 75-76, 78, 81, 93, 109, 110, 112-13, 236, 254-56, 258, 263).⁹ The district's regular education teacher briefly testified about the goals on the student's IEP (Tr. pp. 33-39). On the last day of the impartial hearing, the parent testified in one instance that a goal regarding computational skills at a fourth grade level was not appropriate for the student at the beginning of the school year (Tr. p. 256); however, the parent later testified that she expected the student to reach a high third or fourth grade level at MMCL (Tr. pp. 256, 288). I find that these references in passing to the adequacy of the goals and short-term objectives do not sufficiently support the impartial hearing officer's decision to reach this issue sua sponte and determine that the district failed to offer a FAPE on this basis. Based on these circumstances, I find that the issue of the contents and adequacy of the goals and objectives in the student's IEP was outside the scope of the impartial hearing was not properly before the impartial hearing officer.

Turning next to the parties' contentions regarding the CSE's recommended placement for the student, I find that the hearing record demonstrates that the 12:1+1 placement for the 2008-09 school year as recommended in the student's IEP was reasonably calculated to confer educational benefits in the LRE such that the student was offered a FAPE.

The assistant principal of the recommended district school testified that she supervised instruction in the school's special education classes (Tr. p. 127). She testified that the recommended school served both general and special education students and it contained two self-contained 12:1+1 classes, as well as other special education class options (Tr. p. 130). She further testified that testing accommodations were provided, particularly for students in grades three through five, including modifications such as having tests read to students and time modifications (Tr. pp. 131-32). Each of the self-contained special education classes contained paraprofessionals that provided extra assistance to students under the supervision of a classroom teacher (Tr. p. 132). The assistant principal indicated that had the student attended the offered placement in September 2008, there would have been a classroom spot available for him (Tr. p. 134). The classroom was described as "four-five bridge class" that, at the time of the impartial hearing in spring 2009, contained 12 students and four paraprofessionals to assist the teacher with instruction in the classroom (id.).

⁹ I also note that on appeal the parent similarly focuses on the inadequacy of the procedure of formalizing the IEP goals after the CSE meeting; however, noticeably lacking from her arguments is any assertion that the goals that were ultimately set forth on the IEP were actually inappropriate for the student (see Parent Mem. of Law at pp. 7-10).

With regard to the parties' contentions about grouping, the hearing record includes a class profile for the proposed class that reflects the proposed special class included students in grades four and five who were eligible for special education services as students with a learning disability, speech or language impairment, or emotional disturbance (Tr. pp. 146-49, 157; Dist. Ex. 9). Chronologically, the students in the class ranged between 10 and 13 years old, which is consistent with the student's age (Dist. Exs. 4 at p. 1; 9). According to the class profile, eight students had an instructional reading level ranging between second and third grade, and four students had an instructional math level ranging between 3.2 and 4.0, which was similar to the student's functional levels in reading and math (Dist. Ex. 9). The assistant principal at the recommended school testified that although none of the students in the proposed classroom used an FM unit, one of the other students had an auditory processing disorder (Tr. p. 150).¹⁰ There were two behavior management paraprofessionals assigned to two students in the proposed special class and two additional paraprofessionals assigned to the class, and the assistant principal testified that when observing the class during her rounds, the students are always engaged in an activity (Tr. pp. 148-50). According to the assistant principal, there was no behavior management plan for the proposed class because behavior management was programmatic, the students were contained in the classroom, and "the teacher [was] able to deliver instruction and the children [were] able to learn" (Tr. pp. 148-49).

In order to address the student's tendency to shut down when he was frustrated, the assistant principal testified that the special education teacher of the proposed special class had a very calm and soothing demeanor and had previously been observed taking frustrated students aside, talking to them, and calming them (Tr. pp. 135, 155-56, 160, 162). The hearing record also indicates that the presence of paraprofessionals in the classroom would have facilitated the student's need to work at his own pace and to receive redirection (Tr. pp. 160-61).

Turning next to the student's academic needs, the assistant principal testified that the classroom teacher in the proposed class used the "Balanced Literacy" program (Tr. p. 136). She noted that because there was a "mixture of all ability levels in all the classes," teachers grouped students by their abilities, strengths, and needs, and that this was facilitated in the classroom offered to the student through the four paraprofessionals that assisted the teacher in providing differentiated instruction in the classroom (Tr. pp. 136-37). The assistant principal testified that the classroom teacher of the proposed class used a multisensory approach to address her students' reading needs (Tr. p. 137). When questioned about the phonics aspect of reading, the assistant principal testified that the classroom teacher worked with students on "word study," primarily through shared reading and the use of big books with large print, work in centers with the paraprofessional, and participation in activities pertaining to phonics instruction (Tr. p. 138). Approximately every six weeks, the classroom teacher would keep "running records" to assess if a student could read the words from the chosen book and respond to a series of comprehension questions (Tr. p. 140).

With regard to writing skills, the assistant principal testified that the teacher conferred with students about their writing pieces (Tr. pp. 140-41). All classes handed in writing samples to the

¹⁰ The regular education teacher testified that had the student not attended MMCL, he would have been given an FM unit (Tr. p. 38).

principal and assistant principal monthly so that progress in various writing genres could be monitored (Tr. p. 141).

Regarding math instruction, the assistant principal testified that the recommended school used the "Every Day Mathematics" curriculum (Tr. pp. 138-39). The assistant principal noted that various activities were built into the math program, allowing teachers to differentiate instruction according to students' needs (Tr. p. 139). Quarterly assessments were given to each student in the school (*id.*). The teacher's instruction was driven by the scope and sequence of material, the pacing calendar, and how well students performed on the quarterly assessments (*id.*). The assistant principal indicated that students were provided with instruction in all content areas including science, math, literacy, social studies, as well as computer science, multi-cultural art, Spanish, and physical education (Tr. p. 142). The assistant principal further testified that teachers at the proposed school were encouraged to speak with parents (*id.*). Twice each year, parents and teachers conferred to review the students' work and to discuss progress (Tr. p. 141).

In light of the forgoing evidence in the hearing record, I find that the placement offered by the district was appropriate to address the student's needs, and had he attended, would have been reasonably calculated to offer the student educational benefits.¹¹ Accordingly the impartial hearing officer's determination that the district failed to offer the student a FAPE must be annulled (IHO Decision at pp. 15-17).

Having determined that the district did not fail to offer the student a FAPE, I need not reach the issue of whether MMCL was appropriate for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

¹¹ I also note that with regard to LRE requirements, special education students at the proposed school participated in mainstream physical education with a general education class, where all students received the same instruction (Tr. p. 143). The special education teacher, all of the paraprofessionals, and the gym teacher were present during the mainstream gym class (Tr. pp. 142-43). The assistant principal testified that the special education students "love[d]" to "mix in with the general ed[ucation] students" (Tr. p. 143). Furthermore, the special education students in the recommended school were included and participated in school-wide assemblies, special events, and community activities (Tr. pp. 143-44).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated June 5, 2009 that determined that the student was denied a FAPE and awarded tuition reimbursement to the parent for the student's unilateral placement at MMCL for the 2008-09 school year are hereby annulled.

Dated: **Albany, New York**
 September 08, 2009

PAUL F. KELLY
STATE REVIEW OFFICER