



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-105

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Law Offices of Skyer, Castro, Cutler and Gersten, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioners (the parents) appeal from a decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at St. Ursula Learning Center (St. Ursula) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending sixth grade at St. Ursula (Tr. pp. 7-8; Parent Ex. C). St. Ursula is a private school which 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 programs and services as a student with a learning disability is not in dispute in this appeal (34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]; see Tr. p. 8).

The hearing record shows that in 2005, while he was attending second grade in a district school, the student was initially referred for evaluation by the district and subsequently classified as a student with a learning disability and recommended for special education teacher support services (SETSS) (Dist. Ex. 2 at pp. 2, 3). The hearing record also shows that the student functions in the average range of cognitive ability and exhibits strengths in his working memory, processing speed, and word knowledge (id. at p. 2). The student's verbal comprehension is assessed to be within normal limits (id.). The student exhibits weaknesses in his overall perceptual reasoning ability, spatial visualization, and fluid visual reasoning (id.). Academically, the student's broad math and broad reading are within the average range (id.). His letter-word identification, reading fluency, ability to do calculations, and math fluency are areas of strength; while his academic

knowledge, passage comprehension, word attack skills, quantitative concepts, and overall math reasoning are areas of relative weakness (id.).

In April 2006, a district school psychologist reevaluated the student at the student's mother's request, due to her concerns that the student was not making adequate progress in the district's program (Dist. Ex. 2 at pp. 1, 2). The school psychologist noted that the student's last evaluation on June 7, 2005, yielded a full scale IQ score of 97, determined to be in the average range, with strengths in working memory and processing speed (id. at p. 3). The school psychologist reported that the 2005 psychological evaluation also showed that the student's verbal comprehension was within normal limits, but that he exhibited weakness in perceptual reasoning ability, which was determined to be in the low average range (id.). It was reported that the 2005 psychological evaluation also showed that the student's visual spatial reasoning ability, fluid visual information processing, and abstract reasoning skills were below age expectancy (id.). As part of the April 2006 evaluation, the student was administered the Wechsler Abbreviated Scale of Intelligence (WASI) to get a "quick assessment" of his thinking and reasoning skills (id.). The results reflected that the student obtained a verbal IQ score of 96, a performance IQ score of 84, and a full scale IQ score of 88 (id.). The psychologist noted, however, that the student was "probably" functioning in the average range, since his stronger cognitive skills were not assessed during this evaluation (id. at p. 5). The results of the WASI also showed that the student achieved standard scores in verbal comprehension that were in the average range, and that his knowledge of words and the ability to define the words he knew were an area of strength (id. at p. 3). The student's ability to abstract meaningful concepts and relationships from verbally presented material also fell within the average range; however, this ability was not as strong as his word knowledge or vocabulary (id.). The results of the WASI also showed that in the area of performance skills (or non-verbal reasoning ability), the student achieved standard scores within the low average range (id.). The school psychologist noted that the student's results in these areas remained "exactly the same" as in the prior evaluation administered in 2005, demonstrating that these skills remained an area of relative weakness, and that the student's visual spatial reasoning ability, fluid visual information processing, and abstract reasoning ability remained below age expectancy (id.).

Administration of the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III ACH) yielded standard scores (and percentiles) of: 85 (16) in broad reading, 94 (34) in broad math, 88 (20) in basic reading skills, 99 (49) in math calculation skills, 91 (28) in math reasoning, 90 (25) in letter-word identification, 89 (23) in reading fluency, 97 (42) in calculation, 106 (65) in math fluency, 83 (13) in passage comprehension, 89 (23) in applied problems, 89 (24) in word attack, and 97 (41) in quantitative concepts (Dist. Ex. 2 at pp. 3-4). The school psychologist noted that the student's standard scores in academic areas had declined in the year since the 2005 evaluation (id. at p. 4). The psychologist also noted that while the student maintained standard scores in broad math that were within normal limits, his broad reading "ha[d] not grown overtime relative to his scores from the [2005 evaluation]" (id.). In relation to the student's math skills, the school psychologist noted that the student's ability to do calculations remained an area of strength, with the speed at which he was able to do simple calculations in a timely fashion remaining his "top ability" (id.). The school psychologist noted that student's knowledge of quantitative concepts had improved from the 2005 evaluation and the student attained standard scores within age and grade expectancy (id.). The school psychologist also noted that the student's ability to solve arithmetic word problems presented both orally and pictorially (with an opportunity to read) yielded standard scores below age and grade expectancy (id.). The school psychologist also noted that the student had difficulty with solving monetary word problems and tended not to use paper and pencil to solve those problems, and as a result, the student tended to guess at the answers (id.).

In relation to the student's broad reading and basic reading skills, the student attained standard scores in the low average range, with standard subtest scores in word attack skills, word identification, reading fluency, and passage comprehension determined to be in the low average range and below age and grade expectancy (Dist. Ex. 2 at p. 4). The school psychologist noted that the student tended to read words based on the initial consonant sound, that he had difficulty with both short and long vowel sounds, and that he would confuse vowel sounds (such as the short vowel sounds for "i" and "e") (id.). The school psychologist also noted that the student's ability to comprehend what he read became more variable as the sentences increased in number and when they called for inferences to be made (id.).

Regarding the student's social/emotional functioning, the school psychologist reported that the student had not presented with social or behavioral difficulties in the past and that he tended to exhibit "good behavior" and had peer relationships both at home and in school (Dist. Ex. 2 at p. 4). The student reported that he liked school; that he liked math the best and science the least (id.). The school psychologist noted that the student's then current classroom teacher described the student as getting along well with peers and adults, and being quiet in class during lesson time, but motivated to do well in all areas (id. at p. 2). The teacher also was noted as reporting that the student had difficulty with reading comprehension, arithmetic word problems, and deciding what operation to use to solve word problems (id.). The school psychologist also indicated that the student's classroom teacher reported that the student made "a little bit of progress" during the school year (id.). The psychologist further indicated that the student's SETSS provider described the student as working well with peers and adults, being an active listener who responded well to both praise and a token system, and as having made consistent progress in reading and math (id.). The school psychologist indicated that decisions regarding the student's program would be made at the CSE meeting (id. at p. 5).

The hearing record indicates that for third grade (the 2006-07 school year), the CSE recommended that the student be placed "on the general education side of a Collaborative Team Teaching Class" (CTT) and provided with SETSS; however, the parents rejected the recommended IEP and unilaterally placed the student at St. Ursula (Tr. pp. 147, 158-59; Dist. Ex. 2 at pp. 2, 5). The student continued to attend St. Ursula for the 2007-08 school year (Dist. Ex. 1 at p. 1).

A February 5, 2008 report written by the student's teachers at St. Ursula, showed that the student was estimated to be at the 2.5 instructional level in reading, with strengths noted in sight words, short vowel sounds, and noted improvements in overall decoding and recognizing medial sounds (Dist. Ex. 3 at p. 1). The report noted that the student exhibited weaknesses in comprehension, inferencing, and sequencing (id.). The teachers estimated that the student was at the 3.5 instructional level in math, with his strengths being in basic operations and basic word problems, while his weaknesses were in multi-step problems, multi-step word problems, and recalling multiplication facts (id.). The student's teachers further estimated that the student was at the 2.5 instructional level in written expression skills, with his strength being creativity while he exhibited weaknesses in punctuation and sentence structure (id.). The report also noted that the student had difficulty remembering what he had learned and at times, required directions to be repeated and simplified (id. at p. 2). The teachers noted that the student seemed to benefit from the small class setting and multisensory instructional approach and that he had made an "adequate amount" of progress in academic areas (id. at pp. 1, 2). The February 5, 2008 St. Ursula report also reflected that in March 2006, the student had achieved grade equivalent scores of 3.0 in reading, 3.3 in mathematics, 3.4 in science, and 5.0 in social studies, as measured by the Iowa Test of Basic Skills (ITBS).

On March 19, 2008, the CSE convened for an annual review and to develop the student's IEP for the 2008-09 school year (Dist. Ex. 6). Meeting participants included the student's mother, a school psychologist who also acted as a district representative, a district social worker, an additional parent member, and a special education teacher and a regular education teacher from St. Ursula, both of whom participated via telephone (id. at p. 2). The CSE recommended that the student be placed in a 12:1 special class at a district school and receive speech-language therapy services twice weekly (one 40-minute session in a 1:1 setting and one 40-minute session in a 3:1 group setting) (id. at pp. 12-13). The resultant IEP noted that according to the student's teacher at St. Ursula, the student was making "nice" progress in all academic areas (id. at p. 3). The IEP reflected that the student's teacher from St. Ursula reported that the student's strengths included his fund of sight words, short vowel sounds, basic mathematics operations, and creativity (id.). The student's weaknesses were noted to be reading comprehension, multi-step word problems, and writing mechanics (id.). According to teacher estimates, the student was functioning at a 3.9 to 4.0 instructional level in decoding and reading comprehension, a 2.5 instructional level in writing, and a 3.5 instructional level in computation and problem solving (id.). In determining appropriate placement options, the CSE noted that the student required a small class setting of 12:1 with speech-language therapy as a related service during the school day (id. at p. 12). The IEP reflected that the CSE considered a general education environment for the student, but rejected this option because the student required special education services (id.). The CSE also considered SETSS, but rejected this option because the student required more than a "part-time program" to meet his academic needs (id.). The CSE further considered and rejected two other placements: (1) a CTT class because the student's severe academic and language deficits required a more restrictive program; and (2) a nonpublic school placement because it was too "severe" and restrictive for the student (id.).

To address the student's academic management needs, the CSE recommended a multi-sensory instructional approach, frequent drills and repetitions, simplification of tasks, and the provision of positive reinforcement (Dist. Ex. 6 at p. 3). In the area of social/emotional performance, the CSE noted that the St. Ursula teachers rated the student "good" in the areas of classroom performance, completing assignments, working independently, and in his relationships with adults (id. at p. 4). The teachers rated the student "fair" in motivation, class participation, self control and attention span (id.). To address the student's social/emotional management needs, the CSE recommended that the student be given redirection and refocusing (id.). The CSE also recommended that the student participate in State and local assessments with flexible scheduling (1.5 time), a flexible setting (small group), questions read aloud (except for the New York State reading tests), and directions read and re-read aloud with clarification (id. at p. 13).

The CSE developed six annual goals and 18 corresponding short-term objectives to address the student's academic deficits in decoding, word attack, reading comprehension, vocabulary, identification of main ideas, sequencing, punctuation, written expression, mathematical word problems, and multiplication, as well as to address the student's receptive and expressive language needs (Dist. Ex. 6 at pp. 6-10).

A final notice of recommendation (FNR), dated August 15, 2008, offered the student a placement in a 12:1 special class and services of speech-language therapy within one of the district's community intermediate schools (Dist. Ex. 7). The FNR advised the parents that if they wanted to discuss the recommendation or arrange another CSE meeting, they could contact a district staff person and provided the contact information (id.).

By letter dated August 18, 2008, the parents, through their attorney, advised the district that they were rejecting the March 19, 2008 IEP and were unilaterally placing their son at St. Ursula with the intention of seeking reimbursement for the cost of tuition for the 2008-09 school year (Parent Ex. A). In their letter, the parents asserted in general terms that the March 2008 IEP and recommended placement denied their son a free appropriate public education (FAPE)¹ on both procedural and substantive grounds, and that they were denied meaningful participation in the development of the IEP (*id.*)². The parents also asserted that the proposed placement did not provide their son with a suitable and functional grouping (*id.*).

By due process complaint notice dated October 14, 2008, the parents, through their attorney, requested an impartial hearing asserting that: (1) by virtue of an unappealed prior impartial hearing officer's determination regarding the 2007-08 school year, St. Ursula was the student's pendency placement, and that they would be seeking an order of pendency; (2) the March 2008 IEP was flawed procedurally in that the CSE did not have proper evaluations before it to determine the student's present levels of performance; (3) the annual goals and short-term objectives created by the CSE were vague, generic, immeasurable, not meaningful, and lacked a proper method of assessing progress; (4) the parents had not been offered an FNR with a specific recommended placement; and that (5) "based on information and belief," the proposed placement was inappropriate because it did not offer the student a suitable and functional peer group for instructional and social/emotional purposes (Dist. Ex. 1 at pp. 1-4). The parents proposed that the district reimburse them for the cost of tuition at St. Ursula for the 2008-09 school year (*id.*).

By letter dated October 24, 2008, the student's mother notified the district that she had visited the district's initial proposed placement, that the class already contained 12 students, and that a variance would be required (Dist. Ex. 8).³ The student's mother further noted that the district had recommended a second proposed placement in another 12:1 setting inside one of the district's high schools and that, based upon her observation, it was "evident" that the setting was not appropriate for her son because the needs of the students in the class did not reflect the needs of her son (*id.*). Therefore, the student's mother also rejected the second proposed placement (*id.*).

A January 2009 St. Ursula teachers' report reflected that the student's teachers estimated that the student was at the 4.1 instructional level in reading, with his strengths being in sight words, sound recognition, and literal comprehension; while his weaknesses were in inferencing and sequencing (Parent Ex. B at p. 1). The teachers estimated that the student was at the 3.9 instructional level in math, with his strengths being in number sense, ordering and comparing numbers, and basic operations; while his weaknesses were in operations involving regrouping,

¹ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]; *see* 34 C.F.R. § 300.17).

² The August 18, 2008 letter did not specify the parents' objections to the IEP or how they were denied meaningful participation in its development.

³ I note that the parties stipulated during the impartial hearing that there had been a seat available for the student at the proposed placement at the start of the 2008-09 school year; however, on the date that the parent visited the school (October 22, 2008), there were no seats available (Tr. pp. 110-12; *see* Dist. Ex. 10 at pp. 2, 5).

multi-step problems, and word problems (id.). The teachers estimated that the student was at the 3.5 instructional level in written expression skills, with his strengths being in creativity and sentence structure; while his weaknesses were in punctuation, paragraphs, and formation (id.). The report noted that at times, the student experienced difficulty with long term memory and required directions to be repeated and simplified (id. at p. 2). The teachers further noted in their report that the student seemed to benefit from the small class setting and multisensory instructional approach and that he had made an "adequate amount" of progress in academic areas (id.). The January 2009 St. Ursula teachers' report also reflected that in April 2008, the student achieved grade equivalent scores of 3.9 in reading, 4.6 in mathematics, 4.5 in science, and 4.6 in social studies on the ITBS (id. at p. 1).

On January 15, 2008, a district special education teacher conducted an observation of the student at St. Ursula during a science class (Dist. Ex. 5). The classroom observation report revealed that the student volunteered to read the names of digestive system organs, and was able to read the word "liver" and the sentence "[to] change food into a form that can be used by the cells in the body" (id.). The observation report also indicated that the student copied notes legibly and accurately and responded correctly to a question asked of him (id.). The student was observed to be "well behaved" in class and interacted appropriately with his peers and the teacher (id.).

By letter dated February 5, 2009, the parents, through their attorney, filed an amended due process complaint notice with the district (Parent Ex. D).⁴ The amended due process complaint notice was substantially the same as the original due process complaint notice filed on October 14, 2008; however, the parents' asserted in the amended complaint that they had received an FNR, and that during their visit to the proposed placement, they were notified that there was no seat available for the student (compare Parent Ex. D, with Dist. Ex. 1). The parents also asserted in their amended complaint that they then wrote to the CSE informing it of the lack of a seat at the proposed placement, and that the CSE then recommended a 12:1 setting at a different district high school (Parent Ex. D at pp. 3-4). The parents further asserted that after visiting the second proposed placement, they determined that the second placement was also inappropriate because it did not offer the student a suitable and functional peer group for instructional and social/emotional purposes (id. at p. 4).

On February 13, 2009, an impartial hearing commenced and was completed on May 5, 2009, after two days of testimony (IHO Decision).⁵ In a decision dated August 18, 2009, the impartial hearing officer determined that the district offered the student a FAPE, finding that: (1) the March 2008 CSE was properly composed; (2) the CSE relied upon a psychological evaluation, teacher reports, and a classroom observation in making its recommendations; (3) the CSE considered several placement options, and after rejecting a CTT setting and SETSS, recommended a small special class with a 12:1 ratio; (4) the annual goals and short-term objectives developed by the CSE targeted the student's documented weaknesses in his reading skills and were to be measured by informal assessments and teacher made tests; (5) the student's "math skills were also addressed and expected to improve as well;" and (6) the CSE recommended related services of

⁴ Although the amended due process complaint notice was dated February 5, 2008, it is clear from the context of the hearing record that the correct date of the amended due process complaint notice should have been February 5, 2009.

⁵ The hearing record does not provide a record of requests for extensions of time and approvals for those requests as required by 8 NYCRR 200.5(j)(5)(i).

speech-language therapy as a supplement to the multisensory instruction that was reasonably expected to improve the student's reading deficiency (*id.* at pp. 16-17). The impartial hearing officer found that the district's IEP appeared reasonably calculated to enable the student to receive educational benefits (*id.* at p. 17). He also noted that, although the district's special education math and science teacher testified that his "class" would not be able to meet the "student's" goal of "recit[ing] the times tables by rote up to (12) with (90%) accuracy," the student's "strength in math and academic achievement thus far indicate[d] that he c[ould] meet that goal, even if his class could not (*id.*). The impartial hearing officer stated that the IEP "need only reasonably enable the student to receive an educational benefit" (*id.*). Therefore, he denied the parents' request for tuition reimbursement (*id.*).⁶

The parents appeal the impartial hearing officer's determination that the district offered the student a FAPE for the 2008-09 school year. The parents assert that the March 2008 IEP was not appropriate for the student because it would not enable the student to benefit educationally from instruction. In support of their assertion, the parents first contend that the district's initial proposed placement was inappropriate because the students in that placement were not suitably grouped for instructional purposes. Specifically, the parents allege that there was a five year "gap" in the students' reading levels, and that while two students in the proposed class were reading at the pre-primer level, the district did not produce evidence that differentiated instruction was provided. The parents also allege that since there was only one 12:1 special education class in the community school, the student was recommended to be placed there because of availability rather than his abilities. Moreover, the parents assert that the "goals as written are consistent with the indicated present academic levels of performance;" however, they argue that the goals are "inconsistent with the present levels of performance of the students in the proposed classroom" (Pet. ¶ 43).⁷

The district answers, asserting that the impartial hearing officer correctly determined that it offered the student a FAPE for the 2008-09 school year as a result of a properly composed CSE that reviewed sufficient evaluative and assessment data, and formulated appropriate, measurable annual goals and short-term objectives for the student. The district further argues that the district would have been able to implement the IEP in the recommended placement and that the student would have been functionally grouped in both reading and math. Moreover, the district argues that the parents are not entitled to reimbursement because they presented no evidence of payment to St. Ursula, and that the equities do not favor an award of tuition reimbursement because the parents did not inform the CSE that they planned to re-enroll the student at St. Ursula and their August 18, 2008 letter to the district did not meet the notice requirements of the Individuals with Disabilities Education Act (IDEA).

Two purposes of the 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

⁶ At the impartial hearing, the district defended the appropriateness of its initial placement recommended in the August 15, 2008 FNR. The impartial hearing officer reviewed the appropriateness of this placement in his decision and the parents dispute the appropriateness of that initial placement (as opposed to the second placement) in their petition.

⁷ The parents do not allege any specifics in their petition regarding how St. Ursula was appropriate for the student or why equitable considerations support an award of tuition reimbursement.

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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 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 least restrictive environment (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; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *6 [S.D.N.Y. Oct. 13, 2009]; 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]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Forest Grove, 129 S. Ct. at 2488; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v.

Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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). An IEP must be reviewed periodically, but not less than annually, to determine whether the annual goals are being achieved and to make appropriate revisions (34 C.F.R. § 300.324[b][1]; 8 NYCRR 200.4[f]).

Tuition reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the child from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]; see Application of a Student with a Disability, Appeal No. 08-144; Application of a Student with a Disability, Appeal No. 08-088). Although a reduction in reimbursement is discretionary, courts have upheld the denial of tuition reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]).

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).

The first argument of the parents to be addressed herein is their assertion that the district's proposed placement was inappropriate because the students in the proposed placement were not

suitably grouped for instructional purposes. State regulations require that students with disabilities placed together for the purposes of special education shall be grouped by similarity of individual needs (8 NYCRR 200.1[ww], 200.6[a][3]; see Walczak, 142 F.3d at 123). State regulations further provide that the range of academic or educational achievement shall be limited to assure that instruction provides each student with appropriate opportunities to achieve individual annual goals (8 NYCRR 200.6[a][3][i]; see 8 NYCRR 200.1[ww][3][i]; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-060). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations, and other resources are to be provided to students so that they do not consistently detract from the opportunities of the other students in the group to benefit from instruction (8 NYCRR 200.6[a][3][iv]).

State regulations further provide that the composition of the students in a special class program shall be based on the similarity of the individual needs of the students according to academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]). Moreover, a special class shall be composed of students with disabilities with similar individual needs (8 NYCRR 200.6[h][3]). The chronological age range within a special class of students with disabilities who are less than 16 years of age shall not exceed 36 months (8 NYCRR 200.6[h][5]). The regulations do not, however, preclude a grouping of students in the classroom when the range of achievement levels in reading and math would exceed three years (see 8 NYCRR 200.6[h][7]; Application of a Child with a Disability, Appeal No. 07-068; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073). The similarity of abilities and needs may be demonstrated through the use of a proposed class profile or by the testimony of a witness who is familiar with the children in the proposed class (see Application of a Student with a Disability, Appeal No. 08-092; Application of the Dep't of Educ., Appeal No. 08-095; Application of a Child with a Disability, Appeal No. 07-068).

The hearing record indicates that the student in this case functions intellectually in the average range; however, he has deficits in reading comprehension, non verbal reasoning ability, fluid visual information processing, abstract reasoning, academic knowledge, passage comprehension, word attack skills, quantitative concepts, overall math reasoning, and visual spatial reasoning (Dist. Exs. 2 at pp. 2, 3, 5; 3 at p. 1). The hearing record also demonstrates that based on teacher estimates in the March 2008 IEP, the student was functioning at the 3.9-4.0 instructional level in reading, the 3.5 instructional level in mathematics, and the 2.5 instructional level in written expression (Dist. Ex. 6 at p. 3). A class profile for the district's proposed class contained in the hearing record indicated that eleven out of the twelve students in the class were functioning at the 2.6 to 3.5 instructional level in mathematics, and the twelfth student was functioning at the 3.6 to 4.5 instructional level (Dist. Ex. 9 at p. 1). As indicated above, the student in the instant case was determined to be functioning at the 3.5 instructional level in mathematics (Dist. Exs. 3 at p. 1; 6 at p. 3). Therefore, the hearing record indicates that the student would have been suitably grouped for instructional purposes in mathematics.

The class profile contained in the hearing record also indicated that in reading, two students in the proposed class were functioning at the pre-primer instructional level, three students were functioning at the 2.6 to 3.5 instructional level, five students were functioning at the 3.6 to 4.5

instructional level, and two students were functioning at the 4.6 to 5.0 instructional level (Dist. Ex. 9 at p. 1). The hearing record indicates that according to the March 2008 IEP, the student in this case was functioning at the 3.9-4.0 instructional level in reading, and although the student would have been in a class with students whose instructional levels in reading ranged from pre-primer to the 5.0 level (Dist. Exs. 6 at p. 3; 9 at p. 1), as discussed more fully below, the hearing record demonstrates that the district's special education teacher would have implemented the student's IEP in a manner that would have allowed the student to receive educational benefit.

The district's special education teacher who would have taught the student in English language arts (ELA), social studies and history, testified that at the beginning of the year, she tested her students to determine their reading instructional levels utilizing different methods of testing (Tr. pp. 52, 61). Based on that testing, the teacher divided the students into four reading groups (Tr. pp. 59-60, 61). The special education teacher testified that she utilized "Down with Literacy," which she described as a "reading and writing workshop" (Tr. p. 61). The teacher further testified that she began her instruction in reading with a "mini" lesson for the whole class on the particular strategy she was teaching, and then placed the students into groups based on their reading levels (Tr. pp. 61, 62). Within the individual groups, the teacher testified that she instructed the students using materials that were at their instructional level in reading (Tr. p. 61). The teacher provided an example of how students in a lower level reading group would work on the same thing as students in a higher level reading group and she referred to this approach as "differential learning" (Tr. pp. 61-63). She also testified that she took students out of their groups and worked with them 1:1 on strategies that were in their areas of weakness (Tr. p. 62). The teacher testified that when a group was working independently to finish a task and she observed a student who was "not as strong" as other group members, she would take the student out of the group and work 1:1 with that student (*id.*). According to the special education teacher, she utilized the "balanced literacy" methodology in her class which combines reading aloud, "shared reading," guided reading, and independent reading, as well as audio and visual tapes to help the students understand the lesson (Tr. pp. 63-64). She described "shared reading" as students reading a book or listening to audio tapes together and sharing their ideas of what was happening in the story, or the teacher reading a story to the students and the students gathering ideas, brainstorming, completing graphic organizers, and writing paragraphs about what she had read to them (Tr. pp. 65-66). The teacher testified that in guided reading, she read to the class and then divided the students into groups to complete activities based on what she had read to them (Tr. p. 66).

The special education teacher also testified about how she would address each of the annual reading goals and short-term objectives in the student's March 2008 IEP (Tr. pp. 67-69). She testified that a student's progress is assessed throughout the school year with a variety of instruments including running records and the "Brigance" (Tr. pp. 70-73). She also testified that she believed that the reading and writing annual goals and corresponding short-term objectives developed by the CSE were appropriate for the student and that they addressed the same skills being worked on by the other students in the proposed class (Tr. pp. 69-70).

The hearing record further demonstrates that similar to the student, all 12 students in the proposed class exhibited average cognitive abilities, average receptive and expressive language abilities, age appropriate physical and social development, and that none of the students in the proposed class demonstrated behavioral problems (Dist. Ex. 9 at pp. 1-2; see Dist. Exs. 2 at pp. 1, 4-5; 3 at p. 2; 4 at p. 2; 5; 6 at pp. 4-5).

Given the aforementioned set of facts, the hearing record shows that the student would have been suitably grouped according to his special education needs and abilities in the district's proposed class (see R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at * 6 [S.D.N.Y. Oct. 13, 2009]; see also Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068).

I now turn to the parents' assertion that the district failed to offer the student a FAPE because one of the math "goals" created by the CSE could not have been met by the students in the proposed class. Initially, I note that the "goal" referenced by the parents in the March 2008 IEP was actually a short-term objective that stated "the student will recite the times tables by rote up to 12 with 90% accuracy" (Dist. Ex. 6 at p. 9). The parents contend that the district's math teacher testified that the "goal" was not appropriate for the students in his class during the 2008-09 school year because at the time of the impartial hearing, the students in his class could not yet recite the times table up to 12 (Tr. p. 43). The hearing record reveals however, that the math teacher also testified that the students would be able to achieve this objective by the end of the school year, although they would probably only be able to do so with 75-80 percent accuracy (Tr. pp. 43-44). Federal and State regulations provide that a student's annual goals are appropriate when they are measurable and consistent with the particular student's needs and abilities; the regulations do not require that a student's goals be consistent with the needs and abilities of the students in the class as a whole (see 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). In this case, the parents admit in their petition that the goals created for the student in the May 2008 IEP were consistent with the student's needs as indicated in the present levels of performance (Pet. at ¶ 43). Therefore, I agree with the impartial hearing officer and find that the parents' assertion is without merit (see generally R.R., 615 F. Supp. 2d 283, 295; Connor, 2009 WL 3335760, at *5, *6).

I have considered the parents' remaining contentions pertaining to the district's offered program for the 2008-09 school year and find them to be without merit.

Having found that the hearing record supports the impartial hearing officer's decision that the district offered the student a FAPE in the LRE for the 2008-09 school year, I need not reach the issue of whether St. Ursula is appropriate for the student, or whether the parents gave adequate notice to the district as required by 20 U.S.C. § 1412(a)(10)(C)(iii)(I), 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).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
November 16, 2009**

**PAUL F. KELLY
STATE REVIEW OFFICER**