



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-127

**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, Emily R. Goldman, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, 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 respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Robert Louis Stevenson School (RLS) for a portion of the 2008-09 school year and to fund tuition directly to RLS for the 2009-10 school year. The appeal must be sustained.

At the time of the impartial hearing, the student had completed tenth grade at RLS, a private school for students in grades 8 through 12, whose major obstacles to learning are emotional and social concerns and who have mild to moderate learning needs (Tr. pp. 57-59; Parent Ex. D). RLS has not been approved by the Commissioner of Education as a school with which 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 an other health impairment (OHI) is not in dispute in this proceeding (Parent Exs. A; C at p. 1; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The hearing record reflects that the student attended a private school from kindergarten to the middle of her tenth grade school year (Parent Exs. F at pp. 1-2; P at p. 4). The student's mother reported that the student's academic achievement was poor in first through third grades and that she received diagnoses of a nonverbal learning disability and an attention deficit hyperactivity disorder (ADHD) when she was in third grade (Parent Exs. F at p. 2; K at p. 1). The student was identified as having difficulties with "processing" in elementary school and was seen by an "audio-linguistic specialist" who worked with the student on multisensory learning one or two times per

week for two years (Parent Exs. F at p. 2; P at p. 4). The hearing record reflects that between fifth and eighth grade, the student functioned well at home and school and she was earning grades of "A's" and "B's" in school prior to developing emotional difficulties (Parent Exs. F at p. 3; P at p. 4). According to the student's mother, the student's difficulties in school began in ninth grade with what initially manifested itself as illness, but which the student's mother later realized was "school refusal" (Tr. p. 143). The student's mother reported that, near the end of her ninth grade year, the student developed anxiety over catching up on missed school work after an illness, refused to take tests, exhibited crying episodes, and refused to go to school (Tr. pp. 144-147). At the start of the 2008-09 school year, when the student was in tenth grade, she again exhibited crying episodes and symptoms of illness, was generally overwhelmed in school, and told her mother that she could not go to school because she could not "keep it together" (Tr. p. 147). The student's mother indicated that she sought psychological assistance for the student in September 2008 (Tr. p. 145).

The student underwent a psychoeducational evaluation by a private clinical psychologist on September 30 and October 1, 2008 (Parent Ex. K). The resulting report reflected that the student was referred due to excessive worry about school and because she had missed much school, and that the purpose of the evaluation was to assist with future planning (*id.* at p. 1). Behavioral observations of the student made during the evaluation revealed that she had difficulty with new and novel situations and expressing her thoughts in an organized fashion; however, the report indicated that the student cooperated with all tasks presented, and persevered on challenging items (*id.* at p. 3). Intellectual and academic testing revealed strong abilities, overall. Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ score of 108, determined by the private psychologist to be in the upper end of the average range of intellectual functioning; and standard scores in the superior range on the similarities, vocabulary and matrix reasoning subtests, which the private psychologist determined indicated that the student's intellectual potential was far above average (*id.* at pp. 3-4). Although still within the low average to average range, the student's performance on the working memory scale and the processing speed scale revealed a relative weakness (*id.* at pp. 4-5). Her graphomotor skills were also deemed to be well within age level expectations by her score in the high average range on the Bender Visual-Motor Gestalt Test (*id.* at p. 5). The private evaluation report reflected that the student's academic achievement was primarily evaluated using the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH) (*id.* at pp. 5-7). Her performance yielded scores that ranged from the low average to the superior range (*id.* at p. 5). According to the private psychologist, the student's performance on the Nelson-Denny Reading test reflected stronger reading comprehension skills as indicated by a score at the 82nd percentile rank (high average range); however, her performance also indicated that she was unable to complete the test in the allotted time and that "her reading rate was at the 50<sup>th</sup> percentile" (average range) (*id.* at p. 6). Administration of the Test of Written Language-Third Edition (TOWL-3) yielded a percentile rank of 23 (low average range) and the psychologist reported that the student exhibited difficulty with spelling and punctuation when asked to write a story about a picture, and achieved a score in the 2nd percentile for the contextual conventions subtest (*id.* at p. 7). The private psychologist opined in the evaluation report that this indicated that the student had difficulty dealing with more than one task at time (*id.*). The student achieved scores that were determined to be in the average range on the math subtests, although the evaluation report reflected that she made careless errors at times and sometimes spent a great deal of time attempting to solve problems (*id.*).

Although the private psychologist determined that based on testing results, the student's academic abilities were commensurate with her cognitive abilities, she further determined that the

student "exhibit[ed]" a processing speed disorder, "in that she [was] very slow processing visually-presented information, especially if it is not meaningful;" a receptive and expressive language disorder, because the student "ha[d] particular difficulty holding onto and working with information she hear[d]" and "when responding in demand-language situations, she ramble[d] and d[id] not respond in an organized fashion;" and a learning disorder not otherwise specified, based on the student's "poor" word attack skills, "poor" punctuation, "poor" organization of writing, and "very poor" spelling in the context of writing sentences or stories (Parent Ex. K at p. 8). The private psychologist also determined that the student "exhibit[ed]" an anxiety disorder not otherwise specified, stating " [t]hat is, she exhibits clinically significant symptoms of anxiety and depression. These symptoms coupled with her learning disorder interfere with her ability to function academically at a level commensurate with her intelligence" (id.). The psychologist opined in the report that the student's "approach to the projective techniques" also revealed her above average intellectual potential and that the student at times attempted to employ intellectual defenses to ward off anxiety, although when the student felt unprepared intellectually or academically, her anxieties broke through (id. at p. 7). The private psychologist stated in the report that the student's "underlying rather deep depression" was evidenced throughout the test protocols and that the student felt "empty, and inadequate," with a "profound" sense of inferiority at that time and a poor sense of self (id. at p. 8). She indicated that the student had poor problem solving skills and when stressed, she would attempt to avoid or escape from anxiety provoking stimuli rather than attempt to employ coping skills (id.).

The psychologist suggested that the student be allowed extended time for lengthy classroom tasks and tests to allay her anxieties, that she work with a learning disabilities specialist to prepare for lengthy tests in order to gain strategies for attacking her workload, and that the student perform all writing on a computer so that she could check punctuation and spelling (Parent Ex. K at p. 9). She further suggested that the student "continue in a psychotherapeutic relationship" and that her medication be reassessed to determine its efficacy (id.).

The hearing record reflects that the student stopped attending school around Thanksgiving 2008 (Tr. p. 147). According to the student's mother, a meeting was held at the school which resulted in a recommendation that the student take a medical leave of absence until the end of January 2009 to recuperate (Tr. p. 148). The parent subsequently home schooled the student using the school's curriculum (id.). According to the parent, the student made minimal improvement while being home schooled and was unable to return to school in January 2009 (Tr. pp. 148-49).

On December 10, 2008, during the time the student was not attending school, she underwent a diagnostic psychiatric evaluation by a private clinical psychologist (Parent Ex. P at p. 1). The resultant evaluation report indicated that the student was being evaluated due to concerns regarding her school refusal, depressive symptoms, nightly emotional outbursts, and continual anxiety, and that the evaluation was based on information obtained through interviews with the student and her parents (id. at pp. 1, 3). A mental status exam was conducted by the private psychologist that included, among other things, completion of the Beck Depression Inventory (BDI), on which the student received a score of 28 (id. at p. 2).<sup>1</sup> The evaluation report reflected that the student also experienced significant anxiety, had a highly "conflictual" relationship with her parents, and had recently begun isolating herself from friends (id. at pp. 2, 5). The evaluation

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<sup>1</sup> The evaluation report described the BDI as a "self-reported measure of depressive symptoms" in which a score of 20 or higher is indicative of significant depressive symptoms (Parent Ex. P at p. 2).

report recounted the history of the student's presenting illness and detailed the student's previous psychiatric illness and treatment history (*id.* at pp. 3-4). The private psychologist determined that the student met the diagnostic criteria for a major depressive disorder, single episode, moderate; as well as for a generalized anxiety disorder, although the psychologist indicated that the student's "depression appear[ed] to be the principle disorder" at that time because it was "the disorder most impacting her daily life" (*id.* at pp. 5, 6). The private psychologist further determined that the student was also beginning to "display traits associated with Cluster B personality disorders" (*id.* at p. 6). To address the student's level of emotional intensity, parent-child conflict, self harm behaviors and fears of abandonment, the private psychologist recommended a dialectical behavior therapy (DBT) approach comprised of weekly individual therapy for the student, as well as participation in weekly "multi-family group therapy" for the student and her parents (*id.*).

In December 2008, the parents contacted a private child and adolescent psychiatrist who began seeing the student twice per week and subsequently offered the student diagnoses of a "Bipolar Two Disorder," an "Anxiety Disorder-NOS," and an "Avoidant Personality Disorder" (Tr. p. 116). The child and adolescent psychiatrist referred the student to a day treatment program at a private mental health treatment facility on February 4, 2009 (Tr. pp. 116, 149; Parent Ex. M at p. 1).

The hearing record reflects that the student attended the day treatment program for approximately three weeks (Tr. p. 118; *see* Parent Ex. M at pp. 1, 8). Testimony by the student's child and adolescent psychiatrist indicated that, while the student was attending the day treatment program, she participated in DBT, which "teaches patients new ways of viewing their minds and their thoughts and their actions" in a more positive way (Tr. p. 118). The psychiatrist also testified that "a large part of it was frankly to get her out of the house and to get her into a peer group again, because she hadn't been socializing or seeing peers for several months at this point" (Tr. p. 118).

The hearing record reflects that the student was discharged from the day treatment program on February 26, 2009 (Parent Exs. J at p. 1; M at p. 8). The student's discharge summary reflected that, at the time of discharge, the student's diagnoses included the following: Axis I-Bipolar II; Axis II-deferred; Axis III-gastro-intestinal symptoms; Axis IV reflected psycho-social and environmental problems, including family discord, new school placement, housing problems and financial strain; and Axis V indicated a Global Assessment of Functioning (GAF) score of 47 (Parent Ex. M at p. 8).<sup>2</sup> The discharge summary also indicated that the student's educational plan was to attend RLS, that her psychiatrist would provide psychotherapy and medication follow up, and that the student would participate in a DBT group twice per week (*id.* at p. 9).

Also on February 26, 2009, the student's mother enrolled the student at RLS for the remainder of the 2008-09 school year (Parent Ex. I at p. 1). On February 27, 2009, the student's mother wrote to the Committee on Special Education (CSE) chairperson requesting that the CSE

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<sup>2</sup> Testimony by the student's private psychiatrist indicated that a GAF score of 50 indicates between moderate and serious symptoms of dysfunction and a score of 70 or above is considered to be functioning normally (Tr. pp. 119, 120).

provide a free appropriate public education (FAPE)<sup>3</sup> to her daughter and indicating that she believed that the student required special education services (Parent Ex. S). The student began attending RLS on March 3, 2009 (see Tr. p. 59; Parent Ex. U).

The CSE sent the student's mother an appointment letter dated March 18, 2009, indicating that the student had been scheduled for evaluations to take place on April 4, 2009 (Parent Ex. H at p. 1). An initial notice of referral form, also dated March 18, 2009, was sent to the student's mother, informing her that the CSE had received a referral and that the student would need to be evaluated (id. at p. 2). The CSE also forwarded a "Consent for Initial Evaluation" form dated March 18, 2009 to the parents (Dist. Ex. 2). The student's mother signed and dated the consent form on April 3, 2009 (id.).

On April 3, 2009 the district completed a social history of the student, based on the student's mother's report (Parent Ex. F). The social history report reflected information consistent with the information provided above. In addition, the student's mother reported that the student had seen different "helping" professionals over the years, including psychotherapists (id. at pp. 2, 3, 4, 8). The social history report also indicated that after the student stopped attending the prior private school in November 2008, the parents had looked for alternative schools including therapeutic residential programs, special education day programs and a district program, but they were unable to find an appropriate placement for the student (id. at p. 1). The social history further indicated that while the student's mother was open to any alternatives the district had to offer, she didn't think the district could find an appropriate placement for the student (id.). The social history report also reflected that the student's mother had obtained the assistance of an education consultant, was consulting with an attorney, and that she was seeking tuition reimbursement for RLS from the district (id.). The student's mother further reported that she needed an appropriate placement that would address the student's anxiety, depression, bipolar disorder, and learning needs "quickly" after the prior private school had asked the student to leave (id.).

The student's teachers from her prior private school prepared reports for the CSE describing the student's abilities in reading, mathematics, written language, and social skills during the 2008-09 school year and indicated that the student's skills were estimated to be at the 10.0 to 11.0 grade level in reading and at the 10.0 grade level in mathematics (Dist. Exs. 7 at p. 1; 6 at p.1). According to the teacher reports, the student's reading strengths included good analytical instincts, although not always strong critical thinking (Dist. Ex. 7 at p. 1). The teachers reported that in math, the student was organized, detailed, and able to follow given steps and formulas; however she also required steps to be broken down, a lot of time to complete assignments and tests, and things explained clearly and several times (Dist. Ex. 6 at p. 1). In written language, the student reportedly expressed herself fairly clearly and had good basic "mechanics" (grammar, spelling), but demonstrated weakness in being specific in her expression (Dist. Ex. 7 at p. 2). With regard to

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<sup>3</sup> 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.

social skills, the teacher reports reflected that the student did not interact much with peers, "although within normal range;" had a good "relationship to authority;" and was always respectful (Dist. Exs. 6 at p. 2; 7 at p. 2). The reports also reflected that when reacting to frustration and/or failure, the student could "take things hard," but was usually positive, cheerful and would try again (*id.*). The teachers reported that strategies that had been successful with the student included the use of positive encouragement and reinforcement (Dist. Ex. 6 at p. 2).

The student's teacher from RLS also prepared a report dated April 3, 2009 for the May 2009 CSE meeting reflecting the student's progress (Parent Ex. L). Consistent with the reports from the student's prior private school, the RLS teacher report also reflected that the student was on grade level in reading and mathematics (*id.* at p. 1). The report noted that the student exhibited strengths in reading comprehension skills and weaknesses in speed of reading, which her teacher reported was compromised by difficulties with decoding (*id.*). The report also noted that the student demonstrated some difficulties with vocabulary including analogies, synonyms and antonyms, and words in isolation (*id.*). In math, the report noted no specific areas of strength, but indicated that the student exhibited some difficulties with planning, problem solving, and computation for which she used a calculator (*id.*). With regard to written language skills, the student's teacher noted that the student's strengths included detailed and complex stories; however, her writing skills varied in terms of grammar and spelling, she had poor knowledge of punctuation, and she needed a structured framework for writing (*id.* at p. 2). With regard to social skills, the report from RLS indicated that the student was "somewhat socially isolated" and that she "[felt the] need to impress others" (*id.*). The report reflected that the student sought approval from authority and was not defiant, struggled with failure and perceived failure, was overly sensitive to academic stress, and "collapsed" under academic pressure (*id.*). Strategies that had proven successful with the student included not allowing her to take on more school work than she could handle, helping her prepare for exams in a timely manner, and providing a safe place when the student felt panicked (*id.*). The report also indicated that the student worked well with teachers and was very motivated (*id.*).

On April 22, 2009, the district social worker conducted a classroom observation of the student at RLS during the student's English class in a group consisting of six students (Parent Ex. E at p. 1). The observation report reflected that the student participated in classroom activities with confidence (*id.*). Initially, the teacher gave the students a pop quiz, which the student finished quickly and "appeared sure of her answers" (*id.*). The teacher then introduced a group activity involving three different tasks (*id.*). The observation report reflected that the student was attentive to the teacher's instructions, asked questions for clarity, and volunteered for an art project (*id.*). The student requested permission to do the project alone; however, when the teacher indicated the project was to be done with a partner, the student moved her seat next to her partner's, began working, and demonstrated a nice rapport with her partner (*id.*). The observation report indicated that the student appeared to be the one in charge in that she directed her partner, telling him what he needed to do for the project (*id.*). The report also indicated that the student required one verbal redirection by the teacher to stay on task and a prompt to include her partner in her work instead of asking the teacher questions (*id.*). The student was described as "very articulate and verbal, friendly, outgoing, and upbeat" during the classroom observation (*id.* at p. 2).

Also on April 22, 2009, the district social worker conducted a "Vocational Interest Assessment" of the student using a "Student's Needs, Interests and Aspirations Survey" and a "Level I Vocational Assessment" (parent interview) (Parent Ex. G at p. 1). The student's responses

to the survey indicated that, with regard to learning style, she preferred to work in small groups where she could collaborate with others, worked best in the afternoon when she was very alert and focused, and she learned best by listening (id.). With regard to school, the student indicated that she enjoyed history, English and learning things that she could use in the outside world to broaden her horizons (id.). The student also indicated that she preferred to answer long answer questions as opposed to multiple choice because it allowed her the opportunity to explain what she wanted to communicate so people could fully understand her (id.). The student indicated that she would like to work as a grammar or middle school teacher after high school because she wanted to help people, and that she would prepare for this by majoring in teaching with a secondary major in psychology (id.). The survey also indicated how the student viewed and described herself, as well as her outside interests and hobbies (id. at p. 2). The student's mother responded to questions in the Level I Vocational Interview regarding the student's vocational needs including plans for college, her independent living/personal management skills, and general needs after high school (id. at p. 3).

By letter dated May 11, 2009, the district notified the parent of a CSE meeting scheduled for May 29, 2009 (Parent Ex. N at p. 1). The CSE subsequently met on May 29, 2009 to develop an individualized education program (IEP) for the student for the 2009-10 school year (Parent Ex. C at p. 1). The CSE meeting was attended by the parents, a school psychologist who also acted as district representative, a district special education teacher, a district regular education teacher, an additional parent member, the director of RLS, and the parents' advocate (id. at p. 2). The May 2009 CSE determined that the student was eligible for special education programs and services as a student with an OHI and recommended a general education program with related services of two 40-minute individual counseling sessions per week (see Dist. Ex. 4 at p. 1; Parent Ex. C at pp. 1, 4).

The academic performance section of the May 2009 IEP reflected information consistent with the results of the private October 2008 psychoeducational evaluation and indicated that the student's cognitive abilities were primarily in the high average range and that her current academic status, as measured by the October 2008 administration of the WJ-III ACH, reflected high average ability in reading decoding and passage comprehension, and average ability in spelling and writing samples (see Parent Exs. C at p. 3; K at pp. 3-8). With regard to the student's social/emotional development, the May 2009 IEP reflected that the student was emerging from a period of school withdrawal, depression and anxiety, and that she exhibited unrealistic perfectionism that required regular negative reinforcement in order for her to properly "frame" herself and her abilities in relation to others (Parent Ex. C at p. 4). The May 2009 IEP reflected that the student required counseling services to support her deficits in this area and indicated social/emotional management needs that included assisting her in recognizing her unrealistic perfectionism and her real cognitive and emotional strengths (id.). With regard to the student's present health and physical development, the May 2009 IEP reflected that the student had various medical concerns and that she had received a diagnosis of bipolar disorder for which she was medicated (id. at p. 5). The May 2009 IEP addressed the student's social/emotional needs with four counseling goals that focused on increasing the student's ability to be realistic and less "perfectionistic" in her social interactions and her academic tasks, developing coping strategies for social interactions, and developing organizational strategies to assist in managing school and social obligations (id. at p. 6). The May 2009 IEP provided academic accommodations for test taking including extended time (2x) and provision of a separate location with fewer than 12 students (id. at p. 9). The May 2009 IEP reflected that the CSE determined that the student's high cognitive and academic abilities

required the stimulation and challenge of an unmodified curriculum and were best served in a general education classroom with counseling support (id. at p. 8).

The results of the May 2009 CSE meeting were reflected in a "CSE Review Rationale" also dated May 29, 2009 (Dist. Ex. 4). The rationale reflected information consistent with the student's May 2009 IEP regarding the participants, the student's classification, the recommended program and related services, and reflected that the frequency of the recommended counseling services was two 40-minute individual sessions per week (id. at p. 1).<sup>4</sup>

On June 5, 2009, the district provided the parents with a Final Notice of Recommendation (FNR) recommending a specific district school where the program and services recommended on the May 2009 IEP would be implemented (Parent Ex. Q). The FNR also provided the name and contact information of a district staff person and indicated that the parents should contact that person if they disagreed with the recommendation or wished to schedule another CSE meeting (id.).

The parents visited the district's proposed placement on June 12, 2009 (Parent Ex. O). By letter dated June 24, 2009, the parents informed the district that they were rejecting the recommended placement and were seeking tuition reimbursement for the student's enrollment at RLS for the 2009-10 school year (id.). The parents indicated in the letter that they had met with two staff people at the recommended placement and had discussed the recommended program and the student's needs (id.). The parents stated that they were concerned with the large class size and did not believe that the placement could meet the student's needs (id.).

The hearing record reflects that the student continued to attend RLS (Parent Ex. U). In a report dated June 2009, the student's progress for the fourth quarter at RLS was reflected in an "educational evaluation" (report card) in the areas of yoga, algebra II, library experience, earth science, art and modern history (Parent Ex. V at pp. 7-12). The report reflected that the student received grades ranging from "A-" to "A+" and indicated that the student had primarily earned ratings of "excellent" to "superior" in academic progress; a rating of "outstanding" in class participation; a rating of "highly motivated" in motivation and effort; and a rating of "excellent" in class projects (id.). The report reflected that the student was not missing assignments, demonstrated good study habits and maintained primarily excellent attendance and class promptness (id.). With regard to interaction with other students, the report reflected that the student was relating and working well with others in five of her classes and had shown improvement in working with others in one particular class (id.). The report also indicated that the student's behavior toward the class and teachers was consistently cooperative (id.).<sup>5</sup>

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<sup>4</sup> Testimony by the school psychologist who participated in the May 2009 CSE meeting indicated that the May 2009 IEP reflected that counseling services were recommended and that the notation "counseling 2-40-1" on the CSE Review Rationale meant "counseling twice [per] week in a group of one for 40 minutes each time" (Tr. pp. 43, 50).

<sup>5</sup> The student's progress during the third quarter at RLS was also summarized in this exhibit; however, the report reflected that the student had not attended class long enough to earn credit and, therefore, the report did not reflect any letter grades for that quarter (Parent Ex. V at pp. 1-6).

The hearing record reflects that the student maintained good attendance at RLS during March through June 2009 (Parent Ex. U). A 2008-09 attendance log reflected the student was absent four days in March and did not miss any school days during April, May, and June (id.).

By due process complaint notice dated July 20, 2009, the parents, through their advocate, alleged that: (1) the district impermissibly delayed in convening the May 2009 CSE meeting and failed to offer an appropriate placement in a timely manner; (2) the May 2009 IEP was inappropriate because it recommended a general education program with related services, the level of recommended related services was inappropriate for the student, and the annual goals and short-term objectives did not reflect all of the student's educational, social, and emotional needs; (3) the May 2009 CSE meeting did not have a social worker in attendance; (4) the May 2009 CSE failed to consider the recommendations contained in the private evaluations and relied upon the private evaluations instead of doing their own testing; (5) the May 2009 CSE predetermined the student's program; (6) the May 2009 IEP was inappropriate because the parents were not given a copy of the IEP at the CSE meeting; (7) the parents were denied meaningful participation at the May 2009 CSE meeting because the parents' concerns regarding the student's program were ignored, the annual goals and short-term objectives were not developed at the meeting, and a specific placement was not offered at the meeting; (8) the district's recommended program was inappropriate for the student because the size of the proposed classroom, student-to-teacher ratio, and teaching methodology were inappropriate; (9) the district's recommended program was inappropriate for the student because the student required a 12-month program and a therapeutic environment; and (10) a CSE meeting was not held for the 2008-09 school year, which denied the student a FAPE (Parent Ex. A at pp. 2-4). The parents further asserted that they were unable to pay the student's tuition costs at RLS and that the student was unilaterally placed at RLS (id. at pp. 4-5). The parents requested tuition reimbursement and direct funding for the student's tuition costs at RLS from March 2009 through June 30, 2010, in addition to the costs of evaluations, transportation, and "costs and fees" (id. at p. 5).

On July 27, 2009, the district answered the parents' due process complaint notice, denying the parents' allegations (Parent Ex. B). The district asserted that the CSE had relied upon a social history, psychoeducational evaluation, and a classroom observation in making its recommendations (id.). The district further asserted that the recommended placement was reasonably calculated to enable the student to obtain meaningful educational benefits and that "[u]pon information and belief," the program recommendation was discussed at the CSE meeting (id.).

On August 17, 2009, the parents enrolled the student at RLS for the 2009-10 school year (Parent Ex. I at p. 5).

An impartial hearing was conducted on August 31, 2009 (IHO Amended Decision at p. 2).<sup>6</sup> By amended decision dated October 14, 2009, the impartial hearing officer found that the district failed to offer the student a FAPE during "the last quarter of the 2008-09 school year" and during

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<sup>6</sup> At the impartial hearing, the parents were represented by an attorney.

the 2009-10 school year (*id.* at pp. 7-8).<sup>7</sup> Specifically, the impartial hearing officer found that the district's recommended placement did not offer the student a FAPE because of the large class size and "minimal availability of related services" to meet the student's needs (*id.* at p. 7). The impartial hearing officer also noted that the district did not conduct any of its own evaluations, instead relying on the parents' private evaluations (*id.*). The impartial hearing officer further found that the parents sustained their burden of proving that RLS was appropriate to meet the student's needs and that there was no evidence to suggest that the parents were uncooperative in their relationship with the district (*id.*). The impartial hearing officer found that the parents' inability to pay for the student's tuition costs qualified them for direct funding of the tuition at RLS for the 2009-10 school year (*id.* at p. 8). The impartial hearing officer ordered that: (1) the parents be reimbursed for the student's tuition at RLS from March 2009 through June 2009; (2) the district directly fund tuition to RLS for the student's 2009-10 school year; (3) related services of counseling be provided as detailed in the student's IEP; (4) the parents be reimbursed for the private psychoeducational testing dated October 2008 upon submission of "validated bills;" and (5) transportation be provided to and from the student's home to RLS (*id.*).

The district appeals from the impartial hearing officer's decision insofar as he found that the district denied the student a FAPE, the parents met their burden of proving that RLS was appropriate, equitable considerations favored the parents, and the student was entitled to additional counseling services.<sup>8</sup> The district asserts that it offered the student a FAPE. Specifically, the district alleges that the May 2009 CSE considered and rejected State-approved non-public school and day treatment placement recommendations, and recommended a general education program with 40 minutes of counseling 2 times per week and testing modifications. The district asserts that the May 2009 IEP was timely. The district further asserts that its placement recommendation was for the student to attend a small, transfer school that was described as an alternative setting for students who need a more personalized approach. The district contends that the recommended program had an advisory program to support the student in meeting her educational goals, with small group guidance throughout the day for any social, interpersonal, or integration issues. The district alleges that the proposed program would have modified the student's curriculum to address the student's past school refusal and would have offered the student extensive counseling and social/emotional support. The district further alleges that the testimony of the parents' witness that the student could not be educated in a general education program should be discredited because the witness recommended that the student attend RLS, which was also a general education program.

In addition, the district alleges that RLS is not appropriate for the student because it does not offer the necessary related services to meet the student's educational needs. The district contends that there is no evidence in the hearing record regarding RLS's academic program, teachers' credentials, the curriculum, or how the curriculum might be modified to meet the student's needs. The district asserts that, although the advisory program at RLS is called "counseling," it does not address the student's counseling needs, thus, the impartial hearing officer awarded

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<sup>7</sup> The impartial hearing officer rendered a decision dated October 2, 2009, which was substantively identical to his amended decision dated October 14, 2009, except that the relief awarded to the parents in the October 14, 2009 amended decision included more specific information (compare IHO Decision, with IHO Amended Decision).

<sup>8</sup> The district does not appeal from the portion of the impartial hearing officer's decision which ordered transportation and reimbursement for the private psychoeducational evaluation (Pet. ¶ 53 n.6).

counseling pursuant to the student's May 2009 IEP. The district further asserts that equitable considerations do not favor an award of tuition reimbursement. Specifically, the district asserts that the parents had no intention of removing the student from RLS and would have rejected any public school program recommended by the district. Moreover, the district argues that, even if the parents prevail on the merits of their claim, they should not be awarded direct funding because such relief is not permitted under the Individuals with Disabilities Education Act (IDEA). Finally, the district asserts that the impartial hearing officer erred by sua sponte ordering counseling services, which were not requested in the parents' due process complaint notice.

In their answer, the parents assert that they are entitled to tuition reimbursement under the IDEA because the district failed to offer the student a FAPE, the unilateral placement was appropriate and tailored to meet the student's needs, and equitable considerations favored an award of tuition reimbursement. In addition, the parents assert that the district is barred from arguing that direct funding of the student's tuition at RLS is not an available remedy on appeal because it did not raise the issue at the impartial hearing. The parents request that the decision of the impartial hearing officer be upheld in its entirety.

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 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).

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 (20 U.S.C. §§ 1414[d][4][A]; 34 C.F.R. § 300.324[b][1]; 8 NYCRR 200.4[f]). An eligible student's IEP must be in place at the beginning of each school year (20 U.S.C. § 1414[d][2][A]; 34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; see Cerra, 427 F.3d at 194).

A student's recommended program must 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; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 148 [S.D.N.Y. 2006]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and

State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). Determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

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 (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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "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).

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).

Turning to the district's assertion that the impartial hearing officer erred by awarding tuition reimbursement for a portion of the 2008-09 school year, I agree that the hearing record does not support an award of reimbursement. Pursuant to State regulations, a district must complete the individual evaluation of a student within 60 calendar days from the date of receipt of parental consent to evaluate the student, and arrange for the provision of appropriate special education

programs and services within 60 school days of the receipt of parental consent to evaluate the student (8 NYCRR 200.4[b][1],<sup>9</sup> [d]; see 20 U.S.C. § 1414[a][1][C][i][I]; 34 C.F.R. § 300.301[c][1][i]). In this case, the student's mother provided the district with consent to evaluate the student on April 3, 2009 (Dist. Ex. 2). A review of the hearing record reveals that the district evaluated the student by obtaining teacher reports, a classroom observation report and the student's social history, and convened a CSE meeting on May 29, 2009 to review the private psychoeducational evaluation report and the results of its evaluations (Tr. pp. 13-15, 18; Parent Exs. C; E; F; G; L; Q; Dist. Exs. 5; 6; 7). Thus, I find that the district timely evaluated the student (8 NYCRR 200.4[b][1]). In addition, the hearing record reflects that the student was not eligible for extended school year services, and that the 2008-09 school year ended before the district was required to arrange for the provision of appropriate special education programs and services pursuant to State regulations (Parent Ex. C at p. 1; Dist. Ex. 2; see Educ. Law § 2[15]). Therefore, I find that the district arranged for the provision of special education and services for the student within the applicable time periods specified by State regulations (8 NYCRR 200.4[d]; see 8 NYCRR 200.4 [e][1][ii]). Accordingly, I find that the impartial hearing officer erred by awarding the parents tuition reimbursement from March through June 2009 (8 NYCRR 200.4[b][1], [d]; see 20 U.S.C. § 1414[a][1][C][i][I]; 34 C.F.R. § 300.301[c][1][i]).

Next, the hearing record reveals that the district developed an appropriate program for the student at the May 2009 CSE meeting that would have been appropriately implemented by the recommended placement. The May 2009 CSE created an IEP that accurately reflected the student's needs, included appropriate annual goals to address those needs, and provided the student with appropriate related services in the LRE.

The hearing record reflects that, in developing the description of the student's present level of academic performance in the May 2009 IEP, the May 2009 CSE utilized information from the October 2008 private psychoeducational evaluation, which reflected the student's average to high average cognitive and academic abilities; as well as teacher reports from RLS; "a very detailed description" of the student from the director of RLS; a classroom observation of the student at RLS; and a social history of the student (Tr. pp. 13-15, 18). The student's academic success was documented in the May 2009 CSE meeting minutes, which reflected the discussion at the May 2009 CSE meeting that the student was "doing very well" and getting good grades (Dist. Ex. 4 at p. 2). Testimony by the school psychologist who participated in the May 2009 CSE meeting and also acted as the district representative indicated that the classroom observation revealed that the student was very assertive, involved, attentive and cooperative, and that staff at RLS reported that the student was on grade level (Tr. p. 20). Further testimony by the school psychologist indicated that the student's test scores did not indicate a discrepancy between her abilities and her achievement and that based on her strong intellectual and academic performance, the CSE determined that the student did not have academic management needs (Tr. p. 16). With regard to the student's social/emotional functioning, the school psychologist testified that the student's present level of social/emotional performance reflected on the May 2009 IEP was based primarily on input from the student's parents and RLS, as well as reports of the student (Tr. p. 21). Further testimony by the school psychologist indicated that the parents and the director of RLS participated when the student's present levels of performance were developed at the May 2009 CSE meeting and the hearing record does not reflect that they or anyone else at the May 2009 CSE meeting objected to them (Tr. p. 22). Based on the above, I find that the student's needs were accurately

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<sup>9</sup> See 8 NYCRR 200.1(n).

identified and reflected in the May 2009 IEP (Parent Ex. C at pp. 1, 8; see 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]). Moreover, as discussed below, the IEP identified appropriate special education programs and supports to meet the student's unique special education needs.

The May 2009 CSE recommended the following supports to address the student's needs. To address the student's test anxiety and slow visual processing, which were noted in the October 2008 private psychoeducational evaluation; the May 2009 IEP recommended testing accommodations including extended time (2x) and a separate location with fewer than 12 students (Parent Exs. C at p. 9; K at pp. 2, 5, 7-9). To address the student's social/emotional needs, the May 2009 CSE recommended counseling services of two 40-minute individual sessions per week (Dist. Ex. 4 at p. 1; Parent Ex. C at pp. 4, 6, 8). Testimony by the school psychologist indicated that the May 2009 CSE developed four annual counseling goals that were based on input from the director of RLS, who indicated that the student's difficulties included her tendency to be a perfectionist, some reticence in her social interactions, and her need at times, for organizational assistance (Tr. p. 24). Accordingly, the annual goals focused on increasing the student's ability to be more realistic and less "perfectionistic" in both social and academic situations, developing coping strategies with regard to social interactions, and developing organizational strategies that assisted the student in managing her school and social obligations (see Tr. p. 24; Parent Ex. C at p. 6). The RLS teacher report that was considered at the May 2009 CSE meeting indicated that the student had responded successfully to strategies including not allowing the student to take on more school work than she could handle, helping her prepare for exams in a timely manner, and providing her with a safe place when she felt panicked (Parent Ex. L at p. 2). The director of RLS testified that "the interventions were essentially sitting down with [the student] . . . and helping her to back down a little bit, to become more realistic, and to recognize that she does not have to be perfect, that she does not have to put these incredible demands on herself to succeed" (Tr. pp. 62-63). As such, I find that the May 2009 IEP contained individualized services and annual goals that were appropriate to address the student's unique needs in the LRE (see 34 C.F.R. § 300.320[a][2], [4]; 8 NYCRR 200.4[d][2][iii], [v]).

The hearing record further reflects that the recommended placement identified in the June 5, 2009 FNR could have implemented the student's May 2009 IEP and would have met her individual educational needs. Testimony by the principal of the recommended school reflects that the school is an alternative setting for students who need a more personalized approach than what they have received in the past and that the school is accustomed to having students transfer from other schools (Tr. pp. 90, 97-98). The school has partnerships with local agencies to provide additional counseling, social services, and various other support services to their students (Tr. pp. 90, 94, 112). The school provides for students with special education needs by employing two full time special education teachers and is also equipped to provide students with related services (Tr. pp. 92, 103-04).

The principal of the recommended school testified that based on the academic description of the student in her May 2009 IEP, he would have been able to place the student in eleventh grade at his school (Tr. p. 11). He further testified that his school would have been able to provide the student with the testing modifications recommended in her IEP, including extended time and separate location (Tr. p. 102; see Parent Ex. C. at p. 9). The hearing record reflects that both the student and the student's mother indicated on the Vocational Interest Assessment that the student was interested in attending college and becoming a teacher or other "helping" professional (Parent

Ex. G at pp. 1, 3). The hearing record reflects that the district's recommended school partners with several colleges and offers onsite advisement and college courses for juniors and seniors (Tr. p. 97).

To address the student's academic and social/emotional needs, the principal of the recommended school testified that the school provides an advisory program or "crew," which is a class comprised of 14 students and one teacher who functions as the students' and their families' personal and academic advisor (Tr. p. 91). The crew class meets four days per week (Tr. p. 92). On Mondays, the crew class has a personal check-in where students are invited to share their weekend experiences in order to get to know each other better, build trust among the group, and feel supported by their peers in a non-competitive environment; on another day, the crew advisor conducts an academic advisement session and checks in with students on how they are doing in their classes; and two days per week, the crew class is devoted to planning and then implementing a whole school event called a "town meeting," such as a student run discussion on a topic of interest to the students (Tr. pp. 107-09). The purpose of the crew is to provide both social and academic guidance (Tr. pp. 107-11). The principal of the recommended school testified that "we address student anxiety in crew, by building trust and community in a non-competitive setting" (Tr. p. 111). Therefore, the crew class would have addressed the student's anxiety as well as her tendency to feel "judged," which were noted in the student's May 2009 IEP (Parent Ex. C at p. 4).

The principal testified that the recommended school would have addressed the student's social/emotional needs as described in her May 2009 IEP by using a combination of counseling, conducted by either the social worker or guidance counselor, and by particular attention being paid by her crew advisor and the special education teacher, "who [would know] her IEP intimately," to ensure that the teachers in the general education classes and in the student's advisory class were paying attention to the student's social/emotional needs (Tr. p. 101). With regard to the student's May 2009 IEP annual goals, the principal of the recommended school testified that the special education teachers at his school would be responsible for working with the regular education teachers to make sure that "those goals are present in the planning, and that the student is assisted in - - those goals" (Tr. pp. 104-05). He added that there would be a several "tiered" approach used with the student, in that there would also be collaboration between the student's crew advisor and the social worker or guidance counselor on how the student was interacting with her peers in the small group setting (Tr. p. 105). The principal also testified that the teachers at the recommended school were trained to recognize anxiety in students by the social worker and guidance counselor at the beginning of the year in full staff meetings and also through individual consultation, and that they address student anxiety in crew by building trust and community in a noncompetitive setting (Tr. pp. 105, 111). The principal further testified that if a crew advisor's intervention was not sufficient, the student would be referred to the social worker or the guidance counselor and that he meets weekly with the guidance counselor, the social worker, and the attendance teacher to discuss concerns that come up with students (Tr. pp. 106, 111). The principal testified that in addition to the social worker and guidance counselor, the school offers "social work partners" such as an agency that conducts an onsite clinic several days per week for students and families whose needs regarding anxiety or depression require additional services (Tr. p. 110). When asked if his school was a therapeutic environment whereby a student could see the social worker two times during a day if needed, the principal testified that through collaboration with their partners, such services were available (Tr. pp. 111-112).

The principal of the recommended school also testified that he had previously encountered student's who demonstrated school refusal and would address this concern by first getting to know the student and the student's family to determine the individual reasons for the student's difficulty attending school (Tr. p. 93). He would then work with the student and the family to determine what interventions they could develop together (id.). He testified that the recommended school attempts to make the curriculum as engaging as possible to provoke and engage students and personalize the learning environments as much as possible, relying especially on crew (Tr. p. 94). The principal testified that students often refer to their crew as if it was a family and that students talk about their relationship with their advisor as one that is particularly close (Tr. pp. 94-95). He stated that the crew class has the potential to provide a very meaningful, close relationship for the student because the students are in a group where they are not judged on their academic skills or coursework and are being taught to form a positive group which can result in "a very safe and accommodating place for students" (Tr. p. 95). Based on the above, I find that the district's recommended program was reasonably calculated to confer educational benefits to the student.

Additionally, I find that the impartial hearing officer erred by determining that the district's recommended program was inappropriate because of its class size. The hearing record reflects that the May 2009 CSE did not consider a day treatment or hospital program to be appropriate for the student because they determined that cognitively the student belonged in a general education classroom that would offer academic challenges, and because the student's "poor behavior," including school refusal and yelling at her parents, took place in the home (Tr. pp. 25-26). Testimony by the school psychologist indicated that the student's mother described her as "a good girl at school" in the social history (Tr. p. 25; see Parent Ex. F at p. 2). The school psychologist also testified that the May 2009 CSE used the October 2008 private psychoeducational evaluation to develop the May 2009 IEP, and that there was nothing in the evaluation report to indicate that the student needed a full time special education or hospital placement (Tr. pp. 26-27). I note that, although the private psychoeducational evaluation did make some classroom recommendations that, as noted above, were included in the May 2009 IEP, the evaluation did not indicate that the student required a classroom setting other than a general education setting (see Parent Ex. K at p. 9). Furthermore, testimony by the school psychologist reflects that, although she recalled that the parents said at the CSE meeting that they were looking for an "alternative high school," she did not recall them objecting to the recommended general education program (Tr. p. 29). As such, there is nothing in the hearing record to indicate that the student would not have been able to receive educational benefit from participation in the recommended program with the recommended related services.

The hearing record further reflects that the recommended program attempts to keep class sizes as small as possible (Tr. p. 91). Testimony by the principal of the recommended school indicates that the school averages 25 students per class, although some classes are a few students higher and some are far below that (Tr. p. 90). Although testimony by the student's private psychiatrist indicated that the maximum class size the student could manage was 10 to 12 students, and that she thought that the student would feel overwhelmed, anxious and would "probably stop attending" school in a class of 25 students, the psychiatrist also testified that she was not familiar with the recommended school and did not know what level of support or help was available at that school (Tr. pp. 122-23, 131). By contrast to the psychiatrist's testimony, the hearing record reflects that neither the October 2008 private psychoeducational evaluation report nor the December 2008 diagnostic psychiatric evaluation report, both of which were reviewed by the May 2009 CSE, included in their recommendations that the student required a limited class size (see Parent Exs. K

at p. 9; P at p. 7). I note that the hearing record does not reflect that the student's needs included difficulty functioning in larger groups or that her tendency to place unrealistic academic expectations on herself was affected by class size. I note further that there is nothing in the hearing record that indicates that the student would be unable to function in a class of 25 students. Therefore, I find that the hearing record demonstrates that the program offered by the district in the May 2009 IEP was reasonably calculated to confer educational benefits on the student in the LRE (see Walczak, 142 F.3d at 131-32; Mrs. B., 103 F.3d at 1121-22; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*36 [N.D.N.Y. Sept. 29, 2009] [concluding that "the CSE was obligated to recommend the least restrictive environment in which [the student] could make meaningful progress"]). Moreover, although a CSE is required to consider reports from privately retained experts, it is not required to follow their recommendations (see, e.g., Watson, 325 F. Supp. 2d at 145; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at \*6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567; Application of the Bd. of Educ., Appeal No. 09-101; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child Suspected of Having a Disability, Appeal No. 06-087).

Based on the above, I find that the hearing record demonstrates that the district met its burden to show that the May 2009 IEP accurately reflected the student's needs and that the district's recommended program was reasonably calculated to confer educational benefits on the student in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006], citing J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]). Therefore, I find that the hearing record does not support the impartial hearing officer's conclusion that the district failed to offer the student a FAPE for the 2009-10 school year.

Having found that the district offered the student a FAPE for the 2009-10 school year, I need not reach the issue of whether the parents' placement at RLS was appropriate and the necessary inquiry is at an end (Mrs. 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. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

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

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the portions of the amended decision of the impartial hearing officer dated October 14, 2009 which awarded the parents tuition reimbursement and direct funding of tuition for the student's tuition costs at RLS are annulled.

**Dated:** Albany, New York  
December 19, 2009

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**