



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-138

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, G. Christopher Harriss, Esq., of counsel

Law Offices of Lauren A. Baum, P.C., attorney for respondents, Lauren A. Baum, 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') son and ordered it to reimburse the parents for their son's tuition costs at the Manhattan Day School (MDS) for the 2008-09 school year. The appeal must be sustained.

At the time the impartial hearing convened in May 2009, the student was attending MDS (Tr. p. 3; Parent Exs. A at p. 3, C at pp. 1-4). MDS is a private religious school that has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. pp. 511, 941; see 8 NYCRR 200.1[d], 200.7]. The student's eligibility for special education services as a student with a speech or language impairment is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1 [zz][11]).

With regard to the student's educational history, the student's father reported that the student attended a different religious day school (day school) during nursery school and kindergarten (Tr. pp. 865-67; Dist. Ex. 4 at p. 4). The student was reportedly classified as a student with a disability in approximately May 2006 and, in accordance with an individualized education program (IEP), he received speech-language therapy and occupational therapy (OT) services (Tr. p. 866).¹ In June 2006, the student was described as having become "selectively mute" (Tr. pp.

¹ The hearing record does not contain the 2006 IEP or describe the student's criteria for eligibility during that school year.

719, 730, 865), and the student's father reported that the student had "stopped talking for [a] time," but could reportedly speak to him (Dist. Ex. 4 at p. 4; see Tr. p. 865). The student's father indicated that during the student's kindergarten year, a private pediatric neurologist diagnosed an anxiety-based language disorder upon examining the student in November 2006 (Tr. pp. 868, 875; see Dist. Ex. 4 at p. 4).

According to the student's father, the day school informed the parents in February 2007 that due to the student's developmental delays, the student could no longer attend the day school (Dist. Ex. 4 at p. 4). The parents arranged for the student to be privately tutored by "EBL Coaching" from February to May 2007 (Tr. pp. 870-71; Dist. Ex. 4 at p. 4).² The student's father informed the district that the student was no longer attending the day school and requested assistance in making sure that the student's support services followed him (Tr. p. 873).³

The parents sought assistance for the student from a private neuropsychologist, who conducted an observation and "screening" during February and March 2007 (Tr. pp. 720-21; Parent Ex. R). Administration of the Stanford-Binet Intelligence Scale, Fifth Edition (SB-V) yielded a nonverbal intelligence quotient (IQ) of 84 (14), a verbal IQ of 90 (25) and a full scale IQ of 86 (18) (Parent Ex. R. at p. 2). Administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) yielded a standard score of 100 (49) in letter-word identification, a standard score of 78 (7) in spelling, a standard score of 90 (26) in applied problems, a standard score of 109 (72) in word attack and a standard score of 86 (17) in picture vocabulary (id.). Administration of the Developmental Neuropsychological Assessment Test, Second Edition (NEPSY-II) yielded a scaled score of 3 in comprehension of instructions, a scaled score of 5 in verbal fluency, a scaled score of 4 in design copy, and a scaled score of 9 in sentence repetition (id.).

The student's speech-language pathologist completed a speech-language progress report on April 18, 2007 (Dist. Ex. 5). The speech-language pathologist noted that she had provided the student with speech-language services three times per week individually for 30 minutes since September 2006 (id.). The speech-language pathologist reported that the student had made gradual, steady progress since September 2006 (id.). According to the speech-language pathologist, the student exhibited delays in articulation accompanied by difficulties in oral motor skills, expressive language and receptive language, and his "[a]rticulation [was] characterized by substitution and omissions in all positions of words" and, therefore, he required improvement in his phonemic awareness skills (id.). She reported that the student displayed regression in his articulation and language skills after vacations and therefore she recommended that speech-language therapy be provided on a 12-month basis (id.). The speech-language pathologist further recommended that the student's speech-language services be changed to two times per week individually for 45 minutes due to the extended period of time needed for the student to transition and focus on a therapy task (id.).

² The term "EBL Coaching" is identified in the hearing record by the initials of the individual who coordinates private education related services, which includes, among other things, both center- and home-based tutoring services (Tr. pp. 870-71, 898).

³ Although unclear in the hearing record, it appears that "support services" refer to the speech-language therapy and OT services that were provided by the district (Tr. pp. 866-67, 871, 873). The student's father also indicated that the student received private speech therapy services (Dist. Ex. 4 at p. 4).

The parents enrolled the student in a district school in May 2007 and he attended a general education kindergarten class (Tr. pp. 873-874; Dist. Ex. 4 at p. 4). The student's father reported that the student adjusted fairly well although he was "very far behind, academically" (Dist. Ex. 4 at p. 4). In an undated letter to the district's guidance counselor, the student's father informed the district that the student was a "nervous wreck" and that he bit his fingers (*id.*). The student's father also indicated that the student was under the care of a psychologist "who has helped" and that the student was receiving medical treatment (*id.*).

In a progress report dated June 7, 2007, the student's occupational therapist noted that OT sessions focused on addressing the student's visual fine motor development, upper body strength and coordination, self care skills, increased focus on presented tasks, and sensory integration (Parent Ex. Z at p. 1). The occupational therapist reported that the student had made slow but steady progress; however; the student had demonstrated regression at times over the past year (*id.*). According to the progress report, the student had mastered the annual goals in his 2006-07 IEP related to copying, cutting and attention, and had demonstrated emerging skills in the area of motor skills (*id.* at pp. 2-3). The occupational therapist provided a summary of the student's performance on the Beery-Buktenica Developmental Test of Visual-Motor Integration, Fourth Edition (VMI-4) administered on May 14, 2007, which yielded a standard score (percentile rank) of 85 (16) (*id.* at p. 3). According to the occupational therapist, the VMI-4 results indicated average performance (*id.*). Administration of the Test of Visual Perceptual Skills, Third Edition (TVPS-3) in March 2007 yielded scores (percentile rank) of 73 (4) in overall functioning, a standard score of 72 (3) in basic processes, and a standard score of 88 (21) in complex processes (*id.*).⁴ The occupational therapist reported that the TVPS-3 results indicated the student displayed delays in the area of visual perceptual skills and also noted that the student demonstrated difficulty with maintaining his visual attention during testing (*id.*). The occupational therapist opined that difficulties in visual perceptual skills could negatively affect the student's reading and writing skills, as well as performance on other tasks (*id.* at p. 4). The occupational therapist recommended that the student receive OT three times per week individually for 45 minutes with two of the sessions occurring in a sensory gym (*id.*). Additionally, the occupational therapist recommended that the student receive OT on a 12-month basis to prevent regression and that the Committee on Special Education (CSE) consider a physical therapy (PT) evaluation to assess the student's gross motor skills, balance, and lower body strength and coordination (*id.*).

On June 8, 2007, the CSE convened to conduct a review of the student's educational program (Parent Ex. I at p. 1). The June 2007 CSE determined that the student was eligible for special education and related services as a student with a speech or language impairment and developed the student's IEP for the 2007-08 school year (*id.*). Attendees at the June 2007 CSE meeting included a school psychologist who also acted as the district representative, the parents, a district special education teacher, a district speech-language pathologist, and a district regular education teacher (*id.* at p. 2). The student's present levels of academic performance in the resultant IEP indicated that the student's skills were well below grade level in the areas of reading, writing, and math (*id.* at p. 3). The June 2007 IEP reflected that while the student's decoding skills were at grade level; his listening comprehension, reading comprehension and writing skills were described as below grade level (*id.*). The June 2007 IEP also indicated that the student was below

⁴ The hearing record indicates that the "TPVS-3 is a multiple choice test used to assess the visual perceptual skills of children while minimizing motor requirements" (Parent Ex. Z at p. 3).

grade level in computation skills and applied problems skills (*id.*). With regard to present levels of social/emotional performance, the June 2007 IEP described the student's social skills as below grade level and interfering with his ability to form peer relationships (*id.* at p. 4). In the area of health and physical development, it was noted in the June 2007 IEP that the student was healthy, but that his physical development appeared to be delayed by 12 months (*id.* at p. 5). The June 2007 IEP contained 19 annual goals and 61 corresponding short-term objectives related to the student's needs in reading, writing, math, social/emotional functioning, sensory integration, self-care skills, fine and gross motor skills, speech-language skills, behavior/attention, and "auditory attending skills" (*id.* at pp. 6-16).

The June 2007 CSE recommended that the student be placed in a 12:1+1 special class and receive related services of speech-language therapy one time per week individually for 30 minutes and two times per week in a group of three for 30 minutes, OT two times per week individually for 45 minutes, counseling two times per week in a group of two for 30 minutes, and adapted physical education (Parent Ex. I at p. 19). The June 2007 CSE also recommended that the student receive testing accommodations including a separate location, extended/"double" time, questions read aloud, and directions read/reread aloud (*id.*).

In a "Summer Progress Report" dated August 10, 2007, the student's speech-language pathologist reported that the student's strengths included his pragmatic language, expressive language skills, and receptive language skills (Dist. Ex. 9 at p. 1).⁵ The speech-language pathologist indicated that the student's speech-language therapy addressed his oral motor skills, specifically oral motor strength and range of motion of articulators (*id.* at pp. 1-2). The speech-language pathologist further indicated that although the student's annual goals included development of age level expressive language skills, receptive language skills and auditory processing skills, the student's annual goals also included improvement in articulation skills (*id.* at p. 1). The progress report described the student's strengths and weaknesses during summer 2007 while working on certain phonemes and consonant clusters (*id.* at pp. 1-2). The speech-language pathologist reported that the student had made "steady progress thus far" and noted the student's improvement in the areas of intelligibility and articulation (*id.* at p. 1).

On January 29, 2008, the student's private neuropsychologist conducted another psychoeducational evaluation to assess the student's then current functioning and provide assistance in educational and treatment planning (Dist. Ex. 8 at p. 1). Administration of the WISC-IV yielded a standard score (percentile rank) of 104 (61) in verbal comprehension, a standard score of 98 (45) in perceptual reasoning, and a standard score of 77 (6) in working memory (*id.* at p. 2). The neuropsychologist indicated that the student was unable to complete the processing speed subtests due to fine motor difficulties and therefore, a full scale IQ score was not generated (*id.*). The neuropsychologist also indicated that the student's scores within both the verbal subtest domain and the nonverbal subtest domain indicated varying ability depending on the task (*id.*). Moreover, within the verbal domain, the student's skills had a range from the 16th percentile to the 84th percentile and within the nonverbal domain, the student's skills had a range from the 25th to the 63rd percentile (*id.*). The neuropsychologist reported that the student's performance on the

⁵ Although the June 2007 IEP did not describe the student as eligible for a 12-month extended school year, it appears that the student nevertheless received services during summer 2007 (Dist. Ex. 9; Parent Ex. I at p. 1). The hearing record is unclear regarding the extent to which the parent privately obtained and/or the district provided these services (*id.*).

NEPSY-II indicated that the student had difficulty with tasks that required high levels of attention to language and complex language processing (id. at p. 3). The neuropsychologist further reported that the student's performance on the working memory subtest of the WISC-IV indicated that the student was able to better maintain his attention when provided with context and structure (id.). As indicated by his performance on the NEPSY-II, the student's graphomotor abilities regarding performance on copying exercises had a range from the 6th to the 10th percentile (id.).

The neuropsychologist's administration of the WJ-III ACH yielded a standard score (percentile rank) of 81 (10) in letter-word identification, a standard score of 62 (1) in spelling, a standard score of 66 (1) in passage comprehension, a standard score of 95 (38) in applied problems, a standard score of 87 (19) in word attack, and a standard score of 99 (46) in picture vocabulary (Dist. Ex. 8 at p. 7). The student's performance on the WJ-III ACH reflected that the student's academic abilities ranged from below the kindergarten level to the early first grade level (id. at p. 4).⁶ The neuropsychologist reported that during testing, the student engaged in an appropriate and cooperative manner (id. at p. 2). However, the neuropsychologist noted that during testing the student lacked focus and was disorganized with the more challenging tasks, and that he required prompts and encouragement to maintain his attention and accomplish the tasks (id.). According to the neuropsychologist, the student's variable attention appeared to negatively affect his overall performance (id. at p. 4). The neuropsychologist recommended that the student be placed in a small supportive classroom that provided him with individual attention and a multisensory approach to reading (id. at p. 5). The neuropsychologist further recommended that the student would benefit from verbal cues and prompts to assist with maintaining his attention (id. at p. 6). The neuropsychologist also recommended that the student be placed in a multisensory summer program to address his reading, spelling, and language processing/comprehension difficulties (id.).

The student's special education teacher from the district completed a progress report dated June 18, 2008, indicating that the student demonstrated inconsistent effort and progress in social skills, work habits, reading, and writing (Dist. Ex. 3 at p. 2). The special education teacher also indicated that the student displayed consistent effort in math and approached grade level standards in math, science and, social studies (id.).

The district recorded the student's progress toward his annual goals on his June 2007 IEP and reported that the student had made progress in counting, identification of letters, and writing letters (Dist. Ex. 2 at p. 1). The student mastered identification of coins, months, days and years on a calendar, retelling a story, and writing his name (id.). The student made progress toward mastery of annual goals related to decreasing anxiety in social situations, developing self confidence, sharing feelings, self esteem and improving work behavior (id. at pp. 2-4). During the 2007-08 school year, the student mastered his annual goal related to use of self-calming techniques for increased performance in home and school environments (id. at p. 3).

⁶ Although the neuropsychologist referred to the Wechsler Individual Achievement Test, Second Edition (WIAT-II) in the body of his report (Dist. Ex. 8 at p. 4), the summary of scores portion of his report refers to the WJ-III ACH to assess the student's achievement (id. at p. 7). In light of the WJ-III ACH scores recorded by the neuropsychologist and the description of the testing in the hearing record, it appears that the WJ-III ACH was actually used to assess the student's achievement and WIAT-II was referenced in error (Tr. p. 724; Dist. Ex. 8 at pp. 4, 7).

The hearing record contains a district progress report for winter and spring 2008 that was completed by the student's teachers in art, computer, library, music, and adapted physical education (Dist. Ex. 3 at p. 3; see Parent Ex. I at p. 1). The student's art teacher reported that the student was enthusiastic, but called out in class and needed to learn to listen and maintain his attention (id.). According to the art teacher, the student approached the achievement learning standards and demonstrated consistent effort for both winter and spring 2008 (id.). The student's computer teacher indicated that the student met achievement learning standards in spring 2008; however, the student displayed inconsistent effort in the area of listening and following directions (id.). The library teacher reported that the student approached the achievement learning standards in both winter and spring 2008 and displayed consistent effort in the winter; however, he demonstrated inconsistent effort in spring 2008 in the areas of listening and following directions (id.). Although the library teacher indicated that the student was enthusiastic, she noted that he had difficulty listening and was disruptive during lessons (id.). According to the progress report, the student also displayed inconsistent effort in music, but met achievement learning standards (id.). The music teacher reported that the student participated in class, but would often call out during class (id.). The adapted physical education teacher indicated that the student met achievement learning standards and displayed consistent effort (id.).

In a district progress report dated June 2008, the student's special education teacher indicated that the student volunteered to complete classroom jobs; however, he needed reminders to complete routine tasks (Dist. Ex. 3 at p. 1). The special education teacher noted that the student had grown more responsible with classroom materials and that his curiosity led him to learn new concepts; however, his progress was inconsistent due to his lack of ability to focus (id.). According to the progress report, the student knew letter sounds in isolation and attempted to use this knowledge in his reading (id.). The special education teacher worked with the student to read each word while reading rather than recite what he had memorized (id.). The student was able to answer simple comprehension questions and he was able to draw pictures to tell a story (id.). The student was reportedly "newly motivated to do math" and was able to rote count to 28 and identify numerals one to ten (id.). The special education teacher indicated that the student was learning addition, writing numerals to 14, and had memorized some of his math facts to ten (id.).

The district's occupational therapist completed an OT progress report on May 29, 2008 (Dist. Ex. 6). She reported that the student was "[p]ersonable and polite" and easily transitioned to the OT sessions (id. at p. 1). The occupational therapist further reported that the student's speech intelligibility was affected by an inter-dental lisp (id.). She indicated that the student had improved in the areas of self regulation such as behavioral flexibility and social perspective taking, which assisted with the student's selection of adaptive coping mechanisms regarding unanticipated changes in routine, frustration, and conflict resolution (id.). However, at times the student continued to withdraw and became quiet while in distress (id.). According to the progress report, the student demonstrated deficits in self regulation, difficulty with maintaining his attention, decreased impulse control, "excess chatter," and disorganization when engaged in certain tasks such as tasks that required verbal presentation, multiple steps and had a lack of structure (id.). The occupational therapist reported that the student's overall performance indicated inefficient registration and integration of multiple sensory stimuli for "learning novel behaviors and adapting current behaviors into more mature sequences of skills for greater independence at school" (id. at p. 2). The occupational therapist further reported that the student's "immature pencil grasp" resulted in both compromised writing speed and written output efficiency (id.). Administration of the Berry-Buktenica Developmental Test of Visual-Motor Integration (VMI) when the student

was seven years and three months old, yielded age equivalent scores of 5.11 in visual motor integration, 4.4 in visual perception, and 3.9 in motor coordination (*id.* at p. 2). The occupational therapist recommended the continuation of OT services to improve the student's "sensory processing for developing praxis: learning novel behaviors and adapting current behaviors into more mature sequences of skills for greater independence in all occupational domains: motor, play and self-care" (*id.* at p. 3).

The CSE convened for an annual review on June 19, 2008 to develop the student's IEP for the 2008-09 school year (Dist. Ex. 1 at p. 1). Attendees at the June 2008 CSE meeting included the guidance counselor who also acted as the district representative, the parents, a district special education teacher, a district speech-language pathologist, and a district occupational therapist (*id.* at p. 2). The proposed IEP contained ten annual goals and 42 corresponding short-term objectives related to the student's needs in reading, writing, math, social/emotional functioning, sensory integration, fine and gross motor skills, speech-language skills, and "auditory attending skills" (*id.* at pp. 7-13). The June 2008 CSE recommended that the student be placed in a 12:1+1 special class with related services of speech-language therapy one time per week individually for 30 minutes and three times per week in a group of three for 30 minutes, OT two times per week individually for 30 minutes, counseling one time per week in a group of three for 30 minutes, and adapted physical education (*id.* at p. 15). The June 2008 CSE also recommended testing accommodations including a separate location, extended time, questions read aloud, directions read/reread, and masks and markers to maintain place (*id.*).

In a letter to the district's guidance counselor dated August 14, 2008, the student's father informed the district that the parents had reviewed the June 2008 IEP (Parent. Ex. C at p. 3). According to the student's father, the parents were "discouraged and concerned" due to the student's "lack of academic progress over the 2007-08 school year," and that although the student was seven years old, he remained at a pre-kindergarten to kindergarten level for both reading and math (*id.*). Additionally, the student's father noted that the June 2008 OT progress report indicated that the student functioned at a 3.9 to 5.11 age level (*id.*). The student's father stated that the student's class during the 2007-08 school year did not provide him with appropriate peers of similar needs and abilities and that the student was not provided with the individual attention that he required (*id.*). Therefore, the student's father asserted that the 2008-09 IEP "d[id] not represent an appropriate blueprint upon which a successful first grade year (for a child who chronologically should be in second grade) can be built" (*id.*). According to the student's father, the academic annual goals in the June 2008 IEP were "not sufficient to either address his needs and measure progress in the coming year" (*id.* at pp. 3-4). The student's father remarked that the student's class for the 2008-09 school year would "consist of the same or a similar student mix" (*id.* at p. 4). The student's father asserted that the parents "d[id] not believe that the program or class offered to [the student] for next year w[ould] be appropriate," based upon the other students in the classroom, the student's lack of progress during the 2007-08 school year, the June 2008 IEP, and the classroom setting (*id.*). The student's father indicated that the parents would place the student at MDS and would seek tuition reimbursement (*id.*).

In a letter dated August 20, 2008, the student's father informed the CSE that the student would be enrolled in MDS for the 2008-09 school year (Parent Ex. C at p. 1). The student's father further indicated that he was forwarding a copy of his August 14, 2008 letter to "insure that [the student's] services w[ould] begin for the year without any unnecessary delay" (*id.*). In September 2008, the parents placed the student at MDS in a special class designed for 12 students, with a

head teacher and an assistant teacher (Tr. pp. 512, 532, 554).⁷ The hearing record reflects that the students in the special class at MDS ranged from kindergarten to second grade (Tr. pp. 533-34). The student's related services were provided at MDS by the district (Tr. pp. 521-22, 750). The hearing record indicates that between 35 to 40 percent of the student's day was spent in religious instruction (Tr. pp. 513, 538-39, 759).

In a due process complaint notice dated January 16, 2009, the parents, through their counsel, alleged that the June 2008 CSE lacked a school psychologist, an additional parent member, and a district representative who was qualified to provide or supervise special education and had adequate knowledge of the general education curriculum and the availability of the district's resources (Parent Ex. A at p. 1).⁸ The parents further asserted that the June 2008 CSE failed to consider sufficient evaluative information "to justify its recommendation" (*id.*). According to the parents, the June 2008 CSE meeting was conducted in a manner in which they were denied meaningful participation; however, the due process complaint notice did not elaborate further regarding this allegation (*id.* at p. 1). The parents alleged that the June 2008 IEP lacked appropriate present levels of performance and appropriate, measurable goals to address the student's needs (*id.*) The parents also asserted that the educational placement recommended by the June 2008 CSE was too large and was not appropriate for the student to make academic and social progress (*id.* at pp. 1, 3). According to the parents, during the 2007-08 school year, the student was not grouped with "comparable peers," had no one from whom to model behavior, made "virtually no progress," and "regressed in the development of his graphomotor and social skills" (*id.* at p. 2). Therefore, the parents contended that the June 2008 CSE inappropriately offered the student the same size class with "the same or a similar student mix" and a single teacher, which would not have provided the student with the appropriate level of individualized attention and support to make academic and social progress (*id.* at pp. 2-3). For relief, the parents requested reimbursement for the costs of the student's tuition at MDS for the 2008-09 school year and the provision of transportation and related services (*id.* at p. 3).

In a response to the due process complaint notice dated March 26, 2009, the district asserted, among other things, that the student was offered a free appropriate public education (FAPE) and that the placement offered was reasonably calculated to enable the student to obtain meaningful educational benefits (Parent Ex. B).

An impartial hearing was convened in May 2009 and concluded in September 2009, after eight days of testimony (Tr. pp. 1-1114). In a decision dated October 28, 2009, the impartial hearing officer determined that the student "made virtually no academic or social progress" during the 2007-08 school year and that the district inappropriately offered the student the same program for the 2008-09 school year (IHO Decision at p. 7). The impartial hearing officer further concluded that the achievement testing conducted by the private neuropsychologist in January 2008 showed that the student did not make appropriate progress in academics (*id.* at p. 8). With regard to writing, the impartial hearing officer determined that the student had not mastered two of his short-term objectives and that he was "far below" grade level in writing (*id.*). The impartial hearing officer

⁷ The director of special education at MDS indicated that the student's class consisted of eight students for the 2008-09 school year, but had a capacity for 12 students (Tr. pp. 532-33, 554).

⁸ The hearing record indicates that the parents' due process complaint notice was not filed with the district until March 16, 2009 (Tr. p. 3).

also noted that the student had made some progress in his fine motor skills such as pencil grasp, but not enough to be considered a "mature pencil grasp" (*id.* at pp. 8-9). The impartial hearing officer found that the student had not achieved many of the writing goals in the prior June 2007 IEP; therefore, many of those goals were repeated in the June 2008 IEP (*id.* at p. 9). The impartial hearing officer noted the testimony of the student's father indicating that an example of the student's writing from a diary from June 2007 was not distinguishable from a diary completed in June 2008 (*id.*). The impartial hearing officer concluded that the student made little or no progress in his writing skills during the 2007-08 school year (*id.*).

The impartial hearing officer further noted that the student mastered only one of his four short-term objectives in math and needed more time to achieve three other objectives (IHO Decision at pp. 9-10), and concluded that the student did not make any meaningful progress in math skills during the 2007-08 school year (*id.*). With regard to reading, the impartial hearing officer found that the student mastered two of five short-term objectives (*id.* at p. 10). According to the impartial hearing officer, the student could not read or retell stories at the beginning of the 2007-08 school year, but could "retell important parts of the stories and retell familiar stories" (*id.*). The impartial hearing officer noted that the student did not achieve a short-term objective related to reading 10-15 words aloud from a word wall or class charts, and that the student brought home the same books throughout the year (*id.*).⁹ Therefore, the impartial hearing officer concluded that the student did not make meaningful progress toward his annual goal in reading during the 2007-08 school year (*id.* at p. 11). As for the social/emotional area, the impartial hearing officer found that the student was far below grade standard and needed additional work in six areas (*id.*). The impartial hearing officer noted that the student mimicked aggressiveness, inappropriate language and baby talk exhibited by his classmates, and that the student achieved only one of his five counseling goals (*id.*). The impartial hearing officer found that the student made little progress toward his OT goals for the first two quarters of the 2007-08 school year and that the student's functional level ranged from three to five years old (*id.*). The impartial hearing officer determined that the student failed to make meaningful progress for the 2007-08 school year and that the CSE's recommendation that the student attend a class with the same classroom teacher for the 2008-09 school year would not have provided the student with the attention and support he required and, therefore, the district failed to offer the student a FAPE (*id.* at p. 12).

The impartial hearing officer further found that MDS was an appropriate placement for the student for the 2008-09 school year, MDS complied with the recommendations of the private neuropsychologist, and that the student was able to make progress there (IHO Decision at pp. 13-16). The impartial hearing officer rejected as irrelevant the district's arguments that the student's placement at MDS was inappropriate because MDS did not provide any related services to the student and that the student's related services were provided by the district (*id.* at p. 16). The impartial hearing officer also determined that equitable considerations favored the parents (*id.* at pp. 16-17).

The district appeals, contending that the student made progress during the 2007-08 school year and that the district offered the student an appropriate IEP and placement for the 2008-09 school year. The district further argues that the parents failed to show that MDS was appropriate

⁹ The impartial hearing officer noted that the word wall and class charts were "more than likely" the same during the prior school year (IHO Decision at p. 10); however, as noted previously, the student attended different schools during the 2006-07 school year (Dist. Ex. 4 at p. 4).

for the student due to the lack of related services at MDS and that the impartial hearing officer erred in determining that this issue was irrelevant. According to the district, the impartial hearing officer also erred in failing to reduce the tuition reimbursement award to the parents by 35 to 40 percent because the hearing record clearly shows that this amount of the student's time at MDS was attributable to religious instruction. The district also challenges the impartial hearing officer's inclusion of additional dinner, activity, and security fees in the costs of the tuition reimbursement award. For relief, the district seeks an order annulling the impartial hearing officer's order granting tuition reimbursement to the parents, or, in the alternative, a reduction of the tuition reimbursement award by 35 percent and the denial of the additional fees.

In an answer, the parents deny the district's allegations in the petition for review. The parents assert that the student made inadequate academic or social progress during the 2007-08 school year and that the district's recommendations for the 2008-09 school year were inappropriate for the student. The parents argue that MDS was appropriate for the student and that the parents cooperated with the district. The parents further argue that the impartial hearing officer's award of tuition reimbursement should not be reduced. For relief, the parents request that the impartial hearing officer's decision be upheld.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally 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; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; 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).

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).

At the outset, I note that the impartial hearing officer did not make factual determinations regarding the parents' allegations in their due process complaint notice related to the improper composition of the June 2008 CSE; the district's failure to consider evaluations of the student; the number, measurability or adequacy of the annual goals and short-term objectives in the June 2008 IEP; or the lack of meaningful participation of the parents at the June 2008 CSE (see Parent Ex. A at p. 1). An impartial hearing officer's decision is final and binding upon a party unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). The parents did not cross-appeal any aspect of the impartial hearing officer's decision including her decision not to address certain issues presented in the due process complaint notice, and therefore, these issues are not properly before me and I will not address them.¹⁰

Turning next to parties' dispute over whether the student made adequate progress in the district's recommended placement during the 2007-08 school year, the student's special education teacher for the 2007-08 school year testified that the student made "[s]low but steady" academic progress during the 2007-08 school year (Tr. pp. 352-53). The special education teacher, who attended the CSE meeting, testified that the June 2008 CSE reported that the student's academic functioning was within the pre-kindergarten to kindergarten level (Tr. p. 361). Although the hearing record shows that the parents were dissatisfied that the June 2008 IEP indicated a pre-kindergarten to kindergarten level for both the student's reading and math skills (Tr. p. 920; Dist. Ex. 1 at p. 3; Parent Ex. C at p. 3), the special education teacher testified that the student made progress in his math, reading and social skills from the beginning of the 2007-08 school year to the end of the school year in June 2008 (Tr. pp. 362-65). She further testified that the progress the student made during the 2007-08 school year included "his ability to be able to put sounds together to make words, even though he chose not to, he had the skills" (Tr. p. 362). The special education teacher further testified that writing was the student's greatest area of academic weakness at the beginning of the 2007-08 school year, but that the student had made progress in his ability to write letters, tell stories, and use pictures to convey meanings of a story (Tr. pp. 344-45). The impartial hearing officer's determination with respect to the student's writing skills emphasized the student's June 2008 diary project and the special education teacher's testimony regarding scribbling (IHO Decision at pp. 8-9). However, the hearing record also contains evidence showing progress, albeit uneven, in the student's writing skills that was more than scribbles; such as in the student's communication logbook which contained entries over the course of the 2007-08 school year showing the student's work writing the titles of books that he had read (see, e.g. Parent Ex. X at pp. 5, 10-12, 14, 22, 26, 28-30, 33). Additionally, the student's progress report related to the 2007-08 IEP annual goals indicated adequate progress in the areas of reading, math, and writing (Dist. Ex. 2 at pp. 1-2).

The special education teacher indicated in the June 2008 progress report that the student displayed consistent effort and progress regarding math and that the student was approaching grade level standards in the areas of verbal expression through drawing and writing and identification of numbers one through ten (Dist. Ex. 3 at p. 2). The special education teacher further testified that

¹⁰ Even if the parents had cross-appealed and these matters could be addressed on appeal, I find that after conducting my review of the hearing record, the evidence does not support a conclusion that the procedural violations alleged by parents rose to the level of denying the student a FAPE.

over the course of the 2007-08 school year, the student progressed from counting rote from one through ten to counting rote up to 28 (Tr. p. 362). The special education teacher also testified that the student had learned the concept of addition (Tr. pp. 362-63).¹¹ The special education teacher further indicated in the June 2008 progress report that the student's performance in social studies and science was approaching grade level standards, although his effort and progress in these subjects were inconsistent (Dist. Ex. 3 at p. 2).

With regard to the student's social/emotional progress during the 2007-08 school year, the special education teacher stated that the student listened to teachers, volunteered, and that his participation increased; however, the student required reminders to do things in a timely fashion (Tr. pp. 365-66). For example, when the student volunteered to sharpen the pencils, he became distracted by someone talking to him and needed reminders to complete the task (*id.*). According to the June 2008 progress report, the student demonstrated inconsistent effort and progress regarding personal and social growth (Dist. Ex. 3 at p. 2). The special education teacher reported that the student's progress was inconsistent due to lack of focus (*id.* at p. 1). However, the student's progress report related to his 2007-08 IEP annual goals indicated improvement in the areas of self-confidence, self-esteem, and work behavior (Dist. Ex. 2 at pp. 2-3).

The student's guidance counselor testified that at the beginning of the 2007-08 school year, the student exhibited difficulties in the areas of anxiety, self confidence and transitions into the classroom, but that by the end of the year, he had made social and academic progress (Tr. p. 52). According to the guidance counselor, she assisted the student to identify his feelings and "cope with the anxiety to be able to then refocus or to speak up for himself" (Tr. pp. 53-54). At the beginning of the 2007-08 school year, the guidance counselor noted that the student's social engagement with peers included "positives" because he was eager to please; however, he would "call kids names" which led to negative social interactions (Tr. p. 55). The guidance counselor further testified that she addressed the student's behavior through classroom discussions, small group counseling sessions regarding self-advocacy skills and communication with his parents, and that the student made progress in his annual goal related to expressing his feelings in social situations (Tr. pp. 55-56, 61). The guidance counselor described the student as initially "feeling stressed or anxious" whereas by the end of the year, he had learned to use words more assertively and "speak[] up for himself" (Tr. p. 61). With regard to the student's annual goals in the June 2007 IEP related to counseling, the student's progress was noted on all five goals and the guidance counselor testified that the student mastered his annual goal related to self-calming techniques (Tr. p. 64; Dist. Ex. 2 at pp. 3-4). The guidance counselor also testified that the student "was much more in control" by the end of the 2007-08 school year (Tr. pp. 59, 64). The guidance counselor stated that the student's self esteem improved and that his ability to engage in tasks had increased by the end of the 2007-08 school year (Tr. pp. 59, 66, 71-72).

With regard to the student's progress in OT, the student's father testified that the student did not demonstrate any progress in writing during the 2007-08 school year (Tr. pp. 902-03). Although the occupational therapist testified that in September 2007, the student had difficulties with attention, an "immature" pencil grasp, and that the strokes from his pencil were inadequate (Tr. pp. 403, 406-07, 469); she also testified that by January 2008 the student had demonstrated

¹¹ I note that the student's father testified that the student's math homework "never changed" throughout the school year (Tr. p. 899).

progress related to the quality of his writing, printing the letters of his name, and that he displayed "more appropriate pressure over the pencil" (Tr. p. 409). The occupational therapist further testified that the more time the student spent writing, the more "he would revert to a less mature grasp" due to fatigue and low muscle tone (Tr. pp. 469-70). The occupational therapist testified that the student was able to write letters in the alphabet and that although he still demonstrated some letter reversals, "it was progress from when he first came in September" (Tr. p. 409). However, the occupational therapist also testified that the student's pencil grasp was "immature" and that although toward the end of the 2007-08 school year the student had made progress with his pencil grasp; he continued to demonstrate difficulties with attention and distractibility, which negatively affected his ability "to recall and put on paper" (Tr. p. 410). The occupational therapist noted in the June 2008 progress report that the student had improved in self regulation and social perspective taking, but demonstrated deficits in maintaining his attention and impulse control (Dist. Ex. 6 at p. 1). According to the occupational therapist, the student also made progress in the area of self-care skills such as manipulating fasteners (Tr. p. 432).

The student's speech-language pathologist testified that from September 2007 to January 2008, the student made progress in expressive language, receptive language, auditory memory skills, sequencing, and planning (Tr. pp. 198-99). The speech-language pathologist further testified that throughout the course of the 2007-08 school year, the student made progress related to his speech-language needs including in turn taking, cooperation with peers, following directions, listening skills, maintaining his attention, and participation in games (Tr. pp. 203-04).

The student's father testified that in January 2008, the student displayed regression in his abilities and therefore the parents consulted with the private neuropsychologist (Tr. p. 896).¹² The private neuropsychologist testified that results of the 2007 testing he had administered indicated that the student had at least low average to average cognitive ability (Tr. p. 721). The neuropsychologist testified that testing results indicated that the student "was starting to develop some pre-reading, letter identification skills, just really at the beginning level of his age" (Tr. pp. 721-22; see Parent Ex. R). According to the private neuropsychologist, the student had "a lot of difficulties processing language and expressing himself and significant visual-motor deficits" (Tr. p. 722).

The hearing record shows that after conducting his assessment of the student in January 2008, the private neuropsychologist believed that, while the student was attending the district's 12:1+1 special class in accordance with the June 2007 IEP, he "[wa]s doing well at school and progressing in all areas" (Dist Ex. 8 at p. 1). The private neuropsychologist further reported that in the student's previous placement at a religious school, "he was socially and emotionally less mature than his peers and did not have access to the level of support that he required to be comfortable and successful; but that "since his transfer to [the district] he ha[d] been making steady progress in all areas" (id.). The private neuropsychologist indicated that the student became "anxious at times;" however, the student was "much improved" in this area (id. at p. 2). The private

¹² In an e-mail dated November 5, 2007, the student's father informed the district that the student was "almost regressing in his behavior... acting like a two year old" due to mimicking a classmate's behavior (Dist. Ex. 4 at p. 2). The student's guidance counselor responded that the district's staff had not observed the student mimicking his classmates' behavior, but that the student engaged in "baby-ish behaviors" (id. at p. 1). The guidance counselor provided the parents with suggestions to encourage appropriate behavior and indicated that she would monitor whether the student engaged in any "mimicking behaviors" in school (id.).

neuropsychologist also indicated that the student had a history of "difficulties with self-regulation, frustration tolerance and attention;" however, the student "ha[d] made great strides" in all of these areas (*id.*). Additionally, the private neuropsychologist reported that the student "ha[d] matured and evidenced an improved ability to self-regulate and tolerate frustration" (*id.*). He further reported that the student "ha[d] shown a great deal of growth over this past year and present[ed] as a sweet, socially interested child who was a pleasure to work with [and that the student] clearly benefited from being in a more nurturing environment where he has been allowed to feel successful academically and socially" (*id.*). The private neuropsychologist testified that he compared the student's progress during the 2007-08 school year with the student's "baseline" behavior from approximately 11 months earlier during the 2006-07 school year, which he described as the student as being "almost selectively mute" and fearful of attending school, leaving the home, or working with more than his 1:1 private teacher (Tr. pp. 720-22, 730). In January 2008, the private neuropsychologist recommended that the student should continue on his "good trajectory" in a small classroom with individualized attention and, upon questioning on this point, he testified that he did not recommend changing the student's educational placement after evaluating the student (Tr. pp. 739-40; District Ex. 8 at p. 5).

In light of the forgoing evidence, I find that the hearing record does not support the impartial hearing officer's conclusions that the student made "virtually no academic or social progress," "little or no progress" in writing, "any meaningful progress" in math, did not make "meaningful progress" in reading, and "failed to derive meaningful educational benefit" in the district's 12:1+1 special class placement during the 2007-08 school year (IHO Decision at pp. 9-12; *see O'Toole v. Olathe Dist. Schs Unified Sch Dist. No. 233*, 144 F.3d 692, 707 [10th Cir. 1998] [holding that the student's progress was not inadequate where the student had not fully achieved most of those objectives in her IEP]). Upon examining the totality of the documentary and testimonial evidence in the hearing record, I find that the evidence is consistent with the description in the student's progress report regarding his 2007-08 IEP annual goals, which indicated adequate progress in reading, math, and writing skills as well as improvement in the areas of self confidence, self esteem, and work behavior (Dist. Ex. 2 at pp. 1-2). Additionally, I note that the student mastered his 2007-08 IEP annual goal related to self-calming techniques (*id.* at p. 3). I find that the hearing record shows that the student's June 2008 IEP contained annual goals that were commensurate with his cognitive ability and that although he had significant attentional and self regulation deficits, during the 2007-08 school year, the student made slow, steady progress toward most of his goals, mastered one goal, and nearly mastered a second goal and that no short-term objectives were identified in which the student made no progress at all (Dist. Exs. 2; 8 at p. 2; *see James D. v. Bd of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102*, 642 F. Supp. 2d 804, 827-28 [N.D. Ill. 2009]). The hearing record further shows that the student's progress during the 2007-08 school year was more than trivial (*Newington*, 546 F.3d at 119; *Mrs. B.*, 103 F.3d at 1121; *Connor v. New York City Dept. of Educ.*, 2009 WL 3335760, at *5 [S.D.N.Y. Oct. 13, 2009]).¹³ The hearing record shows that the student's 2008-09 IEP was based upon the 2007-08 IEP, which allowed the student to progress, not regress.

¹³ The description of the student's progress contained in the hearing record in this case is unlike one in which a student has had "very limited academic progress and serious regression in the year prior to the placement" in the previous school year such that the student's academic performance could be described as "stalled" (*Mrs. B.*, 103 F.3d at 1121).

With regard to the district's proposed June 2008 IEP and placement for the 2008-09 school year, the student's present levels of academic achievement in the June 2008 IEP indicated the student presented with below grade level skills in the areas of reading, writing, and math (Dist. Ex. 1 at p. 3). The June 2008 IEP noted that he was able to identify numerals one to ten, rote count up to 28, and had an understanding of letter sounds in isolation (*id.*). With regard to writing, the present levels of performance indicated that the student was able to write beginning and ending sounds for words, but only used this skill on demand (*id.*). According to the June 2008 IEP, the student's academic management needs were identified as small group or 1:1 instruction, which was consistent with the recommendation of the private neuropsychologist (compare Dist. Ex. 1 at p. 3, with Dist Ex. 8 at pp. 4-5).¹⁴ The student's strengths and weaknesses in the area of social/emotional development were noted in the June 2008 IEP, including being eager to volunteer; however, the IEP also reflected that he needed many reminders to complete routine tasks in an efficient manner (Dist. Ex. 1 at p. 4). The June 2008 IEP described that the student's curiosity allowed him to learn new material; however, it was noted that his effort and progress were inconsistent due to his inability to maintain his attention (*id.*). The student's social/emotional management needs were identified in the June 2008 IEP as positive reinforcement, structure, clear expectations, gentle reminders and "much re-focusing" (*id.*). In the area of health and physical development, the June 2008 IEP noted that the student had deficits in self regulation that may have led the student to exhibit inattention, impulsivity, and poor self organization (*id.* at p. 6). The present levels of performance in the IEP described the student's deficits in auditory processing such as auditory attention, discrimination, and sequencing, which underlie the student's difficulty with maintaining his attention and also contributed to his poor sound analysis and synthesis used for reading (*id.*). According to the June 2008 IEP, the student's "[d]eficits in visual analysis skills for processing visual information through visual attention, memory, and abstraction underlie [the] quality and quantity of [the student's] written output" (*id.*). The June 2008 IEP noted the student's low muscle tone in his hands which resulted in "choppy cutting and dark print strokes" (*id.*). His health and physical management needs included a low teacher-to-student ratio, preferential seating, shortened and repeated instructions, visual and kinesthetic aides, and sensory breaks (*id.*).

The June 2008 IEP contained ten annual goals and 42 corresponding short-term objectives that addressed the student's needs in reading, writing, math, social/emotional functioning, sensory integration, fine and gross motor skills, speech-language skills, and "auditory attending skills" (Dist. Ex. 1 at pp. 7-13). The hearing record shows that, consistent with the description of the student's present levels of performance, the annual goals and short-term objectives addressed identification of letters and sounds, reading words aloud, retelling a story, counting, solving addition and subtraction word problems, and identification of coins and calendar dates (*id.* at p. 7). Additionally, the annual goals and short-term objectives included writing letters, numbers, and the student's name; auditory memory skills; categorization; maintaining attention; intelligibility; verbal concepts; self esteem; self confidence; anxiety; self care; and motor skills (*id.* at pp. 8-13). As noted previously, the June 2008 CSE recommended testing accommodations including separate location, extended/"double" time, questions read aloud, directions read/reread, and masks and markers to maintain place (*id.* at p. 15). Although the hearing record shows that the parents expressed their concern at the June 2008 CSE meeting regarding the student's lack of progress (Tr.

¹⁴ Although the hearing record indicates that the student's father discussed the private neuropsychologist's January 2008 evaluation report with district staff, it is unclear whether the student's father provided a copy of the January 2008 private evaluation report to the June 2008 CSE (Tr. pp. 950-51, 981).

pp. 919-20, 930-31), the special education teacher testified that she asked the parents whether they were comfortable with the student's goals in the June 2008 IEP and that the parents voiced no objection to them (Tr. p. 360).

To address the student's special education needs, proposed goals and short-term objectives, the June 2008 CSE recommended that the student be placed in 12:1+1 special class (Dist. Ex. 1 at p. 1). The June 2008 IEP reflected that the CSE also considered placing the student in a regular education classroom and a collaborative team teaching (CTT) class,¹⁵ but rejected these options due to the student's pace and need for additional support (*id.* at p. 14). The June 2008 CSE also recommended related services of speech-language therapy one time per week individually for 30 minutes and three times per week in a group of three for 30 minutes, OT two times per week individually for 30 minutes, counseling one time per week in a group of three for 30 minutes, and adapted physical education (*id.* at p. 15). I find that the hearing record shows that proposed placement offered to the student for the 2008-09 school year was similar to that provided to him during the 2007-08 school year; however, it was appropriately modified to reflect the student's then current present levels of performance and the annual goals and short-term objectives, as well as the frequency and duration of the recommended related services, were based on the student's needs as indicated in the academic, speech-language, and OT progress reports.

The parents stated in a letter that socially, the district did not provide the student with a class having appropriate peers of similar needs and abilities and that the student was not provided with the individual attention that he required during the 2007-08 school year (Parent Ex. C at p. 3). As indicated above, formal testing administered in January 2008 revealed that the student's academic abilities ranged from below kindergarten level to early first grade level (Dist. Ex. 8 at p. 4). The student also demonstrated difficulty with self regulation, frustration tolerance, and attention as well as deficits in his fine motor, gross motor, and speech-language skills (Dist. Exs. 5; 8 at p. 2; Parent Ex. C). The hearing record includes class profiles of the district's proposed 2008-09 special class that were completed by the student's special education teacher (Tr. pp. 329, 330; Dist. Ex. 7; Parent Ex. BB).¹⁶ The proposed special class consisted of seven students who were enrolled in either kindergarten or first grade, and included two students who were five years old, four students who were six years old, and one student who was seven years old (Tr. pp. 320; Parent Ex. BB at p. 2). The class profile reflected that in the area of reading, there were three students at the reading readiness level, two students at the pre-primer level, and two students at the .5 to 1.5 grade level (Parent Ex. BB at p. 1). With regard to math, the class profile reflected that three students were at the pre-primer level and four students were at the .5 to 1.5 level (*id.*). The class profile further indicated that four students had below average learning ability, two students

¹⁵ "Collaborative team teaching," also referred to in State regulation as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.vesid.nysesd.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

¹⁶ The hearing record shows that of the seven students that were placed in the district's special class during the 2007-08 school year, four of them were placed in the same special class during the 2008-09 school year (Tr. p. 601).

had average ability in reading, and one student had above average ability in reading and math (id.). The class profile also showed that six students "need[ed] OT," one student had a part-time paraprofessional, and seven students received counseling (id. at p. 2). In the area of social development, the class profile showed that five students were at the pre-kindergarten to kindergarten level and two students were at the first grade level (id.). The guidance counselor testified that, based on a student's performance in the special class, the special education teacher would make efforts to mainstream a student as much as possible, which would allow for peer modeling to assist the student in social/emotional functioning and conflict resolution skills (Tr. pp. 90-91).

The special education teacher testified that she discussed the students in her class with the related service providers two or three times per week (Tr. p. 327). She organized the curriculum to ensure that the students received needed instruction in reading, writing, math, science, social studies, music, art and physical education, and she provided individual, small group and whole group instruction (Tr. p. 323). The special education teacher further testified that she placed the students into groups based on their abilities (id.) The special education teacher testified that the student "would have been able to work [1:1] and in small groups, very easily" (Tr. p. 376).¹⁷ The special education teacher further testified that a typical day in her 12:1+1 special class started with morning meeting, which consisted of a review of the daily schedule and discussion of the day ahead and the weather (Tr. pp. 323-24). According to the special education teacher, the class then engaged in interactive writing followed by completion of their "jobs," which were designed to build community skills (Tr. p. 324).¹⁸ Next, the class engaged in reading and writing followed by lunch, and upon their return, the students copied their homework assignments into their planners and packed up their backpacks for home (id.). The special education teacher read a story aloud to the class followed by math and then science or social studies (Tr. p. 325). Prior to dismissal, the students had an opportunity to choose a play activity (id.). The special education teacher employed an incentive system during the day in which all the students participated and earned points (id.). The student who had the most points as a result of the classroom behavior intervention system was able to choose a preferred activity first (id.).

The district speech-language pathologist testified that the student would have benefited from the speech-language therapy recommended in the June 2008 IEP for the 2008-09 school year (Tr. p. 223). The speech-language pathologist stated that she implemented a multisensory approach with her students (Tr. pp. 173-74). The speech-language pathologist also testified that she consulted with the special education teacher, the guidance counselor, and the occupational therapist regarding strategies and peer groupings (Tr. pp. 182-83).

In view of the evidence discussed above, I find that the district offered a proposed placement that would have appropriately addressed the student's attentional, speech-language, self regulation, and academic achievement deficits identified in the June 2008 IEP and that the student

¹⁷ Consistent with the private neuropsychologist's recommendation for multisensory instruction, the student's special education teacher testified that she uses multisensory reading instruction in the classroom and that when different groups of students work at different levels, she splits them into smaller groups (Tr. pp. 588-89, 593-94, 729, 741; see District Ex. 8 at p. 5).

¹⁸ The guidance counselor testified that during the 2008-09 school year, she would have worked with the student within the classroom to address conflict resolution skills (Tr. pp. 87-88).

would have been appropriately grouped for instruction with students of similar needs (Connor, 2009 WL 3335760, at *6; R.R. v. Scarsdale Union Free Sch. Dist., 615 F.Supp.2d 283, 294-95 [S.D.N.Y. 2009]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]).

In conclusion, I have reviewed the evidence in the hearing record and I find that the district's proposed program for the student for the 2008-09 school year was similar to the one provided by the district during the 2007-08 school year; however, I also find that the student's June 2008 IEP and placement were appropriately updated to reflect the student's progress during 2007-08 school year that was discussed above, including modifications to the student's present levels of performance, his annual goals and short-term objectives, and the duration and frequency of related services based on his needs as reflected in the current academic, speech-language, and OT progress reports. Accordingly, I find that hearing record does not support the impartial hearing officer's conclusion that the district failed to offer the student a FAPE because it offered an IEP and placement that failed to address the student's alleged lack of progress during the 2007-08 school year. The evidence in the hearing record shows that the student was appropriately offered a small special education class with related services that were reasonably calculated to enable him to receive educational benefits during the 2008-09 school year and that the district offered the student a FAPE in the LRE.

Having determined that the district offered the student a FAPE for the 2008-09 school year, the necessary inquiry is at an end and I need not reach the issues of whether MDS was an appropriate placement for the student or whether the equities support an award of tuition reimbursement to the parents (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have examined 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 impartial hearing officer's decision dated October 28, 2009, which determined that the district failed to offer the student a FAPE for the 2008-09 school year and awarded tuition reimbursement to the parents for the student's unilateral placement at MDS for the 2008-09 school year, are hereby annulled.

Dated: **Albany, New York**
February 8, 2010

PAUL F. KELLY
STATE REVIEW OFFICER