



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-036

### **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

Thivierge and Rothberg, P.C., attorneys for respondents, Randi M. Rothberg, 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 Rebecca School for the 2009-10 school year. The appeal must be sustained in part.

The student's educational history has been discussed in a previous appeal; however, some discussion is warranted in this case (Parent Ex. B; see Application of the Dep't of Educ., Appeal No. 09-051).<sup>1</sup> The student has received diagnoses of a pervasive developmental disorder-not otherwise specified (PDD-NOS) and verbal dyspraxia, and reportedly also exhibits fine motor/graphomotor deficits and motor planning difficulties (Tr. p. 74; Dist. Ex. 10 at pp. 1-3). Although the student reportedly has difficulty relating and communicating, the hearing record indicates that she is more successful with adults than with peers (Tr. p. 417). The hearing record further describes the student as having "a lot of language," although she often utilizes "scripts" when frustrated, anxious or unable to figure out what she wants to say spontaneously (Tr. p. 415). She is able to answer basic "who" and "what" questions but experiences difficulty with "when" and "why" questions that require more abstract thinking (Tr. p. 416). The student has also been described as "hypo-sensitive" and reportedly exhibits sensory integration and processing

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<sup>1</sup> For citation purposes herein, Application of the Dep't of Educ., Appeal No. 09-051 will be referred to as Parent Ex. B.

difficulties that result in her inability to take in and process all the information that she encounters in her environment, causing her to become self-absorbed (*id.*). According to the hearing record, the student requires sensory input throughout the day to stay regulated, including the use of deep pressure and a "fidget" toy such as a "koosh" ball (*id.*). She also exhibits difficulty participating in reality-based play (*id.*). Academically, the student is able to decode and reportedly has "quite a few sight words," although her comprehension skills are described as "at the more basic level" with deficits in comprehending abstract information (Tr. p. 417). The student is able to perform basic addition, identify numbers up to 20 and can count by fives and tens (Tr. pp. 417, 481). Socially, the student has increased her peer interactions and has begun to seek out peers; however, when "left to her own devices," she becomes self-absorbed, exhibits scripting behavior and does not interact with others (Tr. p. 417).

At the time of the impartial hearing, the student was attending an ungraded 8:1+3 class at the Rebecca School comprised of students ages six to nine, where she was also receiving speech-language therapy, counseling, occupational therapy (OT), art therapy, music therapy, drama, and adapted physical education (Tr. pp. 436-37, 441, 444, 456, 487, 553, 645, 682, 853; Parent Ex. Q at pp. 5-6).<sup>2</sup> The Rebecca School is a private school which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. p. 102; *see* 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (Tr. p. 73; Parent Ex. C at p. 1; 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Over a period of seven days beginning January 6, 2006 and ending February 1, 2006, the student underwent a private psychoeducational evaluation by a licensed psychologist (Dist. Ex. 10 at pp. 1, 10). According to the resultant evaluation report, the primary purpose of the evaluation was to determine the student's educational needs and to assist with transition planning (*id.* at p. 1). In addition to the administration of a battery of cognitive and behavioral assessments, the evaluation report also reflected completion of parent and teacher interviews, a classroom observation of the student and a review of the student's prior psychological, speech-language and OT evaluations; speech-language, OT and special education itinerant teacher (SEIT) progress reports; and medical records (*id.*). The evaluation report reflected that the student had previously received diagnoses of a PDD-NOS, verbal dyspraxia, fine motor/graphomotor deficits, and motor planning problems (*id.* at pp. 2-3).

The evaluator reported that administration of the Stanford-Binet Intelligence Scale-Fifth Edition (SB-5) yielded a full scale IQ in the "Mildly Delayed range as indicated by the standard score (56) and percentile rank (.2)" (Dist. Ex. 10 at p. 6). However, the evaluator surmised that the student's performance during the evaluation was affected by her deficits in expressive and receptive language, attention, and the student's motivation to complete tasks and as such, opined that the evaluation results should be interpreted with caution (*id.* at pp. 5-6). The evaluator indicated that the student's performance in the moderately low range on the Vineland Adaptive Behavior Scales (Vineland), resulting in an adaptive behavior composite standard score of 76,

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<sup>2</sup> According to the hearing record, the Rebecca School serves students ages four to nineteen, with neuro-developmental delays in relating and communicating; the majority of whom have received diagnoses on the autism spectrum (Tr. p. 413). With regard to the student's class, the class was composed of seven children in summer 2009 and eight children since September 2009 (Tr. p. 437).

portrayed a more accurate picture of the student's functioning (id. at p. 9). During the evaluation, the student was reported to exhibit self-directed play, use "scripted" language, and to demonstrate some perseverative behavior (id.). According to the evaluator, the student would consistently label objects, but would not give additional details or describe the objects (id.). The evaluator indicated that the student continued to present as a student with a PDD-NOS who required special education services to meet her needs (id.).

The evaluator also included recommendations for the student's educational program that included among other things, a highly structured classroom setting with a small student-to-teacher ratio and professionals trained to work with students with developmental disabilities; programming that provided consistent expectations; rewards and consequences; the use of strategies such as tasks broken into small steps; repetition; the use of a visual schedule; the provision of behavioral, communication, and social models; 1:1 support to assist the student in regularly using learned skills; opportunities for generalization and carry-over of skills across environments; inclusion in a structured social skills or social pragmatics groups where the student would be able to practice the skills learned in therapy with same-aged students; speech-language therapy, OT, and applied behavior analysis (ABA) therapy (Dist. Ex. 10 at pp. 9-10).

On October 4, 2007, a district social worker interviewed the student's mother as part of a social history update of the student (Dist. Ex. 11 at p. 1). The social history update report reflected that the student lived with her parents and younger brother and that she had a great relationship with her brother and sought him out as a playmate (id.). At the time of the social history update, the student had been attending the Rebecca School for one year and according to her mother, she demonstrated a decrease in "scripting" and "tuning out" behaviors as well as an increase in interaction, ability to focus, and ability to physically regulate herself (id. at pp. 1-2). The student's mother indicated to the district social worker that they were very happy with the program at the Rebecca School, as the student had made "nice progress" (id. at p. 2). The student's mother reported that the student had strengths in memory, problem solving, and visual abilities and further described her daughter as athletic and "always upbeat" (id.). She added that the student's difficulties with social skills stemmed from her limited communication and language skills (id.). The student's mother also indicated that her daughter had a variety of interests in addition to a strong network of family relationships and friendships (id.).

On November 19, 2008, a district teacher conducted a classroom observation of the student in her Rebecca School classroom (Parent Ex. R).<sup>3, 4</sup> The observation report indicated that the student's class consisted of seven students, four assistant teachers, a student teacher, and the head teacher (id.). The report further indicated that, with verbal and physical prompting, the student successfully participated in a group activity in which she helped construct parts of an owl (id.). The evaluator reported that the student sang along with the teacher but seemed to lose some focus after a while (id.). However, the report revealed that the student "got back up with the group," as

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<sup>3</sup> The hearing record reflects that the classroom observation was completed by a "Teacher Assigned" (Tr. p. 97; Parent Ex. R at p. 1).

<sup>4</sup> The hearing record contains multiple duplicative exhibits. For purposes of this decision, only Parent exhibits were cited in instances where both District and Parent exhibits were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

the movements became more physical (id.). The report also indicated that the student was unable to attend to and participate in a group number activity and that with prompting the teacher could not get the student to join in with the song and the numbers (id.). However, when the class split up into groups and the student was paired with two other students, the student was able to wait her turn and participate appropriately during a board game (id.). The evaluator observed that the student was able to say "three" to identify the number and as a reward, the student picked out a tiara from the princess box (id.). In summary, the evaluator opined that the student was limited in her ability to participate in groups beyond two or three students (id.).

The student's program and progress at the Rebecca School was summarized in a multidisciplinary progress report dated December 12, 2008 (Parent Ex. Q). The progress report reflected that the student was in a 7:1+3 classroom and was receiving counseling, OT, speech-language therapy, art therapy, music therapy, drama, and adapted physical education (id. at p. 1).<sup>5</sup> With regard to the student's functional/emotional developmental levels, the progress report indicated that the student had "no trouble staying regulated across most circumstances in the classroom," which according to the report, was a "solid foundation on which to build the other developmental levels" (id.). The progress report also noted that the student had greatly increased her ability to "self-soothe" by closing her eyes or removing herself from the situation (id.). The student's ability to engage and relate with familiar peers and adults had reportedly increased significantly (id.). The progress report further noted that she was able to incorporate others' ideas into her play and was a class leader who sought out her peers (id.). According to the progress report, the student had strong bonds with numerous classmates and she initiated play with peers (id.). During gross motor play, the progress report revealed that the student could remain engaged with peers for 20 minutes with minimal adult support (id.). The report reflected that the student's ability to participate in two-way, purposeful communication was a "real strength" and that the student consistently "opened and closed circles of communication," responded to adults' questions, addressed peers and adults by name, and used eye contact and appropriate physical proximity to peers and adults (id. at p. 2). However, when uninterested in a topic or when a peer initiated conversation, the progress report indicated that the student required support to respond (id.). The progress report also reflected that the student's problem solving ability had increased in complexity and that she demonstrated "great strength" with motor problem solving (id.). However, the progress report revealed that although the student was able to answer most "w" questions regarding familiar ideas and topics, she was unable to answer "why" questions, even when provided with multiple choices (id.). With regard to pretend play, the progress report indicated that the student's play sequences were becoming less rote and she was using more characters to play different roles (id.). The student was also accepting new ideas into her play and allowing adults to show undesirable emotions, although the student could not exhibit these emotions in her characters (id.).

With regard to OT, the progress report reflected that the student's sessions had focused on fine and gross motor skills, motor planning and visual-spatial skills, and that gross motor and "heavy work" activities such as climbing, pushing, pulling and resistive work resulted in the student's increased engagement and interactions (Parent Ex. Q at p. 3). The student's occupational therapist described motor planning and sequencing as strengths of the student; however, she indicated that the student required more core strengthening to address her continued needs in fine

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<sup>5</sup> It is presumed within the context of the hearing record that a 7:1+3 classroom consists of seven students, one special education teacher, and three supplementary school personnel.

motor grasp and proximal shoulder strength and to enhance her overall writing skills (id.). According to the progress report, the Beery Developmental Test of Visual-Motor Integration (VMI) was readministered in November 2008, the results of which revealed that the student's visual perception was strong (id.). However, the student's achieved scores on both motor coordination and visual-motor coordination were "lower" (id.). The student's occupational therapist noted that integration of these skills was necessary to improve the student's handwriting skills (id.).

With regard to speech-language therapy, the student's speech-language therapist reported that the student's "engagement/pragmatic, receptive and expressive language skills" had been the primary focus of therapy (Parent Ex. Q at p. 3). According to the progress report, although the student demonstrated an increase in her ability to engage in a continuous flow of conversation and could allow staff to join into her conversation, expand on her ideas and answer questions about her ideas; when introduced to a novel activity or task, the student became disengaged and required scaffolding to bring her back to the activity, and she typically increased her "scripting" behavior and required verbal support to engage in another activity (id. at p. 4). The student's speech-language therapist also reported an increase in the student's receptive language skills, specifically, in her ability to answer "yes/no" questions related to wants and needs independently; "who, what, and where" questions "independently with verbal support;" and "when" and "why" or more abstract questions with scaffolding (id.). Additionally, the speech-language therapist noted that the student could follow one and two-step directives with minimal to no support (id.). Regarding the student's expressive language skills, the speech-language therapist indicated that the student had made gains in her ability to use verbalizations to communicate her wants and needs and in sustaining conversations (id.). The progress report also reflected that the student referred to herself by name but required verbal support to improve her use of pronouns (id.). The speech-language therapist also noted that the student typically used two to four-word utterances but could use up to five words in a given utterance (id.). The report reflected that the student's speech-language therapy would continue to focus on the student's pragmatic difficulties, answering "when" and "why" questions, expanding on her comprehension of abstract ideas, and increasing the student's expressive language through unstructured and semi-structured play (id.). Lastly, the speech-language therapist reported that the student's articulation and oral motor skills were appropriate for her age and gender (id.).

In the area of counseling, the student's therapist reported that the focus of the student's sessions was on developing the student's shared problem solving skills, maintaining circles of communication in a more natural back and forth manner, and broadening her range of interests (Parent Ex. Q at p. 5).<sup>6</sup> Although the therapist noted that the student tended to be regulated most of the time, she further described the student as easily distracted (id.). According to the therapist, the student's shared attention with adults could be inconsistent due to her self-directed behavior such as "scripting" (id.). Highly motivating activities including sensory based play, and puppets and dolls were used to strengthen the student's ability to maintain focus and attention (id.).

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<sup>6</sup> According to the December 2008 Rebecca School progress report, the therapist who worked with the student at that time was an "extern," supervised by a licensed psychologist (Parent Ex. Q at pp. 5, 12).

The multidisciplinary progress report also indicated that the student participated in music therapy and drama to increase her ability in regulation, extended engagement and interaction, and to facilitate a wider range of affective experiences (Parent Ex. Q at pp. 5-6).

The student's Rebecca School teacher reported that with regard to academic instruction, the student exhibited high interest in her math lessons and demonstrated proficiency in comparing quantities (to 9), ordering quantities and numerals (to 9), counting backwards (from 9), describing a quantity as two groups, showing the parts of a total in different ways and combining two groups (Parent Ex. Q at p. 7). The report reflected that the student often learned new concepts quickly and then helped to be a peer model for the class; however, when the student perceived the work to be too difficult, she would often give up (id. at p. 8). In English language arts (ELA), the teacher reported that the focus of the student's instruction was on the development of phonics skills using the "Reading Mastery Program" (id.). At the time of the report, the student had mastered all of the individual consonant sounds, short vowel sounds, and the long vowel sounds for the letters /a/ and /e/ (id.). Her teacher further reported that the student demonstrated the ability to blend sounds together to make words and that the student was working on consonant blends such as /th/ and /sh/ (id.). The student was developing a sight word vocabulary using multisensory activities and techniques from the Visualizing and Verbalizing methodology by Lindamood-Bell in order to develop her ability to connect events in the story to prior knowledge or experience, make predictions based on clues in pictures and text, and to understand the sequence, setting and character traits (id.). The report reflected that during story time, the student was also provided with the opportunity to listen to good models of language, build visual images and enjoy books (id.). The student's ELA goals included connecting the letters of the alphabet to the sounds they make, blending sounds together to make words, increasing her recognition of red words (sight words), learning new vocabulary, developing strategies to enhance her reading comprehension, and interacting with and enjoying print materials (id. at p. 9).

In summary, the multidisciplinary progress report described the student's progress in her program at the Rebecca School as "steady" (Parent Ex. Q at p. 9). The report also included long-term goals and short-term objectives in the areas of DIR/Floortime,<sup>7</sup> OT (sensory processing, motor planning and visual-spatial skills), speech-language skills (engagement/pragmatic skills, receptive and expressive language skills), counseling, and music therapy (id. at pp. 9-11).

In an undated meeting notice for an Educational Planning Conference (EPC)/Committee on Special Education (CSE) review, the CSE chairperson informed the parents of the date and time of the scheduled January 2009 CSE meeting (Parent Ex. O). The parents were advised of their rights to participate fully in the decision making process, as well as their right to bring another individual to the meeting who had special knowledge or expertise regarding the student (id.). The notice further indicated that a "Notice of Parental Rights" was attached (id.).

By letter dated January 6, 2009 to the district representative who was also a special education teacher, the student's mother advised that she wanted the student's head teacher from the

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<sup>7</sup> According to the hearing record, DIR is an acronym for "Developmental Individual Differences [R]elationship based [M]odel," which the director of the Rebecca School further described as a methodology that "looks at the child's developmental level" (Tr. pp. 393-94). According to the director of the Rebecca School, all children go through six basic developmental levels, and students on the autism spectrum do not master or develop through these levels in the same way as their typically developing peers (Tr. p. 394).

Rebecca School to participate in the January 8, 2009 CSE meeting by telephone (Parent Exs. C at p. 2; N at p. 1; O).<sup>8</sup> The student's mother also enclosed copies of the student's December 2008 progress report from the Rebecca School as well as the results from the student's annual physical (id.). Although the student's mother stated that the student's pediatrician had yet to complete the "Request for Medical Accommodation" form, she advised that she would forward it upon receipt (id.).

On January 8, 2009, the CSE convened for an annual review of the student's program and to develop the student's individualized education program (IEP) for the 2009-10 school year (Parent Ex. C at pp. 1-2). The meeting was attended by the district representative who also acted as the district special education teacher, a district school psychologist, the student's mother, and the student's special education teacher from the Rebecca School, who participated by telephone (Tr. pp. 72-73; Parent Ex. C at p. 2). An additional parent member did not take part in the January 2009 CSE meeting (id.). The resultant IEP recommended a 12-month 6:1+1 special class in a specialized school with related services consisting of three 30-minute sessions of OT per week in a group of two, two 30-minute individual sessions per week of speech-language therapy, two 30-minute sessions of speech-language therapy per week in a group of three, one weekly 30-minute individual session of counseling, and one weekly 30-minute session of counseling in a group of three (Parent Ex. C at pp. 1, 13, 15).<sup>9</sup> The January 2009 CSE also developed annual goals and short-term objectives with respect to reading, math, writing, social interaction and engagement, sensory regulation, OT, and speech-language skills (id. at pp. 6-12). As program options, the January 2009 CSE considered a 12:1+1 special class in a community school, but decided against such a program concluding that it would not be appropriate as the student required a 12-month program to address her needs and achieve her IEP goals (id. at p. 14).<sup>10</sup> In addition, the January 2009 CSE considered a 12:1+4 program as a potential placement for the student, but determined that it would not have been an appropriate match for the student at that time (id.).<sup>11</sup> Lastly, the January 2009 CSE considered a nonpublic school placement for the student; however, such a placement was deemed to be too restrictive for the student at that time (id.).

The academic performance and learning characteristics portion of the January 2009 IEP reflected that the student had made progress in developing more spontaneous language and in using coping strategies when around disregulated peers (Parent Ex. C at p. 3). According to the IEP, the student's crying behavior had reduced considerably and at that time, she presented with a regulated demeanor throughout the school day (id.). The January 2009 IEP also reflected that the student required little support to transition from one activity to another in the classroom, was able to initiate interactions with familiar adults, and had emerging skills in initiating peer interactions (id.). Additionally, the IEP stated that the student exhibited a "real strength" in two-way communication

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<sup>8</sup> The letter was also addressed to another individual at the district whose position is not identified in the hearing record (Parent Ex. N at p. 1).

<sup>9</sup> According to the hearing record, a 6:1+1 classroom is comprised of six students, one special education teacher, and one paraprofessional (Tr. p. 231).

<sup>10</sup> It is presumed within the context of the hearing record that a 12:1+1 classroom consists of 12 students, one teacher, and one supplementary school personnel (see 8 NYCRR 200.6[h][i]).

<sup>11</sup> It is presumed within the context of the hearing record that a 12:1+4 classroom consists of 12 students, one teacher, and four supplementary school personnel.

with adults and that she also demonstrated "some strength" with respect to her play skills (id.). However, the January 2009 IEP revealed that the student had difficulty responding to questions outside her areas of interest and in closing "circles of communication," especially with peers (id.). The student was described as having a good memory and it was further noted that she learned best with theme-based materials (id.). According to teacher estimates, the student was functioning at the early first grade instructional level in decoding and listening comprehension, the kindergarten instructional level in writing, and at the upper kindergarten instructional level in math computation and problem solving (id.). Academic management needs contained in the January 2009 IEP included redirection, visual and verbal prompts, the use of manipulatives, and the provision of sensory breaks (id.).

Present levels of social/emotional performance on the IEP also reflected that the student could maintain a regulated state during most of the school day and that she had demonstrated the ability to self-soothe (Parent Ex. C at p. 4). The student's play sequences were described as becoming less rote; however, she continued to require support regarding the flexibility of her play (id.). According to the January 2009 IEP, the student continued to experience difficulty maintaining a continuous flow of communication across all ranges of emotion and despite some improvement, the IEP revealed that the student's self-directed behaviors might impede her shared attention (id.). Additionally, the January 2009 IEP reflected that the student might become disengaged or rely on verbal "scripts" when introduced to a new task or activity (id.). According to the IEP, the student required social/emotional management strategies to address her needs, which included modeling of appropriate socialization and social problem solving skills as well as the provision of frequent sensory breaks facilitated by an occupational therapist (id.). Lastly, the January 2009 CSE determined that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher, as well as the occupational therapist, speech-language therapist, and the school counselor (id.). The January 2009 IEP reflected that with regard to the student's health and physical development, the student was reported to be medically healthy and the CSE recommended adapted physical education in a 6:1+1 ratio (id. at p. 5).

Meeting notes compiled during the CSE meeting by the district representative and the district's school psychologist reflected that the January 2009 CSE reviewed the present levels of performance sections of the student's IEP at the meeting (Tr. p. 115; Dist. Ex. 4 at p. 1). According to the meeting minutes, the student's academic goals were generated at the January 2009 CSE meeting with teacher and parental input and the student's related services goals were provided by the Rebecca school and approved by the student's mother (id.). Meeting minutes further reflected that the CSE explained to the student's mother her due process rights (id.). The district's school psychologist and district representative also documented the student's mother's concerns regarding the proposed program, which included whether the 6:1+1 class would provide sufficient support as well as the student's need for continued bus services consisting of limited time travel and air conditioning (id.). The meeting notes further revealed that during the CSE's discussion of the program recommendation, the student's mother requested that the district recommend the Rebecca School as the student's placement (id.). It was further noted that the student's mother did not express an interest in the public school options presented because she did not feel they could meet her daughter's needs (id.). In addition, the meeting notes reflected that the January 2009 CSE discussed details of the student's present abilities that were consistent with those noted on the January 2009 IEP (id.). The notes further reflected that the student's Rebecca school teacher stated

that the writing and math goals from the student's previous IEP were "still valid" and she was not able to project beyond those skills (id.). However, meeting notes further indicated that the student's Rebecca School teacher and her mother were advised that the CSE could revisit the goals at the beginning of the new school year should any major changes of goals be necessary (id.).

By "Notice of Recommended Deferred Placement" dated January 8, 2009, the CSE chairperson advised the parents of the CSE's recommendation that the student be placed in a 6:1+1 special classroom in a specialized school with related services consisting of OT, speech-language therapy, and counseling (Parent Ex. L). The CSE chairperson further informed the parents that although they had a right to an immediate placement in the recommended program, the CSE believed that it was in the student's best interest to defer placement in the program until June 15, 2009 because the January 2009 IEP had been developed for the 2009-10 school year (id.). The notice further indicated that if the parents disagreed with the deferral process or the recommended program, they should contact the CSE at the address provided and stated that a "Notice of Rights as a Parent of a Child with a Disability" was attached (id.). The district also issued an undated "JA-1 12 Month School Year Consent Form," which indicated that pursuant to her IEP, the student was eligible for summer special education services and if the parents wanted the student to receive those services, written consent was required (Parent Ex. M). The form also stated that the parents would receive a letter in June notifying them of the assigned location of the student's summer services (id.). The form indicated that if the parents had any questions, they should contact the district and provided contact information (id.). Lastly, the form stated that a "Notice of Rights as a Parent of a Child with a Disability" was attached (id.).

By letter dated January 16, 2009 to the CSE chairperson, school psychologist and district representative, the student's mother acknowledged receipt of the notice of deferred placement from the district as well as the 12-month school year consent form concerning the student (Parent Ex. K at p. 1). The student's mother stated in the letter that her daughter required full-year programming and that the parents intended to send the student to school during the summer months (id.). The student's mother further advised that the parents welcomed any placement recommendations from the district and that they consented to the district's request to defer the student's placement until June 15, 2009; however, the student's mother stated that the notice of deferred placement did not indicate by what date the parents would receive a placement recommendation (Tr. p. 877; Parent Ex. K at p. 1). As a result, the student's mother requested that the district notify the parents of the recommended placement "sufficiently in advance" of the summer term, so that they would be able to visit the recommended placement and meet with the professionals who would be working with the student (Parent Ex. K at p. 1). The student's mother also indicated her willingness to visit a "sample of the type of program recommended for [the student]" (id.). The student's mother noted that following their visit, the parents would advise the district regarding their acceptance of or objection to the placement recommendation (id.).

Additionally, the student's mother advised in her letter of "two discrepancies" that the parents had found after a review of the January 2009 IEP (Parent Ex. K at p. 1). According to the student's mother, although the January 2009 IEP stated that "a nonpublic school was discussed, but it was determined that it would [have] been too restrictive at this time," no such determination was made (id.). The student's mother recalled that during the CSE meeting, when she inquired about the availability of programs for the student that would be more restrictive than a 6:1+1 classroom, she was advised that most of the nonpublic "approved" schools for students similar to the student in the instant case were located outside of the district and would have necessitated a

lengthy and "dysregulating" bus ride for her daughter (*id.*). The student's mother further noted that the January 2009 IEP did not mention the CSE's discussion of the district's 8:1+4 program (*id.*). The student's mother indicated the parents' willingness to work with the district to plan the student's program for the 2009-10 school year and provided contact information (*id.*).

On April 2, 2009, the parents entered into an enrollment contract with the Rebecca School for July 6, 2009 through June 25, 2010 (Parent Ex. S). That same day, the parents submitted a total deposit to the Rebecca School in the amount of \$10,000 (Tr. pp. 917-18; Parent Ex. S at pp. 3, 7). The enrollment agreement provided that in the event that the parents withdrew the student from the Rebecca School prior to September 8, 2009, the parents would forfeit a \$2500 non-refundable deposit (Tr. pp. 430, 893; Parent Ex. S at p. 2).

In a letter dated May 5, 2009, per their discussion during the January 2009 CSE meeting, the student's mother provided the district representative with the requisite forms relating to the student's need for certain limitations in connection to her bus ride to and from school for the 2009-10 school year (Parent Ex. J).

By letter dated June 3, 2009 addressed to the student's mother, the district notified the parents of the recommended specific school location for the student for the 2009-10 school year (Parent Ex. I).<sup>12</sup> The June 3, 2009 correspondence also summarized the CSE's recommendations as indicated in the January 2009 IEP (*id.*). In addition, the letter provided the student's mother with the contact information of an individual that she could contact if she wished to discuss the decision or request another CSE meeting (*id.*). The student's mother was also advised regarding her rights to an impartial hearing (*id.*).

On June 16, 2009, the student's mother visited the district's recommended placement for the student for the 2009-10 school year accompanied by a private behavior analyst who had previously worked with the student, (Tr. pp. 324, 340, 342, 360-63, 858, 879; Parent Ex. H at p. 1). By letter dated June 17, 2009 to the CSE chairperson, the student's mother stated that after reviewing the proposed IEP, visiting the school, meeting with the assistant principal and consulting with the private behavior analyst, she had determined that the district's proposed program and placement were not appropriate for the student (Parent Ex. H at p. 1). According to the letter, the student's mother believed that it was likely that the student would have been placed in a class in which the student would have been the only girl, which the student's mother claimed would not be appropriate for her daughter (*id.*). She also expressed concerns that with only one teacher present in the classroom, the student would not receive sufficient and appropriate individual and small group instruction, which the student needed, especially given that the student's mother deemed the functioning levels of the students in the recommended class to be different than her daughter's (*id.*). In addition, the student's mother indicated that the assistant principal could not state whether the teachers at the proposed school were trained in the educational methodologies that they used (*id.*). The student's mother further explained that during the tour, she learned that it was unlikely that all of the students would receive their related services during the school day in light of the number of speech-language therapists and occupational therapists on staff (*id.*). The student's mother also noted that the student presented with "many sensory issues" and she did not believe

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<sup>12</sup> Although the letter does not state as such, it is presumed within the context of the hearing record that the June 3, 2009 letter from the district constituted the student's "Final Notice of Recommendation" (FNR) (*see* Tr. p. 878).

that the school's sensory facilities and services would be adequate to address the student's particular needs (*id.*). Lastly, the student's mother indicated that the student had difficulty with transitions and that the parents were concerned that in the event that the student attended the district's school, she would be forced to move again after only one year in the program (*id.* at pp. 1-2). The student's mother advised that for the 2009-10 school year, including the summer, the parents planned to continue the student's placement at the Rebecca School and that they would be seeking tuition reimbursement from the district, subject to any appropriate program that the district might offer to the student (*id.* at p. 2). The student's mother requested advisement regarding any other schools that she should visit prior to the start of the new school term and noted that the student continued to require limited time transportation from the district (*id.*).

By decision dated June 19, 2009, a State Review Officer found that the district failed to offer the student a free appropriate public education (FAPE)<sup>13</sup> during the 2008-09 school year (Parent Ex. B at p. 12). More specifically, the State Review Officer determined that the challenged IEPs failed to adequately describe the student's sensory deficits, which significantly affected her academic and social performance (*id.* at p. 14). The decision also indicated that neither party appealed the impartial hearing officer's determination that the Rebecca School was appropriate to meet the student's unique needs during the 2008-09 school year; therefore, that decision was final and binding upon the parties (*id.*). Lastly, the State Review Officer concluded that equitable considerations weighed in the parents' favor, and as a result awarded them tuition reimbursement for the Rebecca School for the 2008-09 school year (*id.* at p. 16).

On June 23, 2009, the student's mother signed a "Waiver of IEP Meeting to Amend IEP After Annual Review" (Parent Ex. D). The student's mother agreed to the district's addition of the provision of an air-conditioned bus and limited travel time to the student's IEP without convening a CSE meeting (*id.* at p. 1). The January 2009 IEP was amended to incorporate the changes to which the student's mother agreed and was subsequently sent to the parents (Parent Ex. E).<sup>14</sup>

In a due process complaint notice dated August 29, 2009, the parents, through their attorney, commenced an impartial hearing (Parent Ex. A). As relief, the parents requested, among other things, tuition reimbursement for the Rebecca School for the 2009-10 school year (*id.* at pp. 1, 6). The parents maintained the January 2009 IEP was procedurally and substantively defective, which denied the student a FAPE (*id.* at p. 2). They further specified that the January 2009 CSE meeting and resultant IEP were procedurally and substantively flawed for reasons including that: (1) the district failed to exercise due diligence in preparing for the CSE meeting, such that the district had never conducted a psychoeducational evaluation, nor had the district conducted a functional behavioral assessment (FBA) despite the student's interfering behaviors; (2) the January

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<sup>13</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.  
(20 U.S.C. § 1401[9]; *see* 34 C.F.R. § 300.17).

<sup>14</sup> Although the student's mother consented to revise the IEP to include provisions for transportation, the first page of the IEP was also revised to indicate that the student's grade level was "ungraded" (Parent Exs. D; E).

2009 CSE failed to identify an actual school placement on the IEP, and instead recommended a 6:1+1 special class in a specialized school with related services, which the parents claimed was not an actual school setting; (3) the IEP failed to indicate any program recommendations for the extended school year (ESY); (4) a 6:1+1 classroom was not appropriate for the student; (5) the January 2009 CSE failed to include an additional parent member and an individual to interpret the instructional implications of the student's evaluations and therefore, was invalidly composed; (6) the January 2009 CSE relied on teacher observations of the student's reading, math and writing abilities, rather than using evaluations; (7) the January 2009 CSE failed to identify the student's "significant" sensory needs in identifying her present levels of performance; (8) the January 2009 IEP lacked sufficient sensory breaks to meet the student's individual educational needs; (9) the district had not updated the student's goals or present levels of performance since the January 2009 CSE meeting; (10) the January 2009 CSE did not prepare a behavioral intervention plan (BIP); (11) the January 2009 CSE failed to identify methods of measurement relative to the student's progress toward her goals and objectives or the individual(s) responsible for tracking any progress; (12) some of the goals contained in the January 2009 IEP were vague, not objectively measurable, inappropriate, and insufficient; (13) the January 2009 CSE engaged in impermissible predetermination in developing the student's program; (14) the January 2009 CSE failed to offer the parents any individualized parent training and counseling; (15) the January 2009 IEP failed to provide the student with sufficient supports and services; and (16) the January 2009 IEP was not reasonably calculated to enable the student to make meaningful educational progress (*id.* at pp. 2-4).

The parents also raised other claims regarding the challenged IEP and placement recommendation (Parent Ex. A at p. 4). Although the parents noted that on June 23, 2009, the student's mother signed a "Waiver of IEP Meeting to Amend IEP Annual Review" form that provided for a change in the IEP to include appropriate bus limitations, the parents asserted that the January 2009 CSE also filled in the "Grade" space with "Ungraded," which they argued was not consistent with the student's IEP from the previous school year (*id.*). Regarding the proposed placement, among other things, the parents asserted that the student would not receive sufficient 1:1 and appropriate small group instruction and that the functioning levels of the students in the recommended class differed from those of the student in the instant case (*id.* at p. 5). The parents further expressed concerns that the student would not receive all of her related services at the proposed district school, maintaining that the student required a comprehensive program, with coordinated intervention across disciplines (*id.*). In addition, the parents noted that the student required sufficient sensory services and facilities, which they claimed appeared to be lacking at the recommended placement (*id.*). Next, the parents noted their concerns regarding the gender composition of the recommended class, given that it appeared that the student would have been the only girl in the class (*id.*). Finally, the parents emphasized the student's difficulty with transitions, and argued that in the event that the student were to attend the recommended placement, she would likely have to change schools again in one year, which would have been "extremely disruptive and inappropriate for her" (*id.*).

On September 9, 2009, the district submitted a response to the parents' due process complaint notice (Dist. Ex. 2). Among other things, the district asserted that the placement recommendation was reasonably calculated to enable the student to obtain meaningful educational benefits (*id.* at p. 3). The district also asserted that all CSE members, including the student's mother, had an opportunity to participate in the meeting (*id.* at pp. 3-4). The district further

requested reimbursement for all monies issued during the pendency of the proceeding, in the event that an impartial hearing officer determined that the district offered the student a FAPE during the 2009-10 school year (id. at p. 4).

An impartial hearing commenced on September 18, 2009 and concluded on December 22, 2009, after seven days of testimony (IHO Decision at pp. 1-2). By decision dated March 26, 2010, the impartial hearing officer awarded tuition reimbursement to the parents for the Rebecca School for the 2009-10 school year (id. at p. 23). Specifically, although she noted that the parents failed to properly raise the issue in their due process complaint notice, the impartial hearing officer determined that because the student would not have participated in the general education environment, the participation of a regular education teacher on the January 2009 CSE was not mandatory (id. at p. 20). Next, despite finding that the parents did not execute a valid waiver for the participation of an additional parent member, the impartial hearing officer found that the absence of an additional parent member did not result in a loss of an educational opportunity, seriously infringe on the parents' opportunity to participate in the IEP formulation process, or cause a deprivation of educational benefits (id.). Accordingly, the impartial hearing officer concluded that the January 2009 IEP was not procedurally flawed because all of the required members of the CSE were present (id.).

Turning next to the parents' claim that the challenged IEP was devoid of any recommendation for parent counseling and training as required by State regulations governing the parents of students with autism, the impartial hearing officer found that parent training and counseling was a "required related service to be listed on the IEP" (IHO Decision at p. 21). With respect to the parents' assertion that the annual goals and short-term objectives contained in the January 2009 IEP were inappropriate and lacked a mechanism to measure the student's progress in attaining them, the impartial hearing officer found that the January 2009 CSE failed to dictate the method of measurement of the goals and the schedule to be used for assessing progress when developing goals (id.). The impartial hearing officer further concluded that the district's own witness could not explain how overlapping academic and related provider goals would be measured or which member of the student's staff would be responsible for measuring the overlapping goal, which she found "invalidated" the IEP (id.). Next, the impartial hearing officer concluded that the evidence adduced at the impartial hearing failed to establish that the student would have been grouped appropriately in a special 6:1+1 class in terms of the student's gender and sensory needs (id. at p. 22). Additionally, the impartial hearing officer found that the availability of OT to be provided in gym at the recommended placement would not have met the student's vestibular and proprioceptive needs and that the lack of sensory breaks would not have allowed the student to regulate herself (id.). Based on the foregoing, the impartial hearing officer found the evidence showed that the student was not offered a FAPE during the 2009-10 school year (id.).

With respect to the appropriateness of the Rebecca School, the impartial hearing officer found that the DIR model assessed the student in terms of her developmental level and determined how the student took information from her environment and motivated her to work within her environment to progress (IHO Decision at p. 22). Furthermore, the impartial hearing officer determined that the DIR model was beneficial for the student's sensory processing deficits, her focusing needs, her vestibular and proprioceptive needs, language needs, academic, and social needs based on the Rebecca School's director's description (id. at p. 23). In addition, the impartial hearing officer determined that the weekly training sessions in DIR and weekly sessions with the

staff to assess the student's progress ensured that the related service providers and the head teacher worked collaboratively to ensure that the student progressed (*id.* at p. 22). The impartial hearing officer also concluded that the student's head teacher met the student's academic and focusing needs and that the student's occupational therapist met the student's sensory processing needs in the sensory gym and in the classroom's "sensory corner" (*id.*). Next, she concluded that the student's speech-language therapist increased the student's pragmatic, expressive and receptive language skills through the DIR methodology (*id.*). Through the weekly social skills class, the impartial hearing officer concluded that the social worker from the Rebecca School increased the student's pragmatic skills and the student's socialization (*id.* at pp. 22-23). In addition, the impartial hearing officer determined that the social worker further increased the student's play skills (*id.* at p. 23). Regarding parent training, the impartial hearing officer found that the Rebecca School provided parent training with four days of training in the DIR methodology and daily communication with the head teacher and related service providers (*id.*). Based on the foregoing, the impartial hearing officer found that the Rebecca School met the student's educational needs and was an appropriate placement (*id.*). Lastly, the impartial hearing officer concluded that equitable considerations supported the parents' request for tuition reimbursement, further finding that the parents fully cooperated with the district because they made the student available for evaluations and considered the district's recommended placement for the 2009-10 school year (*id.*).

The district appeals and seeks to vacate those portions of the impartial hearing officer's decision awarding tuition reimbursement to the parents. Alternatively, should tuition reimbursement be otherwise warranted, the district requests a 50 percent reduction in the award because it claims that the parents only gave sufficient notice with respect to ostensible concerns regarding the proposed placement and that they failed to articulate any specific concerns with respect to the January 2009 IEP. The district further requests an order compelling the parents to reimburse it for all monies expended pursuant to pendency.

As a threshold claim, the district asserts that the Individuals with Disabilities Education Act (IDEA) prohibits an award of tuition reimbursement to parents who unilaterally place their children at for-profit schools, such as the Rebecca School. Next, the district asserts that the impartial hearing officer correctly determined that there was no deprivation of a FAPE to the student with respect to the composition of the CSE that developed the student's IEP. The district further maintains that the student was offered a FAPE during the 2009-10 school year for the following reasons: (1) the program developed for the student together with the offer of a placement to implement the IEP's recommendations was reasonably calculated to confer meaningful educational benefits on the student in the least restrictive environment (LRE); (2) the proposed 6:1+1 classroom was appropriate for the student such that there was no denial of a FAPE based on the gender composition of the class and the teachers were experienced and capable teachers who could have met the student's needs, which were appropriately reflected in the January 2009 IEP; (3) the failure to list parent training and counseling on the January 2009 IEP did not amount to a denial of a FAPE to the student; (4) the annual goals and short-term objectives enumerated in the challenged IEP were appropriate and measurable; (5) OT would have been provided to the student in the classroom and the school's physical resources would have met the student's sensory needs; (6) a BIP was not needed for the student and the CSE, including the student's mother, agreed that a BIP was not required; (7) the student's teacher from the Rebecca School who participated in the CSE meeting agreed with the recommendations; and (8) contrary to the impartial hearing officer's

finding, the hearing record demonstrates that the student would have received sensory breaks at the recommended placement.

Next, the district contends that the evidence showed that the Rebecca School was not an appropriate placement for the student in light of the following allegations: (1) the student has made minimal, if any, progress with respect to math, handwriting, reading, listening comprehension, and vocabulary; (2) she has received minimal academic instruction and has not been tested or quizzed at the Rebecca School; (3) the hearing record is vague and inconsistent with respect to the student's program at the Rebecca School; and (4) notwithstanding the student's teacher's testimony that the district's recommended 6:1+1 classroom was not appropriate to meet her needs because the student requires 1:1 instruction, the hearing record reveals that the student received two hours or less of 1:1 instruction at the Rebecca School per week. Finally, the district maintains that equitable considerations preclude an award of reimbursement because the parents did not intend to remove the student from the Rebecca School and enroll her in a district placement.

The parents submitted an answer in which they challenged each of the district's allegations and requested that the district's petition be dismissed in its entirety. Regarding the district's allegation that the IDEA prohibits an award of tuition reimbursement to parents who unilaterally place their children at "for-profit" schools like the Rebecca School, the parents argue that there is legal authority to contradict the district's position. Next, the parents submit that the impartial hearing officer properly determined that the student was denied a FAPE during the 2009-10 school year, and further claim that the district failed to offer the student a program designed to meet her unique needs, which was reasonably calculated to confer educational benefits on the student. Specifically, the parents raise the following assertions regarding the January 2009 CSE and the resultant IEP: (1) no additional parent member participated in the January 2009 CSE meeting and the student's mother did not execute a valid waiver of the additional parent member's participation; (2) the district failed to include the provision for parent counseling and training on the challenged IEP; (3) regardless of whether the district acted improperly in failing to list the provision of parent training and counseling on the January 2009 IEP, the district did not offer the parents any individualized parent training and counseling; (4) the goals and objectives contained in the January 2009 IEP were insufficient, immeasurable, and failed to indicate any method of measurement; and (5) the January 2009 IEP lacked goals and objectives targeting the student's sensory and focusing needs.

The parents also assert that the impartial hearing officer correctly found that the proposed placement for the student was inappropriate. First, the parents maintain that the gender composition of the proposed class was inappropriate to meet the student's social and emotional needs. Next, the parents contend that the student's functioning levels with respect to reading and math did not match the functioning levels of any of the students enrolled in the district's proposed class. The parents also claim that the impartial hearing officer correctly noted that based on her sensory needs, the student would not have been appropriately placed and grouped. Lastly, the parents assert that the proposed placement would not have offered the sufficient OT and supports.

Next, the parents contend that the Rebecca School was appropriate to meet the student's needs because the school's programming was tailored to the student's individual educational needs, included instruction across all domains, and the student made progress, which they maintain was continuously monitored. The parents also argue that equitable considerations favor an award of relief. They assert that they cooperated with the district throughout the IEP development process

and were willing to consider a district placement for the student, but the district failed to provide any other placement recommendations for their daughter. With respect to the district's claim that the parents failed to afford it sufficient notice of their disagreement with the placement recommendation, the parents assert that the district is raising this argument for the first time on appeal and therefore, it is beyond the scope of review. However, assuming that the district properly preserved the argument for appeal, the parents contend that they adhered to the IDEA's notice requirements and provided the district with sufficient information on which the district could act to revise its program and placement for the student. Lastly, with respect to the district's request that in the event that it is determined that it offered the student a FAPE during the 2009-10 school year, the district should be entitled to recoup funds tendered pursuant to pendency, the parents submit that this argument has been previously rejected on appeal and that the district has an absolute responsibility for pendency tuition reimbursement, which is not subject to recovery.

The district submitted a reply to the parents' answer. Pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the parents did not submit any additional evidence with their answer, nor did they interpose any procedural defenses to which the district could respond. Accordingly, the reply is beyond the scope of the State regulations and will not be considered on appeal (Application of a Student with a Disability, Appeal No. 09-121; 8 NYCRR 279.6).

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). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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).

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 (see Application of the Bd. of Educ., Appeal No. 08-016).

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).

In the instant matter, the impartial hearing officer concluded that the district failed to establish that the January 2009 CSE offered the student a FAPE (IHO Decision at p. 22). For the reasons explained below, the hearing record does not support the impartial hearing officer's conclusion; rather, an independent review of the hearing record establishes that for the 2009-10 school year, the district offered the student a program and placement that was developed with meaningful parent participation and was reasonably calculated to enable the student to receive educational benefits in the LRE.

Turning first to the parties' dispute regarding the composition of the January 2009 CSE, the district maintains that the impartial hearing officer correctly determined that despite the absence of an additional parent member, and a valid waiver from the parents of an additional parent member's participation, the student was not deprived of a FAPE as a result thereof. Conversely, the parents argue that the lack of an additional parent member's participation constituted a procedural violation that deprived them of their rights to participate in the development of the student's IEP. As indicated below, the hearing record supports the impartial hearing officer's conclusion that notwithstanding the lack of an additional parent member at the January 2009 CSE meeting, the failure to include an additional parent member did not result in a denial of a FAPE to the student.

Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.344), New York State law requires the presence of an additional parent member on the committee that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July 11, 2005]; Application of a Student with a Disability, Appeal No. 10-002; Application of the Dep't of Educ., Appeal No. 09-078; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-105; Application of Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). New York law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]). In addition, State regulations authorize a parent and district representative of the CSE to agree to use alternative means of CSE meeting participation, such as videoconferences and conference calls (8 NYCRR 200.4[d][4][i][d]).

Here, the hearing record is unequivocal that an additional parent member did not attend the January 2009 CSE meeting (Tr. pp. 72-73, 99, 870; Parent Ex. C at p. 2). Moreover, the hearing record does not show that the student's mother executed a waiver of the participation of an additional parent member (Tr. pp. 99, 870). As a result of the foregoing, the CSE membership

was not consistent with the requirements of the State regulations; therefore, the district committed a procedural error. However, as set forth herein, the hearing record demonstrates that despite the absence of an additional parent member, the student's mother was afforded ample opportunity to participate in the development of the student's January 2009 IEP. As an initial matter, the hearing record reflects that the relevant CSE meeting lasted one hour and that all participants were present throughout the duration of the meeting (Tr. p. 73). The student's mother testified that she was able to provide input regarding her daughter's IEP and further admitted that she was familiar with the process of developing an IEP (Tr. pp. 907-08). In addition, the hearing record reveals that pursuant to the student's mother's request, the student's teacher from the Rebecca School participated in the CSE meeting by telephone (Tr. pp. 73, 647-48, 908; Parent Ex. C at p. 2). According to the student's teacher, she was also given an opportunity to participate in the development of the student's IEP at the CSE meeting (Tr. pp. 73, 649). The hearing record further reflects that the student's teacher advised the January 2009 CSE with regard to the student's then-current functioning levels in math, decoding, reading comprehension, and writing (Tr. pp. 76, 649-50; Parent Ex. C at p. 3). The student's teacher also testified that she informed the January 2009 CSE of needed academic supports for the student, such as the use of verbal and visual prompts which were included in the IEP among the student's academic management needs (Tr. p. 650; Parent Ex. C at p. 3). Furthermore, with regard to the level of related services contained in the challenged IEP, the district's school psychologist stated that the CSE "reviewed them one by one" and their appropriateness was collaboratively discussed with the student's teacher and the student's mother, who both agreed with the district's recommendation for related services (Tr. pp. 84-85, 110-11). Moreover, the hearing record does not show evidence of harm to the student, or the parent, as a result of the CSE composition. Based on the foregoing, given the amount of parental input reflected in the development of the January 2009 IEP, the hearing record does not show that the absence of an additional parent member or the district's failure to obtain a valid waiver of the additional parent member's participation constituted a procedural error that impeded the student's right to a FAPE, significantly impeded the parents' of an opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]; Mills, 2005 WL 1618765, at \*5; see also E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419).

Turning next to the substantive issues in the instant matter, further review of the hearing record reveals that the district also correctly asserts that its recommended program was reasonably calculated to meet the student's educational needs in the least restrictive setting. In the instant case, the district recommended a 12-month 6:1+1 program with related services including OT, speech/language therapy, and counseling to address the student's deficits in academics (reading, math, and writing), social/emotional interaction and engagement, receptive and expressive communications skills, regulation, and fine motor and sensory needs (Parent Exs. C at pp. 3-4, 15; E at p. 1). The student's teacher from the Rebecca School testified that the descriptions of the student reflected in the present levels of academic and social/emotional performance sections of the January 2009 IEP were taken from the December progress report she had developed and accurately depicted the student (Tr. pp. 546-47). The hearing record also reflects that all related services would have been provided at the recommended school (Tr. pp. 192, 256, 288, 319, 335, 338).

Next, contrary to the parents' allegation that the student would not have been functionally grouped in the recommended class, as explained in greater detail below, a review of the hearing

record demonstrates that the student would have been appropriately grouped for instructional purposes with respect to math and reading. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][i], 200.6[a][3], [h][3]; see Application of the Dep't of Educ. Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102).<sup>15</sup> State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a] – [d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). The similarity of abilities and needs may be demonstrated through the use of a proposed class profile or by the testimony of a witness who is familiar with the children in the proposed class (Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, the regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. Of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In the instant case, the January 2009 IEP reflected that the student's instructional levels ranged from a kindergarten and upper kindergarten level in writing and math respectively, to an early first grade level in reading (decoding and listening comprehension) (Parent Ex. C at p. 3). The teacher for the summer session at the district's recommended program (district teacher 1) indicated that the student would have obtained meaningful educational benefits in her class because the student "was on about the same functional level as the majority of the children in the class" (Tr. pp. 138, 154-55). District teacher 1 further testified that the student was the same age as a few of the children in the class, that she had the same classification of autism, and that the social/emotional and academic goals on her IEP were very similar to the goals of the other students in the class (Tr. pp. 155, 164). In addition, the class profile for the recommended summer class<sup>16</sup> reflected that three of the students in the class shared similar instructional levels in reading (1.6 to

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<sup>15</sup> See Walczak, 142 F.3d at 133 (approving an IEP that placed the student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed).

<sup>16</sup> Although the class profile for the summer 2009 class in the hearing record reflected a date of October 16, 2009, district teacher 1 testified that the information provided in the profile was reflective of the students enrolled in her class during summer 2009 (Tr. p. 176).

2.5 compared to the student's early first grade level) with the student and that the student's instructional level in math was approximately six months below that of five of the students in the recommended summer class (compare Parent Ex. C at p. 3, with Dist. Ex. 7 at p. 1). The hearing record reveals that the class profile reflected the instructional levels of the students in the recommended class in June 2009; however, the instructional levels reflected in the student's IEP indicated the student's abilities in January 2009 (Tr. pp. 176-77; Parent Ex. C at p. 3; Dist. Ex. 7 at p. 1). Furthermore, testimony by district teacher 1 indicated that if a student came into the class with kindergarten level skills, that student would participate in group instruction with one of the class paraprofessionals sitting next to the student to further enhance the lesson and give the student the extra necessary support (Tr. p. 187). In addition, testimony from the teacher who taught the recommended class that commenced in September 2009 (district teacher 2) reflected that two of the students from the summer program left at the end of the summer and one additional new student joined her class (Tr. p. 233). According to district teacher 2, the new student was seven years old and his "functioning" level in both reading and math was at a kindergarten/first grade level, similar to the student in the case at bar (Tr. p. 235; see Parent Ex. C at p. 3). District teacher 2 also noted that she believed the student would have received meaningful educational benefits from participation in her class because all of the goals that were set forth in the student's IEP paralleled what she was teaching in her class at that time (Tr. pp. 259-60, 265-67). Upon a review of the disputed IEP, district teacher 2 testified that, the student "look[ed] like she's exactly at the level that would be appropriate for my class," and "[s]he totally fits exactly what we're doing. Every time I've looked at this, I've been doing a lesson related to these goals" (Tr. p. 269).

Based on the above, the hearing record reflects that the student would have been suitably grouped for instructional purposes in the proposed classroom at the district's recommended school. The hearing record illustrates that the student's instructional levels in reading and math were similar to those of the students in the summer class as well as those in the class that began in September 2009. Moreover, the academic and social/emotional goals listed in the January 2009 IEP paralleled those of the students enrolled in the summer and fall sessions of the recommended class. Furthermore, as detailed below, the district persuasively argues that in this case the gender composition of the proposed class did not render the class inappropriate for the student.

The impartial hearing officer found that the district failed to establish that the student would have been grouped appropriately in the proposed placement in terms of her gender needs. However, neither federal nor State regulations require that students be grouped by gender (see 200.1[ww][3][i], 200.6[a][3], [h][2], [3]; see also Doyle v. Arlington Co. Sch. Bd., 806 F. Supp. 1253, 1256 [E.D. Va. 1992]; Bales v. Clarke, 523 F. Supp. 1366, 1371 [E.D. Va. 1981]). Here, the hearing record does not support a finding that the gender composition of the proposed district class would have rendered the placement inappropriate for the student given the student's needs. The student's mother testified that the student played with her brother and the four year old son of a family friend (Tr. pp. 866-67). Testimony by the student's Rebecca School teacher indicated that while the student was able to self-initiate in play with two girls in the classroom, the classroom staff facilitated the student's initiation with the other students in the class and that the student was starting to show some interest in one boy in the class (Tr. p. 573). Lastly, the hearing record does not suggest that student exhibited a fear or phobia of the opposite sex, rendering it inappropriate for her to learn in a classroom where boys were present. Additionally, State regulations also provide that the social needs of a student are not to be the sole determinant of placement (see 8 NYCRR 200.6[a][3][ii]). As indicated above, the hearing record shows that the student would

have been grouped appropriately in the proposed class with respect to her social/emotional needs (see Application of a Student with a Disability, Appeal No. 09-082; Application of the Bd. of Educ., Appeal No. 07-072). Under the circumstances, the hearing record does not show that the gender of the students in the proposed class would have significantly affected the student's ability to participate in the recommended educational setting such that it rendered the placement inappropriate.

Moreover, the hearing record supports the district's claim that the district's teachers in the recommended program for both summer and fall 2009, were experienced and capable teachers who could have met the student's educational needs. Testimony by district teacher 1 indicated she has been employed as a special education teacher in the district for seven years (Tr. p. 132). She testified that she taught in a 6:1+1 classroom for children with autism for the first three years of her career in the district and also for the last three summers (Tr. p. 133). District teacher 1 also had additional experience in educating students with autism as an early intervention teacher providing ABA therapy (*id.*). District teacher 1 further testified that she had completed workshops including ABA-Beginning, Intermediate, and Advanced levels; Positive Behavior Supports; and several workshops through the New York State department of education as well (Tr. p. 134). The hearing record also reflects that district teacher 2 has been teaching students with autism in district 6:1+1 and 6:1+2 special education classrooms for eight years (Tr. pp. 228, 230). Additionally, district teacher 2 testified that she received "constant training" through courses on autism, recently completing a workshop on Autism and Technology, and at that time, she was participating in a workshop on using Everyday Math for children with autism (Tr. p. 231). She also testified that she had received training by a specialist in teaching children with autism (*id.*). According to district teacher 2, her responsibilities as a special education teacher included being a home room teacher; teaching the classroom math, language arts, and reading programs; completing assessments of the students when they entered the school; IEP preparation; and serving as the school's arts coordinator (Tr. p. 229). Lastly, the hearing record reflects that the classroom paraprofessional had been employed by the district for four years and was described as an "absolute asset" to the program in that she "kn[ew] a lot about the students, "prepare[d] very well," and took an interest in the students' goals (Tr. pp. 232-33). District teacher 2 added that the paraprofessional assisted in data collection and that the paraprofessional was very aware of the students' needs and assisted in every way she could (Tr. p. 233).

Turning next to the district's claim that the impartial hearing officer erred in concluding that its failure to list parent training and counseling on the January 2009 IEP contributed to a denial of a FAPE to the student; as set forth herein, the hearing record substantiates the district's assertion that based on the evidence adduced at the impartial hearing, had the student attended the proposed placement the parents would have received extensive parent training and counseling and would have had communication with the student's teachers and providers.

State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, as defined in 8 NYCRR 200.1(kk), when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training, as defined in 8 NYCRR 200.1(kk), for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation

of their child's individualized education program" (8 NYCRR 200.1[kk]). Contrary to the parents' assertion, State regulations do not require individualized parent training and counseling (see 8 NYCRR 200.13[d]).

In the instant case, although parent training and counseling was not provided for in the IEP, the failure to have parent counseling and training listed on the IEP did not rise to the level of a denial of a FAPE. The hearing record contains sufficient evidence to show that the recommended placement would have offered the parents adequate parent training and counseling and therefore, the omission on the IEP did not constitute a procedural error that impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]). The assistant principal from the proposed placement testified that parent counseling and training was available to parents of children who had a classification of autism (Tr. p. 322). According to the assistant principal, the district office offered training to parents regarding social skills and the use of visual supports (Tr. p. 323). She further recalled training offered by the district office that the assistant principal testified was entitled "Using Your Strengths at home, your child's strengths at home," and training regarding home-based 1:1 ABA therapy (id.). At the school level, the assistant principal testified that parents were provided with training on how to create story boards at home, the Picture Exchange Communication System (PECS), and on "potty training" (id.). The assistant principal also testified that parent training and counseling was available to all parents of students in the district placement and she believed that training sessions were offered on a monthly basis (Tr. p. 334). The assistant principal further testified that:

whatever parents see working at school, if they want to replicate that at home, we always offer to meet with parents to let them know how they can do that, and we [have] created materials for parents, whatever they need for their child to be successful, if we can provide it, we do

(Tr. pp. 323-24).

The hearing record also reveals that the district's recommended placement had access to an "autism coach," which the assistant principal described as someone considered to have expertise in the area of autism, who helped students develop (Tr. pp. 318-19). According to the assistant principal, the autism coach was always on call and available to ask questions or obtain feedback, when needed (Tr. p. 319). Additionally, the school also had an autism coordinator on staff who the hearing record describes as someone with a background in teaching students with autism (Tr. p. 317). Among other things, the hearing record indicates that the autism coordinator was trained in ABA therapy and therapeutic crisis intervention (id.). The hearing record further reveals that the autism coordinator assisted with lesson planning in addition to unit planning, and was available at the request of a teacher or the assistant principal (Tr. p. 318).

Furthermore, the hearing record reflects that there were numerous methods of communication between teachers and parents at the district's recommended placement. According to the assistant principal, the school utilized communication notebooks and parents also had the option of scheduling a meeting with the teacher (Tr. p. 324). The assistant principal further testified that "we invite parents in, whatever is necessary to form a cohesive team to support the student, we [will] do" (id.). Testimony from district teacher 1 echoed the assistant principal's

testimony, as she described the use of daily point sheets that were sent home with students in addition to "positive parent phone calls" (Tr. pp. 148-49, 216). According to district teacher 1, the daily point sheets were part of the classroom's positive behavior support system, and indicated what each student was working on each day (Tr. p. 215). District teacher 2 also testified that she communicated with parents on a daily basis through point sheets, and that she also used notebooks as another form of communication with parents (Tr. pp. 231, 258-59). District teacher 2 indicated that through the notebooks, parents would write to her and she would write to them regarding specific things that might need to be addressed with a student (Tr. p. 259). District teacher 2 also testified that she has called parents to discuss their son or daughter and determine if there were factors she was not aware of that could be affecting the student (*id.*). Additionally, district teacher 2 noted that two parent-teacher conferences took place each year (Tr. pp. 300-01).

Accordingly, the district correctly asserts that although parent counseling and training was not specifically set forth in the January 2009 IEP, in light of the evidence presented herein regarding the available services for parent counseling and training at the proposed placement, the district's failure to include these services on the IEP did not procedurally or substantively result in the denial of a FAPE to the student (*see also T.Y. v. New York City Dep't of Educ.*, 2008 U.S. Dist. LEXIS 89827, 51 IDELR 78 [E.D.N.Y. July 2, 2008] *aff'd*, 584 F.3d 412 at 419 [2d Cir. 2009]; *M.N. v. New York City Dept. of Educ.*, 2010 WL 1244555, at \*8 (S.D.N.Y. Mar. 25, 2010); *Application of the New York City Dep't of Educ.*, Appeal No. 08-140; *Application of a Child with a Disability*, Appeal No. 07-030).

The hearing record also substantiates the district's claim that the annual goals and short-term objectives in the challenged IEP were sufficiently appropriate and measurable. An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Here, the hearing record illustrates that the goals and short-term objectives were created with parental input and that the district offered the parents an opportunity to revisit the proposed annual goals and short-term objectives, if necessary. The student's teacher from the Rebecca School testified that she "helped devise the academic and social and emotional goals" for the January 2009 IEP (Tr. pp. 544-45, 555). The hearing record also shows that the OT and speech-language goals were taken from the December 2008 Rebecca School progress report (Tr. pp. 554-55; *compare* Dist. Ex. 3 at pp. 8-11, *with* Dist. Ex. 9 at pp. 9-10). Moreover, despite the parents' claim that the January 2009 CSE failed to reconvene to revisit the student's goals and objectives for the 2009-10 school year, as explained below, the hearing record reflects that the goals and objectives were developed with meaningful parent participation. Although the student's Rebecca School teacher expressed concern at the January 2009 CSE meeting that it was early in the year to be developing an IEP for the upcoming academic year, the hearing record reflects that the district indicated that the CSE could reconvene at the beginning of the new school year to update the student's goals if any changes were needed (Tr. pp. 555, 874; Dist. Ex. 4). However, the hearing record does not suggest that the student's mother or the student's Rebecca school teacher contacted the district to request that the CSE reconvene and revisit the proposed goals and the student's mother rejected the proposed program prior to start of the new school year (*see* Parent Ex. H).

Moreover, the hearing record demonstrates that the annual goals and short-term objectives listed in the January 2009 IEP appropriately addressed the student's primary areas of educational deficit, namely her ability to focus and attend and her sensory integration needs. For example, one of the student's annual goals was to increase her social interactions and her ability to engage with others in a more continuous flow of interaction (Parent Ex. C at p. 7). The short-term objectives to meet this annual goal reflected that the student would maintain circles of communication<sup>17</sup> in a more natural back and forth manner while expanding on a variety of activities, with prompting, 75 percent of the time and that the student would engage in circles of communication of 30 to 40 exchanges during preferred activities (*id.*). Both the annual goal and the two corresponding short-term objectives required that the student maintain her focus of attention in order to progress toward mastering the targeted goal and/or objective (*see id.*). To address the student's goal to improve visual-spatial processing for improved functional participation in activities, one of the corresponding short-term objectives required the student to engage in two-way purposeful interaction for ten minutes (*id.* at p. 9). Although not explicitly stated, mastery of these goals and short-term objectives required the student to increase her ability to remain focused on the tasks at hand. Therefore, the hearing record reflects that the student's focusing and sensory difficulties were addressed by the annual goals and short-term objectives discussed above.

Regarding the measurability of the goals on the January 2009 IEP, although the impartial hearing officer found that the district failed to dictate the method of measurement for the student's IEP goals and failed to indicate the schedule that would have been used for assessing progress on the goals, the hearing record indicates otherwise (IHO Decision at p. 21). The impartial hearing officer noted that the columns next to the goals and objectives on the IEP were blank; however, the district school psychologist testified that the January 2009 CSE did not place methods of measurement on the student's IEP in order to allow for greater flexibility on the part of the teacher who is working with the student and to determine the most appropriate methods of measurement and how the progress would be reported (Tr. p. 94). District teacher 2 also indicated that the students' progress related to their short-term objectives and stated goals was measured using "built-in assessments" within most of the academic programs such as math and reading, as well as through observation of specific skills targeted by the students' goals and data sheets specific to students' IEP goals that were completed by the teacher and the paraprofessional in the classroom (Tr. pp. 299-300). Moreover, the student's January 2009 IEP reflected that the student's progress would be reported three times during the school year and district teacher 2 testified that report cards were issued three times per year (Tr. p. 301; *see* Parent Ex. C at pp. 6-12). In light of the foregoing, the hearing record shows that the annual goals and short-term objectives in the January 2009 IEP were adequately specific and measurable (*see generally M.C. v. Rye Neck Union Free Sch. Dist.*, 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]).

Next, the impartial hearing officer concluded that OT was only available to the student at the recommended district placement in gym, which would not have addressed the student's vestibular and proprioceptive needs, and that the lack of sensory breaks would not have permitted the student to regulate herself (IHO Decision at p. 22). In contrast, the district maintains that OT

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<sup>17</sup> Testimony by the student's Rebecca School teacher indicated that "opening circles" is when the student initiates an interaction, like starting a conversation and that it can be done through a gesture using signs or verbally (Tr. pp. 562-63). She stated that "closing circles" is ending a conversation instead of just walking away from the interaction (Tr. p. 563).

would have been provided to the student in the classroom, the school's physical resources would have met the student's sensory needs, and that the evidence shows that the student would have received sensory breaks. As explained below, the hearing record reflects that despite the impartial hearing officer's finding to the contrary, the student would have been given sensory breaks and the proposed placement was equipped to appropriately address the student's sensory needs.

District teacher 2 testified that similar to the student in the instant case, there were two other children in her class who required frequent sensory breaks (Tr. p. 304). Similarly, district teacher 1 testified that the occupational therapists worked on sensory skills in the classroom, as well as in the pull-out setting (Tr. pp. 193-94). Furthermore, the hearing record reflects that the recommended summer class took place in the same classroom as the 10-month school year recommended program and both teachers indicated that sensory breaks were addressed within their classroom (Tr. pp. 193-94, 264-65, 291-92). District teacher 2 also testified that she had a variety of sensory materials available to the students within the classroom including koosh balls, vibrating toys, stretching rubber, inflatable sensory seat cushions, and weighted vests and that the materials that the students needed were located in the classroom (Tr. pp. 291-92). Testimony by district teacher 1 similarly reflected that there was an area in the classroom designated for sensory breaks away from other students that contained headphones and calming music, books, and a sensory ball for children to squeeze (Tr. p. 194). District teacher 1 further testified that in addition to providing the students with access to the sensory break area and an adult to assist them as needed, she also maintained constant communication with the occupational therapist (Tr. pp. 196-97).

The hearing record further shows that the student's sensory needs could have been adequately addressed by the supports available in the district's recommended program. Testimony elicited from the student's Rebecca School staff revealed that the student required sensory breaks to maintain attention throughout the day, which involved making sure that the student did "some sort of movement-based activity before every seated activity" (Tr. pp. 538-39). According to the hearing record, the type of movement activity provided for the student varied and included among other things, such activities as movement with songs, yoga, and "brain gym" activities, which could all be done in the classroom or in the hallway (Tr. pp. 539, 541 ).<sup>18</sup> The hearing record further indicated that the student required sensory breaks when she appeared "under-aroused" and needed some sensory input to "get her going again" (Tr. p. 490). The type of sensory input provided included allowing the student to jump up and down between activities and sensory input through deep pressure (*id.*). The student's Rebecca School speech-language therapist testified that she would "place [her] hands on [the student's] hips and kind of push down into the chair, so [the student] fe[lt] her body more in space, and also on her arms [she might] give [the student] some deep pressure up and down her arms so she, again, just so she's more aware of her body in space" (*id.*). The hearing record reflects that she learned these techniques from the student's Rebecca School occupational therapist who indicated at the impartial hearing that while it was important for the student to continue to improve her sensory processing, there were various ways of achieving this objective and there was no singular right way to work with her (Tr. pp. 706-07). Regarding the district's recommended program, district teacher 2 indicated that she used various techniques to engage and focus students including movement, kinesthetics, and music (Tr. p. 262). She further testified that students had an opportunity for movement through their participation in yoga, drama,

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<sup>18</sup> The Rebecca School teacher described a "brain gym" activity as a sensory activity that helps to wake up different parts of the brain (Tr. p. 539).

and dance in the school (Tr. p. 264). Additional testimony by the district's school psychologist indicated that the sensory strategies to be implemented would vary depending on the student's need at the moment, that the people who work with her would determine what her needs were at a given time, and that the sensory materials utilized would vary on a daily, weekly, and monthly basis (Tr. p. 114).

Based on the above, the type of sensory activities that the student required to maintain a regulated state were available in the district's recommended program and did not necessarily require extensive sensory gym equipment. Rather, the hearing record indicates that the student's sensory needs could have been adequately met by maintaining frequent opportunities for a variety of types of movement (vestibular input) and deep pressure (proprioceptive input) with ongoing collaboration between the classroom staff, related services providers, and the student's occupational therapist. Considering the variety of movement opportunities built into the district's recommended program, the opportunities for sensory breaks, the variation of the sensory strategies utilized based on the students' current needs, and the ongoing collaboration with the occupational therapist regarding the student's sensory needs, the hearing record demonstrates that the district's program would have adequately and appropriately addressed the student's sensory needs.

Based on the hearing record, as discussed above, the district offered the student a program for the 2009-10 school year that was formulated with adequate procedural compliance with the IDEA and which offered a substantive program reasonably calculated to enable the student to obtain educational benefits, thus the student was offered a FAPE. Moreover, the hearing record does not show that the offered program was inappropriate due to LRE considerations.

Lastly, regarding the district's request for recoupment of the funds paid during the student's pendency placement, I decline to award such funds. The IDEA and the New York State Education Law require that a student remain in his or her current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation, or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). In addition, during the pendency of administrative and judicial proceedings, a student remains at his current educational placement, "unless the State or local educational agency and the parents or guardian otherwise agree" (20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]).

I have considered the district's arguments favoring recoupment of funds paid under pendency and find them to be unpersuasive (see New York City Department of Education v. S.S., 2010 WL 983719, at \*11 (S.D.N.Y. 2010); Application of a Student with a Disability, Appeal No. 09-019; Application of a Student with a Disability, Appeal Nos. 09-008 & 09-010; Application of a Student with a Disability, Appeal No. 08-134; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Child with a Disability, Appeal No. 05-091). Accordingly, I decline to order the parents to reimburse the district for costs incurred by the district in maintaining the student's

pendency placement, an expense it was required to pay in order to comply with the pendency provisions of State and federal law (see Murphy v. Arlington Cent. Sch. Dist., 297 F.3d 195 [2d Cir. 2002]; Bd. of Educ. v. Schutz, 290 F.3d 476 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; see also 20 U.S.C. § 1415[j]; 34 C.F.R. § 300.51[8]; Educ. Law § 4404[4]; 8 NYCRR 200.5[m]).

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' unilateral placement of the student at the Rebecca School 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 the Bd. of Educ., Appeal No. 10-020; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).<sup>19</sup>

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**Dated: Albany, New York  
June 22, 2010**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**

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<sup>19</sup> Although I do not reach the issue in this decision, previous State Review Officer decisions have rejected the district's argument that the parents are categorically barred by § 1412(a)(10)(C)(ii) from seeking relief in the form of tuition reimbursement at a for-profit school, such as the Rebecca School (Application of a Student with a Disability, Appeal No. 09-085; Application of a Student with a Disability, Appeal No. 09-080).