



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-067

### **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, attorneys for petitioner, Jessica C. Darpino, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondents, Jenna L. Pantel, 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 Mary McDowell Center for Learning (Mary McDowell) for the 2009-10 school year. The parents cross-appeal the impartial hearing officer's determinations that the April 2009 individualized education program (IEP) addressed the student's needs and that the district's recommended placement and school for the student were appropriate. The appeal must be sustained in part. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending Mary McDowell in a seventh grade classroom (Tr. pp. 120, 161-62). The hearing record reflects that the student has had long-standing difficulties in school and attended private schools from pre-kindergarten through fifth grade (Dist. Ex. 5 at p. 3; Parent Ex. A at pp. 1-2).<sup>1</sup> The student entered Mary McDowell for sixth

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<sup>1</sup> A January 13, 2009 social history update indicated that when the student was in second grade, she "was evaluated" and by third grade she was receiving special education teacher support services (SETSS) (Dist. Ex. 5 at p. 3). Although the social history update referred to an "afterschool [r]esource [r]oom teacher," no detail is provided regarding the SETSS provided to the student during her third, fourth, and fifth grade years (*see id.*). The January 2009 social history update stated that during the student's fourth and fifth grade years "it was becoming clearer that there were gaps in the student's learning," that she "received support from home and support from the resource room teacher," and that "she was attaining grades of 'B's and 'C's" (*id.*).

grade during the 2008-09 school year (Tr. pp. 120, 153, 162; Dist. Ex. 5 at p. 2; Parent Ex. H at p. 2). Mary McDowell has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (Tr. pp. 7-8; see 34 C.F.R. § 300.8[c][10 ]; 8 NYCRR 200.1[zz][6]).

A July 3, 2008 neuropsychological and educational assessment report indicated that on two days in June 2008, the student participated in a follow-up neuropsychological evaluation to obtain information about the "neuropsychological issues underlying [the student's] long-standing academic difficulties," as well as feedback regarding an appropriate school placement for the student (Parent Ex. A at p. 1). The report referred to a previous psychoeducational evaluation completed in spring 2008 that indicated the student fit the profile to be diagnosed with a nonverbal learning disability without the social problems that often accompany such a diagnosis (*id.*). Areas assessed in the June 2008 neuropsychological assessment included the student's attention, executive function, language, memory, social perception, and reading skills (*id.*). Based on the results, the evaluators determined that the student's disability was consistent with the previous diagnosis of a nonverbal learning disability without the associated social difficulties (*id.* at p. 2).<sup>2</sup> The evaluators described the student as a "socially adept" individual with reasoning abilities that were stronger verbally than nonverbally (*id.* at p. 5). According to the evaluators, the student met the criteria for a diagnosis of an Attention Deficit Hyperactivity Disorder, Inattentive Subtype, which reflected her difficulty regulating her attention system as a result of weaknesses in working memory, slow processing speed, and deficits in executive function (*id.* at pp. 3, 5). The evaluators also found that the student "clearly" met the criteria for a reading disorder which "seems to be a direct result of her difficulty handling novelty and understanding novel aspects of language and reading tasks" and that she required more explicit instructions than other children her age when attempting unfamiliar tasks (*id.* at p. 5). The evaluators noted that the student's "constellation of difficulties" made it difficult for her "to learn to read quickly and for meaning, despite her solid verbal reasoning skills" (*id.*). The evaluators made multiple recommendations for school placement; school-based accommodations; and indicated areas in need of individual remediation, specifically the areas of working memory, executive function, and reading (*id.* at pp. 6-8). The evaluators recommended that if no improvement were seen in the student's self-esteem after the interventions described in the report were implemented, then "individual counseling should be considered to prevent [the student's] academic difficulties from having further impact on her vulnerable self-esteem" (*id.* at p. 8).

On October 29, 2008, the district conducted a classroom observation of the student at Mary McDowell (Dist. Ex. 8). The observation report indicated that there were five students and one teacher present at the time of the observation (*id.*). During the observation, the class was reviewing a book and the student actively participated in the lesson, was able to answer literal comprehension questions as well as more abstract questions, was able to make inferences about characters in the story and what might happen next in the story, often clarified facts from the book when other students gave incorrect information, was able to make a personal connection with a character in the book, was "quite articulate" in her responses and displayed a wide range of background

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<sup>2</sup> The neuropsychological and educational assessment report dated July 3, 2008 indicates that both an examiner with a Ph.D. and a neuropsychologist with a Ph.D. signed the report (Parent Ex. A at p. 8).

knowledge, and was able to compare and contrast certain characters and explain their behaviors to the class (id.). During a vocabulary activity, the observation report noted that the student "was able to work independently," and that when paired with another student, was able to complete the activity with minimal prompts from the teacher (id.). The observation report also indicated that the student "related well" to her classmates and teacher and that she was prepared for the class with her binder and daily planner (id.).

A 22-page Mary McDowell middle school report for the first trimester of the 2008-09 school year included information about the student's speech-language therapy and performance in all of her classes and indicated, among other things, that the student was attending a self-contained homeroom class consisting of 11 students and two teachers (Dist. Ex. 7 at p. 2).<sup>3</sup> The student's classes in literacy and math each contained four other students with similar strengths and weaknesses (id. at p. 2). The student's classes in ancient history, current events, science, Spanish, art, media literacy, and physical fitness classes consisted of the 11 students in the student's homeroom; the student's "healthy choices" class consisted of six students (Tr. p. 126; Dist. Ex. 7 at p. 2). The report described the student as having done a "wonderful job" of transitioning to Mary McDowell (Dist. Ex. 7 at p. 2). According to the report, the student consistently met classroom expectations and participated in the school community (id.). She formed friendships with many of the other girls in the class, but displayed low tolerance for the boys in the class (id.). The report indicated that at various points throughout the trimester, the student "shared with the class her feelings of relief and gratitude" that she was in a school "where she received the help she need[ed]" (id.). However, the report further noted that the student was not yet comfortable asking her teachers for help when she was confused or unsure and that she was not confident of her abilities (id.).

In the report, the student's literacy teacher indicated that the student benefited from teacher scaffolding to break down information within a passage, especially during independent reading; that the student's comprehension was greatly assisted by questions posed by the teacher to guide her thoughts through various topics discussed; that the student maintained a good grasp of explicit information within a book; and that during discussions, she took time to think about the questions posed and was very good at relating ideas and themes to other experiences (Dist. Ex. 7 at p. 5). The literacy teacher also indicated that although the student demonstrated success while working with various teacher supports, she struggled with extracting the implicit detail within the story and was encouraged to practice referencing text when answering specific questions in order to improve recall during class discussion (id.). In addition, the literacy teacher indicated that although the student actively participated in class, when asked to write, she experienced difficulty with expressing the same ideas that she was able to verbalize in discussion (id.). The literacy teacher also reported that the student benefited from teacher prompts to help refocus on the assignment and solidify her ideas (id.). In regard to written work, the teacher indicated that the student responded well to certain writing strategies introduced in class and that she used an outline to begin sequencing thoughts in a more efficient manner (id. at pp. 5-6). The student's grade level in literacy class was noted as "5th grade" (id. at p. 6).

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<sup>3</sup> The hearing record indicates that Mary McDowell's middle school program was departmentalized and students worked with a number of different teachers (Tr. p. 132).

The student's math teacher indicated that the student had a strong working knowledge of basic math facts and that she was proud of her ability to perform pencil-and-paper calculations with "relative accuracy" (Dist. Ex. 7 at p. 8). The math teacher indicated that self-advocacy was an emergent area of strength for the student (id.). She also indicated that mathematical concepts were difficult for the student as she "tended to become overwhelmed easily" when asked to solve a word-based problem or a problem with steps not immediately clear to her (id. at p. 9). The math teacher further indicated that the concepts of adding and subtracting were difficult for the student to grasp (id.). Additionally, the student's math teacher indicated that the student had "very strong ideas" about what it meant to be successful in math and that it was "difficult" for her to accept that using a calculator or other resources would help her become more successful in math (id.). The student's grade level in math class was noted as "3rd Grade" (id.).

The student's speech-language therapist reported that the student received language therapy one time per week for 40 minutes in a group of three students (Dist. Ex. 7 at p. 20). Throughout the first trimester, the student "demonstrated age appropriate comprehension of word relationships and applied this knowledge to comprehension of complex analogies" (id.). The speech-language therapist also indicated that word finding and verbal organization skills appeared age-appropriate (id.). The speech-language therapist further indicated that auditory processing weaknesses interfered with the student's ability to follow orally presented multi-step directions (id.).

A district social worker interviewed the student's mother and completed a January 13, 2009 social history update (Dist. Ex. 5 at pp. 1, 2). In addition to providing personal, family, and academic information, the social history update report stated that the student's strengths were in science and "in her increasing enthusiasm around attending school" (id. at pp. 1-5). The social history update report stated that the student's challenges were "in reading comprehension and retention of information previously learned" (id. at p. 5). The social history update report also indicated that the student had some friends outside of school and that she was in good overall health (id.).

A January 14, 2009 psychoeducational evaluation report<sup>4</sup> indicated that an evaluation update was conducted to review the student's special education services (Dist. Ex. 6 at p. 1). The evaluation report indicated that behaviorally, the student was willing to accompany the examiner to the evaluation site, was conversant during the session, maintained eye contact, had "no difficulty remaining focused on various tasks," and appeared to be working to the best of her ability (id.). The evaluation report also noted that on some math subtest items, the student required more time to problem solve; that the student asked the examiner to repeat some verbal directions for math word problems in order to process information; and that on a reading comprehension subtest, the student read multiple-choice questions aloud to herself to aid in task completion (id.). Administration of the various formal tests indicated that the student's performance in applying academic skills "ranged from below average to average in reading, math and written language" (id. at pp. 1-2). In regard to social and emotional considerations, clinical interview and projective data suggested that the student was developing a sense of individuality and was learning positive socialization skills (id. at p. 3). The evaluator noted that the student was able to express her thoughts and feelings related to social awareness, that she knew what was expected of her at home

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<sup>4</sup> The hearing record reflects that the date of "1/14/08" on the psychoeducational evaluation report was a typographical error and that the parties agreed that the correct date of the evaluation was 1/14/09 (Tr. p. 4).

and at school, that she was able to name friends at school, and that she enjoyed watching television in her spare time (id.).

The evaluator administered the Parent Rating Scale of the Behavior Assessment System for Children, Second Edition (BASC-2) to the student's mother to obtain an estimate of the student's level of social and emotional difficulties (Dist. Ex. 6 at pp. 3-4). Standardized scores on the Behavior Symptoms Index of the BASC-2 showed "adequate functioning in relation to same age peers," as the student's mother reported that the student was capable of maintaining necessary levels of attention/focus in school and was able to regulate her emotional reactions to various situations (id. at p. 4). Within the Adaptive Scales of the BASC-2, the student's mother reported "age-appropriate functioning in all areas assessed," as she reported that the student was able to react appropriately to various situations and demonstrated adequate expressive/receptive communication skills (id.). With respect to social and emotional considerations, the evaluation report indicated that "clinically significant behavior was noted on the internalizing factor of anxiety," and that the student "may display behavior stemming from worry, nervousness and/or fear" (id.). The evaluation report further indicated that the student lost her temper easily, interrupted people when speaking, and needed help to get up on time (id.). According to the report, clear and concise directions along with pre-teaching of concepts would be important for the student to allow her to follow through on assignments and feel more comfortable within the classroom setting (id.). In addition, encouragement from teachers and positive, specific feedback on a job well done would help the student develop solid academic skills across the curriculum (id.). The evaluator further recommended continuing the student's mandated levels of related services (id.).

On or about February 23, 2009, the parents executed an enrollment contract for the student to attend Mary McDowell for the 2009-10 school year (Tr. pp. 240-41; Parent Ex. F). Pursuant to the terms of the contract, the parents paid a non-refundable deposit in February 2009 and paid the student's tuition through monthly payments beginning in April 2009 and concluding in January 2010 (Tr. pp. 242, 246-77; Parent Exs. F; G).

On April 24, 2009, the district's Committee on Special Education (CSE) convened for the student's three-year reevaluation and to develop the student's IEP for the 2009-10 school year (Tr. p. 11; Dist. Exs. 2 at p. 1; 4 at p. 1). The CSE meeting lasted approximately 45 minutes to an hour (Tr. p. 14). Attendees were a school psychologist, who was also the district representative; a district regular education teacher; a district school social worker;<sup>5</sup> the student's mother; and by telephone, an additional parent member and one of the student's teachers at Mary McDowell (Tr. pp. 12-14, 218-19; Dist. Exs. 2 at p. 2; 4 at p. 1).<sup>6</sup> The April 24, 2009 CSE meeting minutes indicate that evaluative materials were reviewed by the CSE and testing results were explained to the student's mother (Dist. Ex. 4 at p. 1). The CSE meeting minutes further indicate that the student's mother was provided with a copy of her due process rights and that she had no questions regarding those rights (id.). The CSE meeting minutes reflect that the student's mother provided information about the student's strengths and weaknesses at the April 2009 CSE meeting (id.). The

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<sup>5</sup> The hearing record reflects that although the district social worker did not sign the attendance sheet, he attended the April 24, 2009 CSE meeting in its entirety and recorded the minutes of the meeting (Tr. p. 13; see Dist. Exs. 2 at p. 2; 4).

<sup>6</sup> The district representative stated at the impartial hearing that she thought the additional parent member attended the April 24, 2009 CSE meeting by telephone because she was ill (Tr. pp. 31-32).

April 2009 CSE discussed the student's challenges in comprehension, poor working memory, processing speed, nonverbal reasoning, executive function and organization, attention, and anxiety, as well as discussed that the student "sits and spins wheels until she gets 1:1 support," and that she struggles with explicit/conceptual information (*id.*). The April 2009 CSE also discussed the student's strengths, which included "good" skills in handing in homework, in verbal reasoning, relating well to peers and teachers, and social awareness (*id.*). Among other things, the April 2009 CSE discussed that the student's overall health was good; that she did well with advice; that she was reluctant to share until completely confident; and that in regard to her anxiety and learning, the student was best helped in a small group with highly structured individualized instruction (*id.* at pp. 1-2). The hearing record reflects that during the April 2009 CSE meeting, the student's teacher from Mary McDowell contributed to the development of the April 2009 IEP's present levels of performance and annual goals (Tr. pp. 18, 27, 30, 32-33, 45-46, 254; see Dist. Ex. 2 at pp. 5, 7).

The April 2009 CSE recommended continuing the student's eligibility for special education services as a student with a learning disability and recommended a 10-month placement in a 12:1 special class in a community school with the related service of individual counseling one time per week for 30 minutes in a separate location (Dist. Ex. 2 at pp. 1-2, 17). Recommended classroom accommodations to address the student's academic management needs included a multisensory approach to learning, teacher redirection and frequent check-ins with teacher, repetition of concrete directions and previously learned material presented verbally and non-verbally, rephrasing of rules, use of outlines, story-starters, checklists and visual organizers for writing, provision of visual and verbal cues, use of manipulatives for mathematics, and preferential seating as needed (*id.* at pp. 4-5). Accommodations to address the student's social and emotional management needs were teacher redirection and prompts as needed and school counseling (*id.* at pp. 6-7). Recommended testing accommodations were for separate location and extended time by fifty percent (*id.* at p. 17). The April 2009 IEP also included a modified criteria for promotion whereby the student would be required to meet 70 percent of the seventh grade English language arts (ELA) standards as evidenced by schoolwork, teacher observation, assessment and 90 percent attendance, as well as that the student would meet 60 percent of the seventh grade math standards as evidenced by her work, teacher documentation, and assessment, as well as 90 percent attendance (*id.*). The April 2009 CSE considered the student's placement in a general education class with SETSS or in an integrated co-teaching class, but determined that such placements would be insufficient to meet the student's needs (Dist. Ex. 4 at p. 2; see Dist. Ex. 2 at pp. 15-16). The hearing record reflects that the district sent the April 2009 IEP to the parents on May 4, 2009 (Dist. Ex. 2 at p. 2).

The district issued a Final Notice of Recommendation (FNR) to the parents dated July 8, 2009, which the parents received prior to July 15, 2009 (Tr. pp. 229-30, 265; Dist. Exs. 2; 3). Among other things, the July 2009 FNR notified the parents of the recommended school and classroom and summarized the recommendations made by the April 2009 CSE (Dist. Ex. 3).

The hearing record reflects that on or about July 15, 2009, the student's mother telephoned the parent coordinator at the proposed school and was informed that she would not be able to visit the proposed school until September 2009 due to reconstruction (Tr. pp. 230, 269-71, 280; Parent Ex. B at p. 1). According to the student's mother, the parent coordinator did not have any information regarding the school's curriculum and advised the mother that she would answer her questions when they met in September (Tr. pp. 230-31, 272, 280). By letter dated July 15, 2009

to the CSE chairperson, the student's mother advised the district that she had received the July 2009 FNR, that she had spoken to the school's parent coordinator, that she planned to visit the recommended school in September 2009, and that the student would attend Mary McDowell until she was able to determine the appropriateness of the recommended placement (Parent Ex. B at p. 1).

Subsequent to the student's mother's July 15, 2009 letter, the parents received a class profile from the district regarding the particular class that had been referenced in the July 2009 FNR (Tr. p. 232; Parent Ex. C; Dist. Ex. 3).

By letter dated August 6, 2009 to the CSE chairperson, the student's mother advised that although she had "not been able to visit the recommended placement due to school being out of session for the summer," she had concerns regarding the student's recommended IEP and class profile (Parent Ex. D at p. 2). In particular, the student's mother wrote that she was "unclear as whether the suggested program integrates a multi-sensory approach to learning," something that she stated the student required (id.). She expressed concern about the class profile's "wide range of academic levels amongst the students," stating that she believed the recommended environment would not be suitable for the student because the variety of academic deficits would result in the student's needs not being appropriately addressed (id.). In her letter, she again advised the district that she planned to visit the recommended school in September 2009 and that until such time, the student would remain at Mary McDowell (id.).

The student's mother visited the recommended school on or about September 23, 2009 (Tr. pp. 234, 269) and was taken through the school by the school's parent coordinator (Tr. pp. 234, 272). The parent coordinator showed the student's mother two special education classes, which the parent observed for "less than a period" (Tr. pp. 234, 273). The parent coordinator did not otherwise identify the two classes the parent observed and the parent coordinator was "not able to tell" the student's mother which class the student would attend (Tr. p. 234). The student's mother did understand that the student would be in one of the two classes (Tr. pp. 234, 271). The student's mother testified that after she observed the two classes, she asked the parent coordinator for information regarding the reading, mathematics, and writing curriculum and was told that she needed to speak with the special education supervisor, who was not then available (Tr. pp. 236-37). The student's mother testified that she telephoned the special education supervisor the next day to make an appointment to review the April 2009 IEP, that the supervisor told her that she was "very busy" and "didn't have the time," and that she therefore asked the special education supervisor questions on the telephone (Tr. pp. 237-38, 274).

By letter dated September 23, 2009 to the CSE chairperson, the student's mother indicated that after visiting the proposed school and observing two classes,<sup>7</sup> and after discussing the student's special education needs with the supervisor of special education, she was rejecting the recommended program (Parent Ex. E at p. 2). The student's mother advised that the student would remain at Mary McDowell and that she would seek tuition reimbursement from the district (id.). With respect to the specific reasons for her rejection of the recommended program, the student's mother indicated that she had been shown two classes at the recommended school and had spoken

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<sup>7</sup> The hearing record reflects that during the March 4, 2010 impartial hearing proceedings the parents were not contesting that the student's parent was shown two classes during her September 2009 visit to the proposed school (Tr. p. 102).

with the special education supervisor who was unable to answer her questions regarding the placement and the levels of the students (id.). According to the student's mother, the disability classifications in the classroom varied, she was informed that it was possible for the student to be placed with other students who had behavioral problems, the school had security guards on every floor, and the students in the class were physically larger than the student—all situations that the student's mother considered intimidating for the student and that she believed would increase the student's anxiety (id.). Although the curriculum in the 12:1 class was modified, the student's mother stated that no one at the school could explain to her how the curriculum was modified (id.). In addition, the student's mother indicated that materials were not modified in any manner and that the same course materials were used in general education classes (id.). The letter stated that the student required multisensory instruction and modified materials that were geared toward teaching her in a manner from which she could learn, but that the proposed school would not provide the student with the necessary instructional differentiation (id.). Based on the mother's observation of the class during a silent reading activity, she did not believe that the student would receive the attention she needed (id.). The letter also indicated the mother's belief that the proposed school was too large for the student and that the student would have difficulty transitioning to the setting (id. at pp. 2-3). According to the student's mother, she received no response from the district in regard to her concerns communicated in the letter (Tr. p. 240).

By due process complaint notice dated November 2, 2009, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) (Dist. Ex. 1).<sup>8</sup> In particular, the parents asserted that the April 2009 CSE was invalidly composed and "failed to appropriately consider the opinions of professionals who have worked with [the student]" (id.). The parents also alleged that the April 2009 IEP contained insufficient goals and objectives relating to counseling and executive functioning (id.). According to the parents, the class profile of the recommended class showed too large a discrepancy in reading and math functional levels among the students in the class (id.). With respect to the recommended class, the parents contended that when the student's mother visited the recommended school in September 2009, she "was shown two classes and it was not clear which one" the district was recommending (id.). Noting the student's anxiety, the parents alleged that the district's recommendations to mainstream the student for lunch and recess, place her in a large school environment, and place her in a class with students who exhibit behavioral difficulties would be inappropriate (id.). The parents also contended that although the student's mother "was told the curriculum was modified, no one could explain how" (id.). According to the parents, the course materials were not modified in any manner and were the same materials used in the general education classes, the student would not receive the appropriate level of differentiated instruction, and the student would not receive the level of multisensory instruction that she required (id.). The parents further asserted that the student would not make appropriate progress at the recommended school (id.). The parents contended that the student "requires a small class, in a small school environment, where she will receive full time special education" (id. at pp. 1-2). As a proposed resolution, the parents requested, among other relief, reimbursement for the student's tuition at Mary McDowell and the provision of transportation and related services (id. at p. 2).

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<sup>8</sup> The petition refers to the November 2, 2009 due process complaint notice as a "corrected" due process complaint (Pet. ¶3). The November 2, 2009 due process complaint notice does not state on its face that it was a "corrected" version, and there is no other indication in the hearing record that an earlier due process complaint notice was filed.

The impartial hearing began on March 4, 2010 and concluded on May 26, 2010, after three days of proceedings (Tr. pp. 1, 105, 214, 314). During the impartial hearing, the district defended the student's placement in a 12:1 special class at its recommended school which was a different 12:1 special class than the one that was referenced in the July 2009 FNR (see, e.g., Tr. pp. 5, 54-55, 63, 64-76; Dist. Ex. 3). By decision dated June 22, 2010, the impartial hearing officer found that the district failed to meet its burden to show that it offered the student a FAPE, that the parents showed that Mary McDowell was an appropriate placement for the student, and that equities weighed in the parents' favor for an award of tuition reimbursement (IHO Decision at pp. 11-12).

Regarding the April 2009 CSE meeting, the impartial hearing officer concluded that there was no dispute about the composition of the CSE or the timeliness of the meeting (IHO Decision at p. 8).<sup>9</sup> With respect to the parents' claim asserted at the impartial hearing that the April 2009 IEP failed to accurately describe the student's deficits, the impartial hearing officer concluded that the "IEP includes in its component parts . . . the necessary information to identify and address [the student's] educational needs" and that "in its totality[,] the IEP fairly and accurately expresses [the student's] educational needs" (id. at pp. 8-9). Further, with respect to the April 2009 IEP's annual goals and short term objectives, the impartial hearing officer concluded that "[w]hile the goals may not be perfect... they are sufficiently clear and complete to enable the educational providers to address [the student's] primary educational needs" (id. at p. 9). The impartial hearing officer also concluded that the student "needs a small full-time special education class" and that while a "higher teacher-student ratio [would be] beneficial for the student," there was "nothing in the record to support [the conclusion] that [a] FAPE requires a 6:1 ratio" and that the district's "recommendation of a 12:1 program satisf[ied] FAPE" (id. at pp. 9-10). The impartial hearing officer also found that the parents' objections to the size of the school, the effect of noise and confusion in the hallways, and the presence of security guards in the school on the student's anxiety were "too speculative" (id. at p. 10).

The impartial hearing officer also concluded that the parents were offered a specific class by the district's July 2009 FNR, and that until being told otherwise, the parents were entitled to rely on the class profile "as a snapshot of the class as of the first day of school in September" (IHO Decision at p. 10). The impartial hearing officer further noted that district personnel did not advise the student's mother of any change in the proposed class from the class that was set forth in the July 2009 FNR (id.). Therefore, the impartial hearing officer concluded that the district was "estopped from asserting that the student was recommended for an appropriate class other than the class recommended in the district's [July 2009 FNR]" (id.). Based on this, the impartial hearing officer concluded that the testimony from the district's witness regarding the composition of, and "modes of instruction" used in, the class which the district had presented at the impartial hearing as the class the student would be in during the 2009-10 school year, which was a different class than that recommended in the July 2009 FNR, was "irrelevant" (id.). The impartial hearing officer further concluded that the district "did not offer definitive proof that [the] student was in fact placed in [that] class" (id.). With respect to the particular class recommended in the July 2009 FNR, the impartial hearing officer concluded that the hearing record "has none of the required proof ..." such as "the qualifications of the teachers, the behavioral and social characteristics of the students[,] and the academic levels of the students" (IHO Decision at pp. 10-11). Consequently,

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<sup>9</sup> While the parents' November 2, 2009 due process complaint notice asserted that the April 2009 CSE was not properly composed, the hearing record shows that the parents abandoned this claim at the impartial hearing.

the impartial hearing officer determined that the district failed to meet its burden to show that it offered the student a FAPE (id. at p. 11).

The impartial hearing officer also concluded that the parents met their burden of proof with respect to the student's unilateral private placement (IHO Decision at p. 11). With respect to the district's claim that Mary McDowell did not provide the student with the counseling recommended on the April 2009 IEP, the impartial hearing officer concluded that at Mary McDowell, the student "received the essence of small group social skills counseling weekly ... plus sufficient attention from her content-area teachers to build her confidence[,] self-advocacy skills[,] and self-esteem" (id.). Further, the impartial hearing officer was not persuaded by the district's argument that Mary McDowell was an overly restrictive environment for the student, noting that the parents were not required to show that their unilateral placement satisfied least restrictive environment (LRE) considerations (id.).

Finally, and with respect to equitable considerations, the impartial hearing officer found "no equitable impediment" to bar the parents' request for tuition reimbursement (IHO Decision at p. 12). She found that that the parents had been cooperative with the district's CSE. Regarding the district's contention that the parents had no intention of accepting a public school placement, she found that it "was reasonable for the parent[s] to make alternative contingency plans" and that had the district offered an appropriate placement, the parents would have borne the financial risk of choosing Mary McDowell (id.). Based on these findings, the impartial hearing officer ordered the district, upon proof of payment, to reimburse the parents for the student's tuition at Mary McDowell for the 2009-10 school year (id.).

The district appeals, contending that the impartial hearing officer's decision must be annulled because the district offered the student a FAPE, the parents did not demonstrate that Mary McDowell was an appropriate placement, and equitable considerations precluded an award of tuition reimbursement. With respect to its contention that it offered the student a FAPE, the district first asserts that the class profile the parents received from the district which related to the class referenced in the district's July 2009 FNR should not have been admitted into evidence. The district also asserts that it offered the student a FAPE because the April 2009 CSE recommended an IEP that was appropriate to the student's needs and was not overly restrictive, the class the district indicated at the impartial hearing that the student would be in was an appropriate placement consistent with the student's needs, and that the district presented sufficient information at the impartial hearing with respect to the program offered by the district at the recommended school to support the appropriateness of its placement. The district further asserts that its witness credibly testified with respect to which class the student would have attended. The district also contends that the impartial hearing officer wrongfully determined that the district was estopped from asserting that the student was recommended for an appropriate class other than the class set forth in its July 2009 FNR. Further, the district asserts that the parents did not demonstrate that Mary McDowell was appropriate for the student. According to the district, equitable considerations also preclude an award of tuition reimbursement because the parents never seriously intended to enroll the student in public school and the parents did not give timely notice of their intent to enroll the student in Mary McDowell.

The parents answered the district's petition for review and filed a cross-appeal. In their answer, they assert that the class profile provided to them by the district was properly admitted by the impartial hearing officer into evidence. They also contend that the district was estopped from

defending the student's placement in a class other than the class referenced in the district's July 2009 FNR. The parents further allege that the district failed to demonstrate that the class it defended at the impartial hearing was appropriate for the student, and additionally, that the evidence was not sufficient to show that the student would have been placed in that class. With respect to the appropriateness of the parental placement, the parents assert that the impartial hearing officer correctly determined that Mary McDowell was appropriate for the student. With respect to the equities, the parents contend that equitable considerations favor awarding them tuition reimbursement.

The parents cross-appeal the impartial hearing officer's findings with respect to the district's April 2009 IEP, its recommended placement, and the district's recommended school. In particular, the parents assert that the April 2009 IEP is inaccurate and inappropriate in that its discussion of the student's needs is not complete, that particular annual goals are unrealistic, and that its annual goals fail to address the student's areas of deficits. With respect to the student's recommended placement, the parents assert that the student requires another adult in the classroom and that the district offered what was available rather than what was appropriate. The parents also assert that the April 2009 CSE did not consider a 12:1+1 placement or a non-public school recommendation. The parents further assert that the April 2009 CSE incorrectly advised the student's mother that a 12:1+1 setting was "not an available setting" (Answer ¶ 65), that the April 2009 CSE did not discuss the district's reason for not recommending a 12:1+1 program, and that the latter precluded the student's mother from participating in the April 2009 CSE's recommendation. Finally, the parents contend that the district failed to establish that the recommended school would be an appropriate setting for the student and that the impartial hearing officer erred in finding as too speculative the parents' objections relating to an increase in the student's anxiety due to the size of the recommended school and the presence of security guards.

The district answered the parents' cross-appeal. With respect to the parents' contentions relating to the April 2009 IEP, the district asserts that it offered the student a FAPE, that the April 2009 IEP addressed the student's relevant needs, and that the annual goals in the April 2009 IEP were appropriate for the student as they addressed her deficit areas and were discussed and agreed upon by all parties at the April 2009 CSE meeting. The district also alleges that the impartial hearing officer correctly determined that the April 2009 IEP was not on the whole inadequate. Regarding the appropriateness of the 12:1 recommended placement, the district contends that the impartial hearing officer correctly determined that the recommendation of a 12:1 placement satisfies the district's obligation to offer a FAPE and further asserts that a 12:1 placement is appropriate for the student. The district further asserts that the impartial hearing officer properly determined the parents' school-related claims were too speculative, that the district's recommended placement was appropriate, and that the recommended school would adequately address the student's needs. The district also asserts that the parents' concern relating to security guards at the school was not raised in their November 2009 due process complaint notice and that this issue therefore should not be considered.

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

[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), establishes annual

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148). The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

First, I will review the parents' assertion in their cross-appeal that the impartial hearing officer erred in finding that the district's April 2009 IEP was appropriate. In particular, the parents assert that the April 2009 IEP does not include the student's diagnosis of a nonverbal learning disability or an ADHD and does not adequately address the student's difficulties in processing information. Upon review, and for the reasons discussed below, I find that the April 2009 IEP contained adequate statements of present levels of academic achievement and functional performance with respect to the student's needs, from which relevant goals could be drafted.

The IDEA provides that an IEP must, among other things, include a statement of present levels of academic achievement and functional performance, including a description of how the student's disability affects his or her involvement and progress in the general curriculum (20 U.S.C. § 1414[d][1][A][i][I][aa]; see 34 C.F.R. § 300.320[a][1][i]); 8 NYCRR 200.4[d][2][i][a]). An IEP's present levels of academic performance and functional levels provide the relevant baselines for projecting annual performance and for developing meaningful measurable annual goals and short-term objectives (Application of the Bd. of Educ., Appeal No. 04-026; see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*25 – \*26 [S.D.N.Y. Sept. 29, 2009]).

The hearing record reflects that during the April 2009 CSE meeting, the CSE reviewed the July 3, 2008 private neuropsychological assessment report, the October 29, 2008 classroom observation, the 2008-09 Mary McDowell report, the January 13, 2009 social history update, and the January 14, 2009 district psychoeducational report (Tr. pp. 30, 33, 35, 219-21; Dist. Ex. 4 at p. 1; see also Dist. Exs. 5-8; Parent Ex. A). Consistent with the student's mother's concerns, which were noted in the minutes of the April 24, 2009 CSE meeting and in information contained in the

evaluation reports reviewed by the April 2009 CSE, the April 2009 IEP set forth accurate information regarding the student's present levels of academic achievement and functional performance (see Dist. Exs. 2 at p. 3; 4 at p. 1). The April 2009 IEP contained the results of formal testing which showed that when compared to her peers, the student's performance in applying academic skills ranged from below average to average in reading, math, and written language (Dist. Ex. 2 at p. 3).

The April 2009 IEP specifically noted that the student was able to identify and read elementary level sight words, read passages with appropriate inflection, "search[] back" to text to formulate responses, and comprehend elementary passages using both concrete and inferential content clues (Dist. Ex. 2 at p. 3). The April 2009 IEP also indicated that the student was able to correctly spell words such as "worried," "knocked," and "construction" (id.). In writing, the April 2009 IEP reflected that the student was capable of making elementary capitalization and punctuation corrections and was able to make logical connections/agreement in simple sentences (id.). The April 2009 IEP noted that the student had a "good sight word bank" but had greater difficulty with unknown words (id. at p. 5). The student's classroom teacher informed the April 2009 CSE that the student tended to forget what she reads in class; that spelling and decoding were areas of relative strength; and that although when writing the student had "beautiful handwriting," her executive function difficulties were apparent in her organization and completion of writing, writing mechanics, and grammar (id.).

For math, the April 2009 IEP indicated that the student was able to solve problems in advanced addition/subtraction and simple multiplication in a timely manner, and that division and fraction items were too complex for her (Dist. Ex. 2 at p. 3). The April 2009 IEP also indicated that the student was able to solve problems using basic skills in number concepts and some sequential items and that she had difficulty with tasks involving units of measurement, money concepts, fractions, and division (id.). According to the April 2009 IEP, the student was learning advanced addition, subtraction, multiplication, and division and her difficulty with math concepts and recalling of data made problem-solving of conceptual questions difficult for her (id. at p. 5). Furthermore, the April 2009 IEP indicated that, according to the student's classroom teacher, the student greatly benefited from repeated exposure to information in order to have "fluidity of knowledge" (id.). The April 2009 IEP included the student's teacher's estimates of the student's instructional level for decoding as 5.0, for reading comprehension as 4.9, for writing as 4.9, for spelling as 5.5, for math computation as 3.8, and for math problem-solving as 4.0 (id.).

Consistent with the July 3, 2008 neuropsychological and educational assessment report, the April 2009 IEP indicated that clinical data suggested that the student was developing a sense of individuality and learning positive socialization skills (Dist. Ex. 2 at p. 6). The April 2009 IEP also indicated that the student was able to express her thoughts and feelings related to social awareness and that she seemed to know what was expected of her both at home and in school (id.). The April 2009 IEP noted that the student's standardized scores on the parent rating form of the BASC-2 indicated that the student adequately functioned in relation to same age peers with respect to behavioral regulation and adaptive functioning (Dist. Ex. 2 at p. 6; see also Parent Ex. A at p. 4). In addition, the April 2009 IEP referenced results from the BASC-2 indicating the student's clinically significant behavior on the internalizing factor of anxiety (Dist. Ex. 2 at p. 6; see also Parent Ex. A at p. 4). The April 2009 IEP further indicated that the student might display behaviors stemming from worry, nervousness and/or fear (Dist. Ex. 2 at p. 6). The April 2009 IEP also indicated that the student's behavior did not seriously interfere with instruction and could be

addressed by the special education classroom teacher (id. at pp. 6-7). The April 2009 IEP further indicated that, according to the student's classroom teacher, the student related well to her peers and to her teachers (id. at p. 7). The April 2009 IEP also indicated that the classroom teacher described the student's interactions with peers as "great," that the student had a good sense of humor, and that the student was kind to others (id.). The April 2009 IEP further included information from the student's teacher that in class the student related well to adults, would "cover up what she does not know," and would "not ask for help when necessary" (id.). The April 2009 IEP indicated that "[the student] must develop her self-advocacy skills," and also indicated that the 2008 neuropsychological and educational assessment report noted student behavior related to anxiety which could impact the student's academic functioning (id.).

As set out above and as indicated in the evaluative material reviewed by the April 2009 CSE, I find that the April 2009 IEP accurately reflects the student's deficits (see Tr. pp. 17, 19, 21, 23, 35, 41, 43, 44, 217, 218, 220-21, 222-23, 259-60; Dist. Ex. 2 at pp. 3, 5, 6, 7; see also Dist. Exs. 4; 5 at pp. 2, 4, 5; 6; 7 at pp. 6, 9, 20; Parent Ex. A at pp. 1, 2-5). Further, while the student's non-verbal learning disability is not mentioned in the April 2009 IEP, the IEP includes the student's needs as they relate to her nonverbal learning disability, which provided the April 2009 CSE with the ability to develop appropriate annual goals and/or accommodations. Although the April 2009 IEP does not explicitly state the student's diagnosis of an ADHD, the CSE discussed the student's attention needs at the April 2009 CSE meeting and included a number of accommodations in the IEP to address the student's attention, including teacher redirection, teacher repetition of directions and previously presented information (both verbal and nonverbal), visual and/or verbal cues, and preferential seating as needed (Tr. pp. 24-25, 220-21; Dist. Exs. 2 at pp. 4, 5; 4 at p. 1; see also Tr. p. 223).

Next, I will address the parents' contention that the annual goals in the April 2009 IEP fail to address the student's areas of deficits and that some of the annual goals are not realistic. More specifically, the parents assert that (1) the writing goals fail to address the impact of the student's executive function difficulties, which the parents assert impact the student's organization and completion of writing mechanics; (2) there are no goals relating to retention even though the student has difficulty with recall; (3) there are no math goals for conceptual math questions; (4) the math goal listed is an area that the student was already working on at the time of the April 2009 CSE meeting; and (5) the student has no attentional goals despite attention being an area of need. The district contends that the annual goals address the student's deficit areas and that the impartial hearing officer correctly found that "[w]hile the goals may not be perfect . . . they are sufficiently clear and complete to enable the educational providers to address [the student's] primary educational needs" (IHO Decision at p. 9).

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]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

The April 2009 IEP contained seven annual goals that would be reported three times per year (Dist. Ex. 2 at pp. 9-14). The annual goals were related to the student's deficit areas and/or needs with respect to academic performance, nonverbal learning, executive functioning, auditory processing, anxiety, and self-advocacy (Tr. pp. 19-24, 43-44, 47; see Dist. Exs. 5 at pp. 2, 4, 5; 6; 7 at pp. 6, 9, 20; Parent Ex. A at pp. 1, 2-5). Moreover, testimony by the special education teacher who participated at the April 24, 2009 CSE described how the CSE determined the goals to be included in the IEP and that the student's teacher from Mary McDowell participated in the discussion regarding the goals that the student needed and had a chance to review the goals after they were written (Tr. pp. 46-47). Testimony by the student's mother indicated that the CSE discussed the goals "in general" with her and the rest of the CSE (Tr. p. 255). Further, a head teacher from Mary McDowell testified that the goals in the April 2009 IEP addressed "a lot of the areas" where the student required the most remediation (Tr. pp. 196-97).

With respect to the parents' specific allegations, the April 2009 IEP provided the student with a writing goal that was relevant to the student's executive function difficulties (Dist. Ex. 2 at p. 10; Tr. pp. 22-23, 43-44) and with appropriate math goals which were relevant to the student's difficulties with retention and with the conceptualization of math questions (Dist. Ex. 2 at p. 9; Tr. p. 21). The math goals set forth in the April 2009 IEP appropriately target her deficit areas in mathematics (see Tr. pp. 21-22; Dist. Ex. 2 at pp. 3, 5, 9; see Dist. Ex. 6 at pp. 2-3) and the evidence referenced by the parents in support of their contention that the student was already working on one of the annual math goals (see Pet. ¶ 62, referencing "Ex. 3-1, 3-3") does not support the parents' argument. Finally, as indicated above, the April 2009 IEP addresses the student's attention needs through accommodations including teacher redirection, teacher repetition of directions and previously presented information (both verbal and nonverbal), visual and/or verbal cues, and preferential seating as needed (Tr. pp. 24-25; Dist. Ex. 2 at pp. 4, 5; see also Tr. p. 223). Based on the foregoing, I find that the annual goals are aligned to the student's areas of need such that the educational program set forth in the April 2009 IEP is reasonably calculated to enable the student to make meaningful progress.

The parents also assert that the math computation and reading comprehension annual goals in the April 2009 IEP are unrealistic and inappropriate in that those annual goals anticipate more than one year of progress. An annual goal should reflect what a student with a disability should reasonably be able to accomplish within a 12-month period (Application of a Child with a Disability, Appeal No. 04-112; Letter to Butler, 213 IDELR 118 [OSERS 1988]; see also Application of a Child with a Disability, Appeal No. 06-063 [setting forth that annual goal was not realistic]; Application of a Child with a Disability, Appeal No. 95-074 [indicating that annual goal was realistic]). The April 2009 IEP seeks to increase the student's math computation and reading comprehension skills by more than one full grade level compared to where the student was in January 2009 and April 2009 (compare Dist. Ex. 2 at pp. 3, 5, with Dist. Ex. 2 at pp. 9, 10).<sup>10</sup> The

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<sup>10</sup> Results from the January 2009 Kaufman Test of Educational Achievement, Second Edition, which were referenced in the April 2009 IEP, indicated that at that time the student's performance in math calculation was at the 3.6 grade level and that at that time the student was performing at a grade equivalency of 5.2 in reading comprehension (Dist. Ex. 6 at pp. 1, 2; see Dist. Ex. 2 at p. 3). At the time of the April 2009 CSE meeting, one of the student's teachers at Mary McDowell estimated that the student's instructional level in math computation was 3.8 and in reading comprehension, was 4.9 (Dist. Ex. 2 at p. 5). The April 2009 IEP included an annual goal in math computation at the fifth grade level and an annual goal in reading comprehension at the sixth grade level (id. at pp. 9, 10).

hearing record does not explain the basis upon which the April 2009 CSE determined that the fifth grade level was an appropriate math computation goal and that the sixth grade level was an appropriate reading comprehension level. However, upon review, I find that this deficiency in the hearing record is insufficient to conclude that the educational program and services recommended in the April 2009 IEP are inadequate to provide the student with a FAPE.

Next, I turn to the district's assertion that the impartial hearing officer erred in determining that the district was estopped from asserting that the student was recommended for a class other than the class that had been set forth in the district's July 2009 FNR. At the impartial hearing, a district special education teacher testified that the student would be in her class and not the 12:1 special education class that was set forth in the July 2009 FNR (Tr. pp. 63, 96; Dist. Ex. 3). The student's mother testified that when she visited the school on or about September 23, 2009, she was told that the student would be placed in one of the two classrooms that she observed (Tr. pp. 234, 271). Further, the November 2009 due process complaint notice did not raise the issue of whether the district could properly assign the student to a different class than what it recommended in its July 2009 FNR (see Dist. Ex. 1; see also Dist. Ex. 3). In addition, the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include whether the district could properly change the student's classroom placement, which was the issue addressed by the impartial hearing officer (see IHO Decision at p. 10). As a result, the issue of whether the district could properly assign a class different from the one that appeared on its July 2009 FNR was not before the impartial hearing officer (see 20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], [ii], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]). I therefore find that the impartial hearing officer should not have considered that issue (Application of a Student with a Disability, Appeal No. 10-012; Application of the Dep't of Educ., Appeal No. 09-078; Application of the Bd. Of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-056). As a consequence, the impartial hearing officer's finding that the district was estopped from asserting that the student was recommended for a class other than the class it recommended in its July 2009 FNR should be annulled.

Moreover, under the circumstances of this case, I decline to find that the district did not adequately prove at the impartial hearing that the student would have attended the class it defended at the impartial hearing.<sup>11</sup> As previously discussed, after being advised by the parents that they objected to the class recommended by the July 2009 FNR, the district showed the student's mother two 12:1 classes at the recommended school (Tr. pp. 132-33, 234, 271; Dist. Ex. 1 at p. 1; Parent Exs. D at p. 2; E at p. 1). Additionally, the hearing record reflects that as a result of her September 2009 visit, the student's mother understood that the student would have been placed in one of those two classrooms (Tr. p. 271). The parents' November 2009 due process complaint notice made no claim either that the district would not have had a specific placement available for the student at

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<sup>11</sup> I note that the assignment of a particular school is an administrative decision, provided that it is made in conformance with the CSE's educational placement recommendation (Letter to Veasey, 37 IDELR 10 [OSEP 2001]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at \*2 [2d Cir. March 30, 2010]). The U.S. Department of Education's Office of Special Educational Programs (OPSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-097; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-013).

the beginning of the 2009-10 school year or that the student would not have been enrolled in either of the two classrooms that the student's mother had visited (see Dist. Ex. 1). Additionally, there is nothing in the hearing record to suggest that the class the district defended at the impartial hearing was not one of the two classes that the student's mother observed when she visited the district's recommended school. In addition, the hearing record reflects that the classroom defended at the impartial hearing was a 12:1 classroom at the recommended school (Tr. pp. 62, 63). Finally, I note that the special education teacher twice testified that the student would have been in her class had she enrolled in the recommended school in September 2009 (Tr. pp. 63, 96).

Next, I consider the question of whether suitable grouping for instructional purposes was available for the student in the 12:1 special class defended by the district at the impartial hearing. The district asserts on appeal that the class defended at the impartial hearing was appropriate for the student and that, among other things, the hearing record provides adequate information about the behavior, academic levels, and characteristics of the students in the defended class. The parents' November 2009 due process complaint notice contended that the class recommended in the district's July 2009 FNR "included too large a discrepancy between functional levels" (Dist. Ex. 1 at p. 1). The November 2009 due process complaint notice also alleged that both of the classes the student's mother visited in September 2009 included three girls and six boys; that the student's mother had "asked questions regarding the placement and levels of the students" in the two classes that she had visited; and that she was informed that the student may be placed with students with behavioral difficulties, which she believed was inappropriate for the student (see Dist. Ex. 1 at p. 1).

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 Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; 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). 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 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[h][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 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).

Upon careful review, I find that the hearing record shows that suitable grouping for instructional purposes was available for the student in the district's proposed 12:1 special class. The testimony with respect to the student's specific 12:1 class was provided by a certified special education teacher who would have instructed the student for three consecutive periods during the school day, the first two being ELA and the third being social studies (Tr. pp. 71-72, 86, 97). The special education teacher testified that on the first day of the 2009-10 school year, the class that the student would have attended consisted of eight students, four girls and four boys (Tr. pp. 65-67). The special education teacher reported that five students were classified as students with a learning disability, two students were classified as students with a speech and/or language impairment, and one student was classified as a student with an emotional disturbance (Tr. pp. 65-67). The special education teacher testified that the age range of the students in the class was between 12 and 13 years old and that it was a "class with slower learners" (Tr. pp. 63, 65). She also testified that as of the first day of the 2009-10 school year, the students' functioning levels for both reading and math ranged between third and fifth grade (Tr. p. 65). I note that upon her review of the student's IEP, the special education teacher indicated that the student appeared similar to the students in the class and testified that the student's needs could have been addressed (Tr. p. 75). She also testified that she had been with the students in the class for two years, indicated that the student would have fit in, and testified that she had reviewed the student's IEP with the class' special education math teacher (Tr. pp. 75-76, 82). The special education teacher also testified that none of the students in the class had any behavioral needs and that the student with an emotional disturbance did not have any behavioral issues (Tr. p. 82). She further indicated that the student's academic needs were similar to those of the students in the class (Tr. p. 90). With respect to the needs of the students in the proposed class, the special education teacher also testified that some of the student's in the class received related services (Tr. p. 69).

Regarding instruction, the special education teacher testified that the math and reading curricula were standards-based (Tr. pp. 67-68), that the student's math teacher was a certified special education teacher (Tr. p. 98), and that she individualized the curriculum for her students (Tr. p. 68). The special education teacher testified that the school day included eight periods plus time in homeroom at the beginning of the day as well as at the end of the day (Tr. pp. 72-73). She testified that the subjects for the 12:1 class were social studies, ELA, science, two periods of math, art, and gym (Tr. pp. 86, 88). The eight students stayed together as a class, but actual instruction was departmentalized whereby the students went to different classrooms for various subjects (Tr. pp. 70, 89, 97). The special education teacher also testified that "we do groups ... [w]e do an entire group, and then we break up into little groups" (Tr. p. 83). She testified that in her ELA class, she taught reading and writing as an entire group and then she broke the class up into small groups based on the areas in which students had difficulty and on their skill levels (Tr. pp. 83-85). She also testified that she provided her class with opportunities for her students to work together in a social environment (Tr. pp. 84-85). The special education teacher used multisensory as well as individualized instruction and made use of instructional books and materials geared to different levels (Tr. pp. 68, 73, 82, 88). She testified that the student's math class also utilized multisensory learning materials and other things appropriate for the student (see Tr. p. 74).

Based on the above, I find that the student would have been suitably grouped for instructional purposes in the 12:1 special class that the district defended at the impartial hearing.

Next, I consider the parents' assertions that the student requires another adult in the classroom to address her learning disabilities, attention, and anxiety and that the April 2009 CSE recommended a 12:1 placement because it was what was available and not what was appropriate. The impartial hearing officer found that the April 2009 CSE recommendation for a 12:1 special class "satisfies FAPE," that the student needed a small full-time special education class, and that a placement which would have included general education students or a placement in a general education class with SETSS for the student would have been inappropriate (IHO Decision at pp. 9-10). The district's regular education teacher at the April 2009 CSE meeting, who was also a special education teacher, testified that a 12:1 setting would be appropriate for the student because she needed a small class setting where she would have the opportunity to interact with the teacher and be provided with refocusing, "things broken down," repetition, clarification, and praise (Tr. p. 16). The district's regular education teacher also testified that during the April 2009 CSE meeting, she advised the student's mother that a 12:1 setting would provide the student with the "attention" and "academic help" that she needed (Tr. p. 29). She also testified that the district's school psychologist at the April 2009 CSE meeting advised the student's mother that the April 2009 CSE felt that the student needed a 12:1 placement (Tr. p. 31). She further testified that the results of the Mary McDowell report indicated that the student continued to need a small class program as her deficits in reading, math, and writing were continuing and that this was conveyed to the student's mother at the April 2009 CSE meeting (Tr. p. 35; see Dist. Ex. 7 at pp. 2-9). The district's regular education teacher at the April 2009 CSE meeting testified that the April 2009 CSE did not recommend a 12:1+1 program because it felt that one teacher in an appropriate sized classroom would be sufficient for the student and that a 12:1 program would be a "better fit" for the student than would a 12:1+1 class because some of the latter classes contained students with behavioral difficulties and the student had "some anxiety about her learning" (Tr. pp. 36-37). The April 2009 IEP identifies numerous classroom modifications and accommodations that would assist the student in the recommended 12:1 setting, including the use of multisensory instruction; teacher redirection and "frequent check-ins" with the teacher; the repetition of concrete directions/previously learned material/rephrasing of rules; outlines, story starters, and visual organizers for writing; visual and verbal cues; and the use of manipulatives, graphic organizers, and checklists (Dist. Ex. 2 at pp. 4, 5, 7). I also concur with the impartial hearing officer that neither the October 29, 2008 classroom observation report nor the Mary McDowell report "portray a student so impaired or delayed as to require a 6:1 setting" (see IHO Decision at pp. 9-10; see also Dist. Exs. 7 at pp. 1-22; 8). Based on the foregoing, I find that the April 2009 CSE's recommendation for a 12:1 special education class is an appropriate educational setting for the student.<sup>12</sup>

Moreover, the hearing record does not support a finding that the student's mother was denied an opportunity to participate in the decision-making process regarding the provision of a FAPE to the student. The parents assert in their cross-appeal that the April 2009 CSE incorrectly

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<sup>12</sup> I am not persuaded by the parents' contention that the April 2009 CSE should have considered a non-public school placement. As required, the April 2009 CSE recommended an appropriate placement from the State's continuum of alternative placements (see 8 NYCRR 200.6, 200.6[h]). Contrary to the parents' claim that it is obligated to do so, in such circumstances, the district is not required to consider placing the student in a private school (W.S. v. Rye City Sch. Dist., 454 F.Supp.2d 134, 148 [S.D.N.Y. 2006]; see also 8 NYCRR 200.6[j]).

advised the student's mother that a 12:1+1 setting was not an available setting and therefore precluded the student's mother from participating in the April 2009 CSE's recommendation. In general, the IDEA requires parental participation in determining the educational placement of a student (see 34 C.F.R. §§ 300.116, 300.327, 300.501[c]). Further, in developing an IEP, the IEP team must consider, among other things, the concerns of the parents for enhancing the education of their child (34 C.F.R. §§ 300.324[a][2]; 8 NYCRR 200.4[d][2]). Additionally, the CSE should have an "open mind" with respect to the content of the IEP (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). In this case, the student's mother participated in the April 2009 CSE meeting which determined the recommended placement for the student (Tr. pp. 13, 218-19; Dist. Ex. 2 at p. 2). I also note that the student's mother testified that she took that opportunity to state her objections to the recommended 12:1 classroom placement (see Tr. pp. 252-53).<sup>13</sup> Moreover, the hearing record shows that the April 2009 CSE considered at least two programs in addition to the recommended 12:1 program—a general education program with SETSS as well as an integrated co-teaching class program. The hearing record also reflects that, based on an assessment of the student's needs, the April 2009 CSE rejected both alternative programs (Tr. pp. 29, 31, 35, 36, 225-26, 253-54, 262; Dist. Exs. 2 at p. 16; 4 at p. 2). With respect to the possibility of the student's placement in an integrated co-teaching class program, I note that the student's mother testified that she played a significant role in the April 2009 CSE's decision not to recommend that placement (see Tr. pp. 225-26). Additionally, although there is a lack of clarity in the hearing record with respect to the specific discussion at the April 2009 CSE meeting with respect to the student's placement in a 12:1+1 class, as the student's mother's testimony regarding the integrated co-teaching class program alternative indicates, the hearing record shows that the April 2009 CSE considered placement related concerns of the parent (see Tr. pp. 225-26, 254; Dist. Exs. 2 at p. 16; 4 at p. 2). Further, I also find that the hearing record shows that the April 2009 CSE had the requisite open mind with respect to the 12:1 program recommended for the student. With respect to this, the hearing record establishes that the April 2009 CSE's recommended 12:1 placement was driven by its consideration of the student's individual needs (Tr. pp. 16, 29, 31, 35, 36-37, 39; Dist. Exs. 5; 6; 7 at pp. 2-9; Parent Ex. A).

Next, I consider the parents' contentions in their cross-appeal that the district failed to establish that the recommended school would be an appropriate setting for the student and that the impartial hearing officer's erred in concluding that the parents' objections to the size of the school, the effect of noise and confusion in the hallways, and the presence of security guards on the student's anxiety were "too speculative" (see IHO Decision at p. 10). I agree with the district that the impact on the student of the presence of security guards in the recommended school is an issue which is outside the scope of my review. The parents' November 2009 due process complaint notice did not raise any issue relating to the impact on the student of security guards being present in the recommended school and the hearing record does not show that the district consented to expand the scope of the impartial hearing to include this issue (see 20 U.S.C. § 1415[c][2]E)[i][II], [f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], [ii], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]).

As it relates to the impact on the student of the size of the recommended school and of any noise and confusion in the hallways of the recommended school, for the reasons discussed below,

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<sup>13</sup> The district's regular education teacher member of the April 2009 CSE meeting testified that "no one" disagreed with the recommended 12:1 program and also that the student's mother and one of the student's then teachers at Mary McDowell "absolutely" did not disagree with any part of the April 2009 IEP (Tr. pp. 26-27, 38).

I agree with the impartial hearing officer that the parents' concerns are speculative. I also find that those concerns are not supported by facts in the hearing record. I note further that the parents do not refer to any evidence in the hearing record which establishes that the size of the recommended school would prevent the student from being provided with a FAPE or that any noise and confusion in the hallways of the recommended school would do the same. With respect to this, I also note that one of the special education teachers who would have taught the student in the class defended by the district at the impartial hearing testified that the environment at the recommended school when classes "switch" was "quiet," that the halls were "very quiet," that "teachers stand in the halls," and that "it is usually very, very nice in the hallways" (Tr. pp. 89-90). The parents' cross-appeal also references impartial hearing testimony that during the student's mother's visit to the recommended school, she observed a student being escorted out by security and that testimony by the district's regular education teacher member at the April 2009 CSE meeting indicated that it would be inappropriate for the student to be with students who have such behavioral difficulties. However, there is nothing in the student's mother's testimony that suggests that the student would be unable to receive a FAPE in the environment that she observed during her visit (see Tr. pp. 238-39). Further, the testimony of the district's teacher, who was testifying with respect to what she saw as the most appropriate classroom environment, did not address the environment of the recommended school outside of the classroom and her testimony therefore did not indicate that the presence of students with behavioral difficulties in the recommended school would preclude the student from receiving a FAPE if she were receiving educational instruction at that school (see Tr. pp. 36, 37).

In conclusion, upon review and due consideration of the entire hearing record in this matter and for the reasons set forth above, I find that (1) the impartial hearing officer properly determined that the April 2009 IEP was not inadequate so as to deny the student a FAPE, (2) the district's recommended placement in a 12:1 special education program appropriately met the student's needs, (3) in the circumstances of this case, it was not improper for the district to defend at the impartial hearing a specific 12:1 special class that was different from the special class recommended in the district's July 2009 FNR, (4) the student would have been suitably grouped for instructional purposes in the 12:1 special class defended by the district at the impartial hearing, and (5) the parents' claim that the recommended school was not an appropriate setting for the student was in relevant part speculative and/or not supported by facts in the hearing record.

Having made these determinations, it is not necessary to reach the issue of whether Mary McDowell is an appropriate placement for the student for the 2009-10 school year and the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have also considered the parties' remaining contentions and find that I need not address them in light of my determinations.

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

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED**, that the impartial hearing officer's decision dated June 22, 2010 is annulled to the extent that it determined that the district failed to offer the student a free appropriate

public education and ordered the district to reimburse the parents for the costs of the student's tuition at Mary McDowell for the 2009-10 school year.

**Dated:**           **Albany, New York**  
                          **November 19, 2010**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**