



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-105

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

**Appearances:**

Law Offices of Lauren A. Baum, P.C., attorney for petitioners, Lauren A. Baum, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Neha Dewan, Esq., of counsel

### DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Mary McDowell Center for Learning (Mary McDowell) for the 2009-10 school year.<sup>1</sup> The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Mary McDowell in an ungraded classroom (Tr. pp. 290, 294-95, 455, 505, 520; Dist. Ex. 8 at p. 1). The student has attended Mary McDowell since the 2005-06 school year (see Tr. pp. 519-20; Dist. Exs. 5 at p. 1; 8 at p. 1). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz ][6]).

The student demonstrates difficulties with reading, writing, math, auditory processing, language processing, attention, visual-motor/perceptual skills, and sensory regulation (Parent Ex. G; Dist. Exs. 2; 4; 5; 6; 7). The student has received diagnoses of an attention deficit hyperactivity disorder, combined type and a learning disorder, not otherwise specified (Dist. Ex. 3 at p. 11).

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<sup>1</sup> Mary McDowell changed its name to the Mary McDowell Friends School after the commencement of the impartial hearing (Pet. ¶ 6 n.1).

When the student was two years old, he began receiving speech-language therapy to address his language delays (Tr. pp. 518-19). He attended a private school for preschool and kindergarten (Tr. pp. 518-20). The parents subsequently enrolled the student in Mary McDowell and he has continued to be enrolled at that school since that time.

On December 20, 2006, an occupational therapist conducted an evaluation of the student which included a parent interview, an observation, a sensory profile, and an administration of the Beery-Buktenica Developmental Test of Visual Motor Integration (Beery VMI) (Parent Ex. I). According to the occupational therapist, the student demonstrated inadequate visual discrimination skills and "had difficulty with remembering a 9 word sentence in prep[aration] for writing tasks" (id. at p. 1). The occupational therapist indicated that the student was a "proprioceptive seeker as he would enjoy crashing and jumping into the sensory equipment in the gym" (id. at p. 2). The occupational therapist further reported that the student was unable to discriminate between his left and right sides and that his motor coordination was decreased during painting and drawing tasks (id. at p. 3). Additionally, according to the occupational therapist's report, the student's printing skills were poor, including sizing and spacing of letters (id.). Results from the Beery VMI, a test that involves reproducing paper/pencil design below a model, indicated below age appropriate level skills (5-2 age equivalent) (id.). The occupational therapist opined that a student who experienced "difficulty with visual motor integration skills tend[ed] to have academic challenges in copying from the board, utilize reversal or leave out words or word endings when writing, and problems with math subjects" (id.). On the motor free test of visual perception subtest of the Beery VMI, the student's score fell at the 4-8 age equivalent (id.). The motor free visual perception subtest "involves concepts of form constancy, visual discrimination, figure ground discrimination, visual memory, whole-part relationships, position in space, and spatial relations" (id.). The occupational therapist opined that a student who experienced difficulty with visual perceptual skills tended to have academic challenges in reading, including difficulties with tracking (id.). The occupational therapist recommended occupational therapy (OT) three times per week individually for 30 minutes (id.).

On May 14, 2008, a speech-language pathologist conducted an evaluation of the student (Parent Ex. H at p. 1). According to the resultant evaluation report, the speech-language pathologist conducted an observation and administered the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) and the Test of Problem Solving-Elementary (TOPS) (id.). Results of standardized testing indicated age appropriate skills in the areas of following directions, auditory memory and recall, and processing for linguistic structures (id. at p. 2). With regard to the understanding spoken paragraphs subtest on the CELF-4, the student performed in the low average range; however, the speech-language pathologist noted that the student's "poor performance appear[ed] to be a result of poor focus" (id. at p. 3). Informal observation indicated that the student demonstrated weak expressive language skills for functional communication (id.). The speech-language pathologist indicated that the student "primarily spoke in simple sentence constructions" (id.). However, the student performed in the above average range on the word structure subtest of the CELF-4, which indicated that he had strong abilities regarding the use of word structure to extend word meaning, determining meanings for unfamiliar words, and increasing word specificity (id. at pp. 3-4). Informal observation indicated that the student's vocabulary skills "appeared slightly reduced" and standardized testing indicated that he exhibited difficulty with expressive language as well as mildly delayed language-based critical thinking skills (id. at pp. 4-5). The speech-language pathologist reported that overall, the results of the

evaluation indicated that the student had low average to average receptive and expressive language skills but had not yet generalized these skills to the classroom and social environments (id. at p. 6). The speech-language pathologist further reported that the student was making "noteworthy progress" (id. at p. 7). The speech-language pathologist recommended the continuation of speech-language therapy two times per week in a group of two for 30 minutes (id.).

The hearing record contains the results of a private psychoeducational evaluation of the student dated September 7, 2008, along with a summary of a follow up meeting between the private psychologist and the parents (see Dist. Ex. 3 at pp. 1, 2, 3-15).<sup>2,3</sup> According to the evaluation report, the private psychologist administered a battery of standardized tests including the Wechsler Intelligence Scale for Children – 4 (WISC-IV), selected subtests of the Wechsler Intelligence Scale for Children – Third Edition (WISC-3), the Boston Naming Test (BNT), the Test of Language Competence – Expanded Edition Level 2 (TLC), Beery-Buktenica Developmental Test of Visual-Motor Integration – Fifth Edition (VMI), Roy-Osterrieth Complex Figure Drawing (ROCF), California Verbal Learning Test – Children's Version (CVLT-C), Wide Range Assessment of Memory and Learning (WRAML), Comprehensive Test of Phonological Processing (CTOPP), Phonological Awareness Test – Second Edition, Gray Oral Reading Test – Third Edition (GORT-3), Human Figure Drawing (HFD), House-Tree Person (HTP), Sentence Completion, The Rorschach Inkblots, and the Thematic Apperception Test (TAT) (id. at pp. 13-15). Administration of the WISC-IV yielded a verbal comprehension standard score (percentile rank) of 95 (37), a perceptual reasoning standard score of 94 (34), a working memory standard score of 99 (47), and a processing speed standard score of 75 (5) (id. at p. 13). The private psychologist reported that during testing, the student had difficulty maintaining his attention even with frequent breaks (id. at p. 4). The private psychologist advised that because of the significant differences between the WISC-IV composite scores it was not possible to compute a valid full scale IQ for the student (id. at p. 5). The private psychologist also opined that the student's scores on the WISC-IV and on other tests given were an underestimate of his true intellectual potential because his performance was negatively affected by neuropsychological and psychological factors, chief among which was a "very significant attention deficit" (id.).

The private psychologist reported that the student's "lesser success with [WISC-IV] tasks that tapped into crystallized intelligence point[ed] to gaps in learning, and underachievement due to attentional inconsistency" (Dist. Ex. 3 at p. 5). The student demonstrated average ability in the area of verbal problem solving and "some weakness" in the area of auditory discrimination (id.). Additionally, according to the private psychologist, the student's visual discrimination ability was good but that his "visual ability unravel[ed], however, as the visual field increase[ed] in complexity or abstraction, and as a more fine-tuned focus and deeper concentration [wa]s required" (id. at p. 6). The private psychologist further reported that the student's "intellectual profile [wa]s at every

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<sup>2</sup> In response to a district social worker's notification that the student was due for his three-year reevaluation during the 2008-09 school year and the social worker's request for information with respect to whether the student had been tested by a private evaluator within the last three years (Dist. Ex. 1), the parents provided the district with a copy of the private psychoeducational evaluation report and related meeting summary to the district under cover of a letter dated October 6, 2008 (Dist. Ex. 3 at p. 1).

<sup>3</sup> The hearing record contains duplicative exhibits. For purposes of this decision, reference is made to the district's exhibits only. 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 (see 8 NYCRR 200.5[j][3][xii][c]).

turn impacted by significant attention deficit disorder, the classic elements of which include inattention, impulsivity, and overactivity" (id. at p. 8). The private psychologist opined that visual information, repetition, chunking of information, previewing, and providing the student with time "to digest" material would assist the student to process language more successfully (id. at p. 6). The private psychologist indicated that the student's attention related needs were also affected by "anxiety in the face of academic or school-related challenges" (id. at p. 4). She also advised that the student would benefit from, among other things, redirection; reassurance; more time to process incoming information, pull information from long term storage, and formulate his responses; being taught strategies to hold on to information; and to be taught to attend to and make use of organizational strategies (id. at pp. 4, 6, 7).

The private psychologist reported that in the area of reading the student was able to "produce all letter sounds, including consonants, consonant blends and consonant digraphs" (Dist. Ex. 3 at p. 8). She reported that the student had knowledge of long and short vowel sounds and was able to discriminate letter sounds, produce rhyme, and blend two and sometimes three sounds in sequence (id.). The private psychologist indicated that the student had benefited from the phonetic instruction that he received, that the student need[ed] an individualized reading program, and "at this point ... one that focuse[d] less on phonics and more on meaning" (id.). She also indicated that "[i]n general," testing results indicated that the student's reading and writing skills were at the first grade level (id. at p. 9). The private psychologist reported that while the student "demonstrate[d] knowledge of many of the skills that go into each of these complex cognitive processes, his ability to apply, integrate, and generalize them [was] limited" (id.). She also reported that testing indicated that the student's math skills were at a second grade level (id.). The student was able to complete addition and subtraction word problems but his calculation skills lacked in automaticity and he tended to make careless errors (id.). With regard to the student's fine motor abilities, the private psychologist indicated that the more the student was required to write the more difficult it became for him to maintain consistent letter size, spacing, and neatness (id.). Additionally, she reported that the student had good pencil grip and was able to steady the writing page with his other hand (id.).

The private psychologist reported that projective testing suggested that the student "can be overwhelmed and overloaded by too much incoming stimulation and information," and that he presented younger than his age (Dist. Ex. 3 at pp. 9-10). She further reported that the student valued peer interaction and shared active play and reported that he had participated in weekly "play therapy" sessions outside of school since fall 2007 (id. at pp. 3, 11). The private psychologist indicated that the student became overwhelmed by complexity and volume, and needed time to process information as well as repetition and support (id. at pp. 10-11). She advised that the student met the diagnostic criteria for both an attention deficit hyperactivity disorder, combined type and a learning disorder, not otherwise specified, and recommended the continuation of the student's special school placement and individualized therapies (id. at pp. 11-12). The private psychologist also recommended that the parents, in consultation with the student's therapist, pursue a medication consultation to address the student's attention (id.).

A district social worker completed a social history update dated September 23, 2008 with the assistance of the parents who provided information regarding the student's classroom experience, family status, and health status (Dist. Ex. 2 at pp. 1-4). According to the social history update, the student was enrolled in Mary McDowell, an ungraded school, and was in the fourth

grade, "by age" (id. at p. 2). The social history update indicated that the student's April 2008 individualized education program (IEP) indicated that the student was performing between a middle first and early second grade level in reading and at a late first grade level in math, "placing [the student] more than a year behind in reading and two behind in math" (id.). According to the parents, the student's strengths included being well liked, highly social, and "fairly" articulate (id.). According to the social history update, the student demonstrated difficulty in the areas of attention, focus, and distractibility (id.). Additionally, the student demonstrated difficulty with activities that were "language involved," especially multi-step problems; as well as with processing information, where he needed additional time to process and respond to questions (id.). The social history update indicated that the student "can be immature as evidenced by becoming easily frustrated when presented with a challenge and [that] he may sulk at school and at home may tantrum" (id. at pp. 2-3). The student also "seem[ed] to experience general anxiety in various situations which present[ed] as him being afraid" (id. at p. 3). According to the social history update, the student exhibited sensory issues, which were demonstrated when he soothed himself by chewing on his shirt or chewing on his bed sheet when at home in bed (id.).

The social history update stated that the student had "many friends and [wa]s adaptable in social situations" (Dist. Ex. 2 at p. 4). It indicated that the student demonstrated age appropriate skills in many activities of daily living but needed assistance in organization and other areas of executive functions including remembering things and keeping track of his belongings; that the student exhibited sensory concerns including sensitivity to wearing long pants, long sleeves, labels touching his skin, and certain fabrics; and that the student was artistic, sensitive, perceptive, and a natural performer (id.).

A district teacher observed the student at Mary McDowell in a class of 10 students and two teachers as part of the student's three-year reevaluation process and prepared an observation report dated December 12, 2008 (Dist Ex. 4). The observation report noted that a classroom amplification system was used throughout the lesson and that the students worked in pairs to write complete sentences (id.). According to the observation report, the student initially complained about his partner and had difficulty maintaining his attention (id.). When the student felt he was through with the task, he yelled out "done," and began to jump around the room (id.). The observation report further indicated that the student banged on his desk and required additional teacher prompts and assistance to complete the assignment (id.).

A 22-page Mary McDowell mid-year report with respect to the 2008-2009 school year included information about the student's performance in all of his classes and that, among other things, the student was enrolled in a self-contained class comprised of 12 students, a teacher, and an assistant teacher (Tr. p. 295; Dist. Ex. 5). The student received instruction at Mary McDowell in reading, math, science, social studies, art, music, theatre arts, and physical education (Dist. Ex. 5 at pp. 13-22). The student also received speech-language therapy twice per week in a group of two for 30 minutes and occupational therapy (OT) one time per week in a group of two for 30 minutes (id. at p. 2). According to the mid-year report, the student made progress but he demonstrated difficulty with transitions and with acceptance of the new routine and expectations at the beginning of the semester (id.). Additionally, at the beginning of the school year the student responded to class expectations with frustration and needed a movement break (id.). According to the mid-year report, the student's lack of attention and focus negatively affected his classroom performance and he benefited from repetition as well as verbal and visual prompts (id.). According

to the mid-year report, when the student became overwhelmed by academic tasks he would engage in a movement break (id.). The mid-year report indicated that the length of the student's assignments was modified to assist him in building stamina and confidence (id. at p. 3). As the school year progressed, the student adapted to the routine and developed positive relationships with teachers and peers (id. at p. 2).

The mid-year report also indicated that the student was in a reading group with four other students, which met four times per week for 60 minutes to strengthen decoding and encoding skills (Dist. Ex. 5 at p. 4). The reading section of the mid-year report indicated that the student made good progress in reading, attention, stamina, and confidence (id. at p. 5). In the area of writing, the student's sentence writing had increased in length and sophistication (id.). The student demonstrated greater confidence when reading aloud and was able to break apart each word into its specific sounds (id.). The student was also able to answer direct reading questions such as finding the main idea or recalling sequences and was developing his abilities in the area of inferential comprehension skills (id. at p. 6). The student made use of and/or benefited from teacher prompts and reminders, verbal and visual cues, and the repetitive nature of the program. He was reportedly at the early second grade level in reading (id. at pp. 5-6).

The mid-year report also indicated that the student was in a math group with five other students, which met four times per week for 30 minutes and one time per week for 45 minutes (Dist. Ex. 5 at p. 7). The mid-year report indicated that the student appreciated the consistent daily routine of the group, benefited from the repetitive and cyclical nature of the program, and demonstrated progress in math skills and participation (id.). As a result of repeated practice, the student was able "to read[] and identify numbers to 100, identify right and left, write addition and subtraction fact families, recognize sums of 10, add 10 to a multiple of 10, find missing numbers on a piece of the hundred number chart, identify tens and ones, add 10 to a two-digit number, order two-digit numbers," add three or more single-digit numbers, subtract 1, and add three two-digit numbers" (id. at p. 8). The mid-year report further indicated that the student made use of and/or benefited from the repetitive nature of the program, applying learned strategies, a "math shark," and a number line and that the student was at the mid-second grade level in math (id. at pp. 7-9).

According to the mid-year report, the student demonstrated an understanding of nouns and adjectives, distinguished between sentences and fragments, expanded sentences using certain conjunctions, and generated questions from various pictures, when these concepts were taught in isolation (Dist. Ex. 5 at p. 10). However, the student had difficulty distinguishing different sentence types and discriminating between parts of speech (id.). The mid-year report indicated that the student made use of and/or benefited from repeated practice, adjusting homework/classwork to his stamina levels, verbal and visual cues and reminders, placement of "margin lines" in writing areas, and prompting, and that the student had demonstrated "a significant amount of growth and development in his writing skills this semester" (id. at pp. 10-12).

The student's Mary McDowell speech-language pathologist prepared a speech-language progress report dated January 2009 (Dist. Ex. 7). The speech-language pathologist reported that the student received therapy two times per week in a group of two (id. at p. 1). According to the speech-language pathologist, due to processing weaknesses the student had difficulty with organization of incoming verbal information (id.). She noted that the student demonstrated receptive language deficits in the areas of comparative concepts, multi-step directions, and word

classes as well as "evident" auditory processing weaknesses in the areas of auditory memory, sequencing, integration of information, and listening in the presence of background noise (id.). The student also demonstrated expressive language weaknesses in the areas of word retrieval, sentence formulation, verbal organization, and descriptive language skills (id. at p. 2). With respect to the student's pragmatic language skills, the speech-language pathologist reported that the student's therapy sessions addressed topic maintenance and conversational turn-taking skills (id.). She reported that during therapy with the student she utilized and/or found effective, worksheets, picture stimuli, and interactive games; previewing; visual aides, including graphic organizers; multiple repetition for important concepts; memory aids; lists, charts, a whiteboard, and picture aids; extra time for processing; verbal prompts accompanied by visual cues (id. at pp. 1-2). She also reported that an "FM amplification system" utilized in the classroom and the speech-therapy room supported the student's ability to process verbal information in the presence of environmental stimuli (id. at p. 1). The speech-language pathologist recommended that the student's speech-language therapy be continued to address his receptive language, auditory processing and expressive language skills, with a focus on verbal organization and critical thinking skills (id. at p. 2).

The student's occupational therapist at Mary McDowell prepared an OT progress report dated January 2009 (see Dist. Ex. 6). Based on the results of standardized tests and clinical observations, the OT progress report contained information regarding the student's fine motor/graphomotor, visual perception, gross motor, sensory regulation, and activities of daily living (id. at pp. 1-3). The occupational therapist reported that in the area of manuscript skills, the student was working on a beginning level or at a level needing continued practice with supports, that his pencil grasp was efficient, and that the student did not exhibit hand fatigue (id. at p. 1). With respect to the student's visual perception, the occupational therapist reported that the student had "established" skills in the areas of figure ground discrimination and visual memory. However, the student demonstrated "moderate difficulty" in the areas of spatial relationships and visual discrimination; "severe difficulty" with form perception, visual sequential memory, and visual closure skills; and "mild difficulty" with copying skills (id. at pp. 1-2). The student demonstrated mild difficulty in all areas of gross motor skills/abilities including upper extremity strength, upper extremity endurance, core/trunk strength, core/trunk endurance, bilateral coordination, eye-hand coordination, balance, and motor planning (id. at p. 2). Regarding his sensory processing needs, the student demonstrated "mild difficulty" in the areas of sensory over-responsiveness and self-regulation and "moderate difficulty" with sensory seeking/craving (id.). The student attended OT one time per week in a group of two for 30 minutes. According to the occupational therapist, he worked well in the sensory room with his partner, required redirection at times to slow down when he wrote, and continued to make "solid gains in all areas" (id. at p. 3).

On January 11, 2009, the parents executed an enrollment contract and paid Mary McDowell a non-refundable deposit for the student to attend Mary McDowell for the 2009-10 school year (Tr. pp. 534, 538; see Parent Exs. L; O at p. 1).<sup>4</sup>

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<sup>4</sup> As provided for by the terms of the enrollment contract, the parents paid Mary McDowell the balance of the student's tuition for the 2009-10 school year by checks dated July 1 and November 8, 2009 (Parent Exs. L; O at pp. 2-5; see Parent Ex. K). The balance of the tuition paid by the parents also reflected a financial aid award (Tr. pp. 550-51).

On May 6, 2009, the district's Committee on Special Education (CSE) convened to review the student's three-year reevaluation and develop an IEP for the 2009-10 school year (Dist. Exs. 8 at pp. 1, 2; 9; Tr. pp. 54-57). Attendees included a district social worker; a district regular education teacher; a district school psychologist, who was also the district representative; the student's mother; an additional parent member; and the student's teacher at Mary McDowell, who participated by telephone for a portion of the meeting (Tr. pp. 57-59, 137, 521-22, 540; Dist. Exs. 8 at p. 2; 9).<sup>5</sup> The May 2009 CSE considered the December 2008 district classroom observation, the September 2008 social history update, the September 2008 private psychoeducational evaluation, the Mary McDowell mid-year report, the January 2009 Mary McDowell OT report and the January 2009 Mary McDowell speech-language therapy report (Tr. pp. 59-60, 523-24; Dist. Ex. 9). The May 2009 CSE determined that the student was eligible for special education programs and services as a student with a learning disability (see Dist. Ex. 8 at p. 1).

The May 2009 CSE discussed the student's needs and developed present levels of performance in the areas of academic performance, social/emotional performance, and health and physical development, which were based on information contained in the student's private evaluation and also provided by the student's special education teacher at Mary McDowell or from his parents (Tr. pp. 61-64, 65, 66-67, 68, 71-73, 75-76; Dist. Ex. 8 at pp. 3, 5-7; see Dist. Ex. 9; see also Dist. Ex. 3 at pp. 2-14).<sup>6</sup> The student's academic and social/emotional management needs, which were developed in conjunction with information from the student's teacher at Mary McDowell, included additional wait-time to process verbal/non-verbal information, multisensory instruction, repetition of previously presented information, repetition of concrete directions, graphic organizers when writing, movement breaks, outlines, diagrams, organizers, and teacher redirection (Tr. pp. 69-71, 73, 107, 108; Dist. Ex. 8 at pp. 4-6). The IEP resulting from the May 2009 CSE meeting contained eight annual goals which were in the areas of math, visual-motor/perceptual skills, reading, spelling, and reading (including decoding), social pragmatics, expressive/receptive language skills, and writing mechanics (Dist. Ex. 8 at pp. 8-9). The May 2009 IEP also included testing accommodations for the student, including extended time (1.5), a separate location, and questions and directions read and reread aloud (id. at p. 17).

The May 2009 CSE recommended that, for the 2009-10 school year, the student be placed in a 12:1+1 special class with related services of speech-language therapy two times per week in a group of two for 30 minutes and OT one time per week in a group of two for 30 minutes (Tr. pp. 72, 78, 91-92; Dist. Ex. 8 at p. 17). The May 2009 CSE also considered, but rejected, placing the student in both an integrated co-teaching program (ICT) and a special class in a community school

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<sup>5</sup> The student's mother testified that the May 2009 CSE meeting was approximately one hour in length, that one of the student's teacher at Mary McDowell participated by telephone for approximately one third of the meeting, and that the teacher listened and addressed the student's learning needs (Tr. p. 522, 524).

<sup>6</sup> The May 2009 IEP indicates that the student's reading and math standardized test scores and instructional levels are derived from tests given in July 2009 (Dist. Ex. 8 at p. 3). During the impartial hearing, the district clarified that this reflected clerical error and that the dates should have reflected testing given to the student in 2008 as part of his private evaluation (Tr. pp. 64-65; see Dist. Ex. 3 at pp. 3, 15).

(Tr. pp. 92-93; see Dist. Ex. 8 at p. 16).<sup>7</sup> The hearing record reflects that the district sent the May 2009 IEP to the parents in early July 2009 (Dist. Ex. 8 at p. 2; see also Tr. p. 524).

The district issued a Final Notice of Recommendation (FNR) to the parents dated July 17, 2009 (Dist. Ex. 10). Among other things, the July 2009 FNR indicated the student's classification and summarized the recommendations made by the May 2009 CSE. The FNR also notified the parents of the name of the assigned school and classroom (Tr. p. 528; Dist. Ex. 10).

In a letter to the district's CSE dated July 31, 2009, the parents acknowledged receiving the FNR and indicated that because the assigned school was not in session during the summer they were unable to visit it and advised the district that there were no "reviews" on the school's website (Parent Ex. F at p. 1; see Tr. p. 525). The parents requested information regarding the school's program so that they could "make a judgment as to its appropriateness" for the student (id.). The parents asked that the district respond to approximately 20 questions (id. at pp. 1-2). Among other things, the parents requested information about the number of grades in the school, the size of the school and the number of children in each class; where the students who attended the school resided; the related services the student would receive at the school; the number of teachers and adults assigned to the student's 12:1+1 classes; the special education experience and certifications of the student's teachers; the age range and functional levels in math and reading of the other students in the assigned class; the number of girls and the number of boys in the assigned school and in the student's classes; the disabilities and classifications of the other children in the student's classes; the range of written and verbal language abilities of the student's classmates; the length of time students continued in special education, whether they were eventually mainstreamed, and the schools the children attended when they left the recommended school; the methodologies used in math, reading, and writing; the number of children who were together for lunch and recess and the supervision during those activities; the behavioral needs of the students in the assigned class and whether any of the students had "intervention [p]lans" for their behavior; what happened when a student "misbehav[e]d" and what type of discipline techniques were used; and whether there were after-school activities available (id. at p. 2). The parents indicated that if they did not receive answers to their questions, they would visit the assigned program "in early September" and that they would let the district know of their decision "at that time" (id. at p. 3). The parents advised the district that "[i]n the interim," they would send the student to Mary McDowell and would "seek reimbursement for that placement" until they received the "necessary information so that [they could] assess the program and determine its appropriateness" (id.).

According to the student's mother, subsequent to the parents' July 31, 2009 letter, the parents received a "grid" which provided them with certain information relating to the possible student composition of the assigned class (Tr. pp. 525-26).

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<sup>7</sup> "Integrated co-teaching" is the "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

In a letter to the district dated September 9, 2009, the parents acknowledged receipt of the information provided to them and asserted that the district had not "fully answer[ed]" the questions in their July 2009 letter (Tr. p. 526; Parent Ex. E at p. 1). The parents indicated that school was not in session when they received the additional information from the district and that they were unable to visit the assigned school (Parent Ex. E at p. 1). The parents submitted a revised list of the questions to which they said the district had not fully responded (*id.*). The parents also indicated they would visit the assigned program and would advise the district of their decision with respect to the recommended placement at that time. The parents restated that "in the interim" they would send the student to Mary McDowell and would seek reimbursement for that placement until they received the information they sought and determined whether the district's recommended placement was appropriate (*id.*). The student's mother testified at the impartial hearing that the parents did not receive a response to their September 9, 2009 letter (Tr. p. 526).

The parents visited the assigned school and class on October 21, 2009 (Tr. p. 527; Parent Ex. E at p. 1). In a letter to the district dated October 21, 2009, the parents advised the CSE that based on their classroom observation, they did not believe that the recommended placement was appropriate for their son (Tr. p. 532; Parent Ex. D at p. 1). In particular, the parents set forth that the students in the proposed class ranged from eight to 11 years of age and also ranged in maturity levels and functional ability (Parent Ex. D at p. 1). The parents indicated that a teacher having to address "such a wide range of ages, maturity, and functional levels would not be able to provide [the student] with the level of individual attention that he require[d] in order to progress" (*id.*). The parents also indicated that they had been advised that there were students on the "borderline" of mental retardation and that placement of the student with such children would not offer an appropriate role model for the student and that the student would be part of a "peer group that is not composed of similarly functioning students" (*id.* at p. 2). The parents further indicated that the instruction provided in the assigned class and the materials on the bulletin boards required a level of reading ability and vocabulary that the student did not have and that as a result, he would be "distracted," "overwhelmed," and "frustrated" (*id.*). Additionally, the parents indicated that the classroom they observed was not equipped with a classroom FM unit which they believed the student required, and that a personal FM unit for the student would not be appropriate because of his "attentional challenges" (*id.*). The parents further indicated that certain "curriculum methodology" used in the classroom was not appropriate for the student because it was "very heavy in language demands" and/or "used for general education students" (*id.*). The parents indicated that the assigned school "mainstreamed" special education students for lunch and recess in groups of 200 students and that because of the student's sensory integration difficulties, these activities would negatively affect the student's ability to regain focus for academic pursuits at other times (*id.* at p. 3). The parents also stated that they "presumed" that the student would not have the benefit of an FM unit during these recess and lunch time (*id.*). The parents concluded that the assigned school could therefore not "suit" the student's learning needs and that they would continue to send the student to Mary McDowell and seek reimbursement for that placement (*id.*). The student's mother testified at the impartial hearing that the parents did not receive a response to their October 21, 2009 letter (Tr. p. 532).

By due process complaint notice dated February 18, 2010, the parents alleged that the May 2009 IEP was not reasonably calculated to provide meaningful educational benefit to the student, that the district failed to offer an appropriate educational program that would enable the student to make academic and social progress and avoid regression, and that the district failed to provide the

student with a free appropriate public education (FAPE) for the 2009-10 school year. (Parent Ex. A at pp. 2, 4). The parents contended that the May 2009 CSE was invalidly "constituted" and "failed to adequately consider current, sufficient and appropriate evaluatory and documentary material to justify its recommendations" (id. at p. 1). The parents also contended that the May 2009 IEP (1) did not appropriately reflect the student's present levels of performance and educational needs; (2) failed to adequately consider the student's language delays and anxiety; (3) failed to accurately reflect the "depth of [the student's] academic issues"; (4) contained annual goals that were too generic and lacked annual goals to appropriately address the student's attentional issues, auditory processing issues, organizational issues, self regulatory issues, sensory and multiple-processing issues, visual issues, or social issues; (5) failed to provide special education and related services tailored to the student's unique needs; and (6) contained inappropriate promotion criteria (id. at p. 2).

The parents also contended that the specific 12:1+1 special class to which the district assigned the student was not appropriate (Parent Ex. A at p. 2). Among other things, the parents asserted that (1) the academic level of instruction and instructional methodology used in the assigned classroom were not appropriate for the student; (2) the assigned class included children who were on the "borderline" of mental retardation and that the placement of the student with students with developmental disorders other than "standard learning or language disabilities" would not offer appropriate role models for the student; (3) the student's placement in a program of "only one teacher and a paraprofessional" was not appropriate for the student given his needs and the placement of the student in the recommended setting would not provide him with the level of individualized attention he required because the teacher would be required to address "the diverse group of students of various cognitive and functioning levels" in the class; (4) the student required at least two trained teachers in the class and a class of twelve or fewer "similar peers" in order to make "adequate" academic and social progress; (5) there was no FM unit in the assigned classroom and a personal FM unit for the student would not be appropriate as it would "severely distract him"; and (6) the assigned school's environment was too large to meet the student's needs as the student would have lunch and recess with 200 or more students "in a noisy unstructured setting" with inadequate supervision, which would be overwhelming for the student and would negatively affect the student's ability to function at other times during the school day (Parent Ex. A at pp. 3-4).

The parents also asserted that Mary McDowell offered a program that appropriately addressed the student's needs and which enabled him to make academic and social progress to avoid regression (Parent Ex. A at p. 4). The parents further alleged that they actively and cooperatively participated "throughout the CSE and placement process" and that they provided "timely and appropriate notice to the CSE" of the parents' rejection of the placement offered by the district (id.).

As a proposed resolution, the parents requested, among other relief, that the impartial hearing officer find that the district failed "to provide" the student with a FAPE for the 2009-10 school year; order reimbursement for the student's tuition at Mary McDowell, the provision of transportation, and related services; and that the district continue to fund the student's pendency placement (Parent Ex. A at pp. 4-5). The district responded to the parents' due process complaint notice by an answer dated March 8, 2010 (see Dist. Ex. 11).

The impartial hearing began on April 27, 2010 and concluded on August 3, 2010, after five days of proceedings (Tr. pp. 1, 143, 286, 392, 565, 599). In a decision dated October 6, 2010, the impartial hearing officer found that the district offered the student a FAPE for the 2009-10 school year and denied the parents' request for reimbursement of the student's tuition costs at Mary McDowell for that school year (IHO Decision at p. 41).

The impartial hearing officer concluded that the May 2009 CSE was not improperly composed on the basis that it did not have a proper regular education teacher member (see IHO Decision at pp. 33, 34-35; see also 20 U.S.C. § 1414[d][1][B][ii] [CSE includes not less than one regular education teacher "of the child," if the child is or may be, participating in the regular education environment]; 34 C.F.R. § 300.321[a][2] [same]; 8 NYCRR 200.3[a][1][ii] [same]). After initially determining that the issue of the composition of the May 2009 CSE was properly before her, the impartial hearing officer pointed out that the student "did not have a placement in a regular education class" at the time of the May 2009 CSE meeting; concluded that the student's educational disability "was of such a nature that he would not be considered for a general education curriculum;" and that while the May 2009 CSE considered the student's placement in an ICT class, none of the members of the May 2009 CSE, including the parent, objected when that placement was rejected (IHO Decision at pp. 33-35). The impartial hearing officer noted that the parents had not alleged more than "generalities" regarding how the regular education teacher's participation at the May 2009 CSE had limited the relevant discussion at the May 2009 CSE meeting (id. at p. 35). Additionally, the impartial hearing officer also noted that she was constrained from finding that a procedural violation rises to the denial of a FAPE unless the procedural inadequacy 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 (id. at p. 36; see also 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]). She further concluded that in this case the participation of the district's regular education teacher member of the May 2009 CSE meeting did not significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE or cause a deprivation of educational benefits (IHO Decision at p. 36).

The impartial hearing officer also considered whether the May 2009 IEP was inappropriate on the basis that: (1) the May 2009 CSE failed to read aloud in their entirety the reports it relied upon in developing the May 2009 IEP; (2) the special education teacher member of the May 2009 CSE could not remember receiving a copy of those reports; (3) the hearing record did not show whether the district's classroom observation of the student reflected typical classroom behavior; (4) the special education teacher member of the May 2009 CSE was present for only a portion of the May 2009 CSE meeting; (5) the May 2009 CSE did not review standardized test results with respect to OT and speech-language therapy; (6) the May 2009 CSE did not consider a program for the student more restrictive than a 12:1+1 special class placement; (7) the annual goals were not read either to the student's mother or to the special education teacher member of the May 2009 CSE before they were written and added to the May 2009 IEP; and (8) the parents were not given a copy of the minutes of the May 2009 CSE meeting (IHO Decision at p. 35).

The impartial hearing officer found that none of the issues above, "either individually or cumulatively, 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" (IHO Decision at pp. 35-36). Further, the impartial hearing officer concluded that the May 2009 IEP was developed with the full participation of the parents, and "particularly relied upon the information provided by the student's teacher" at Mary McDowell, who as the special education teacher member of the May 2009 CSE, was a full participant in the May 2009 CSE's discussion of the student's needs and that the contents of the student's detailed 2008 private evaluation was known to the May 2009 CSE members (*id.*). The impartial hearing officer also concluded that the May 2009 CSE appropriately relied upon the OT and speech-language therapy progress reports in light of the fact that the parents had not sought an increase in OT or speech-language therapy for the student and because the May 2009 CSE had not recommended any changes in those related services recommendations (*id.*). Further, the impartial hearing officer indicated that she was not persuaded that the parents were required to be present when the annual goals for the May 2009 IEP were actually drafted or that it was necessary for the May 2009 CSE to read aloud all of the documents that were discussed at that CSE meeting (*id.*).

Additionally, the impartial hearing officer concluded that the May 2009 CSE considered the student's needs (IHO Decision at p. 37). She found that the May 2009 CSE discussed the student's academic deficits and how his difficulties with attention, organization, stamina, frustration tolerance, stress, and anxiety affected his work production (*id.*). She also found that the student's teacher at Mary McDowell conveyed to the team information regarding the student's present levels of academic performance and that the annual goals were developed from the information provided by the student's teacher as well as from the reports and that the annual goals specifically addressed the student's academic, OT and speech-language needs (*id.*). The impartial hearing officer also pointed to strategies to address the student's management needs in the May 2009 IEP that she indicated would assist the student with his academic difficulties; his difficulties in processing; his frustration, tolerance, stress, and anxiety needs; and his organization needs (*id.*). The impartial hearing officer also concluded that the OT goals in the May 2009 IEP would help address the student's stamina, sensory needs, and organizational concerns and that the social/emotional management needs set forth in the May 2009 IEP would help the student focus (*id.*). The impartial hearing officer indicated that while the student's mid-year report from Mary McDowell indicated that the student's areas of struggle continued to include maintaining focus and attention, it also reported that his stamina and anxiety needs, attention deficits, and need for movement breaks had all diminished and that the student was better able to attend within the structure of the class, which included a mixture of a maximum student size of 12, 1:1 and small group instruction, and appropriate student groupings (*id.*). She also concluded that the May 2009 IEP's speech-language goals specifically addressed the student's expressive and receptive language skills (*id.* at p. 38). The impartial hearing officer further found that the annual goals in the May 2009 IEP were directly linked to the student's identified areas of need and contained sufficient specificity by which to guide instruction, intervention, and how to evaluate and measure the student's progress and that, additionally, the parents had not shown that the annual goals were inaccurate, in any way unrepresentative of where the student was functioning at the time of the May 2009 CSE meeting, or not properly reflective of the achievement levels anticipated over the course of the school year (*id.*). The impartial hearing officer further pointed out that the May 2009 IEP provided for "various management needs" to "guide instruction" and properly considered the

student's functional levels in determining the promotional standards that would be appropriate for him for the 2009-10 school year (id.).

With respect to the assigned class, the impartial hearing officer concluded that the classroom's special education teacher was appropriately qualified and that over the course of the school year would, including the student, only have had nine students and two adults (IHO Decision at p. 39). The impartial hearing officer indicated that the special education teacher used an appropriately graded curriculum, which was supplemented with "lower grade material" and which she "differentiated based on her student's levels and needs" (id.). With respect to the students in the assigned class, she indicated, among other things, that the hearing record showed that there were identifiable groups of students who were functioning in math and reading "well in line" with the student's levels in these subjects (id.). She further pointed out that she used small group, 1:1, and "paired instruction" in her classroom (id.).<sup>8</sup> The special education teacher acknowledged that the math curriculum, to which the parents objected, was "language based" (id.). However, she explained that it was a "spiraled" and differentiated curriculum (id.).<sup>9</sup> She also explained that this math curriculum was presented in the classroom using different components in order that students would receive instruction based on their abilities and that it was taught in small groups (id.). With respect to the testimony by the parents' witnesses that the math curriculum used in the assigned class was not appropriate for the student, the impartial hearing officer concluded that it should not be relied upon because it was "attenuated in time" (id.). With further respect to the teaching and instruction in the assigned class, the impartial hearing officer explained that the special education teacher "used a multisensory approach to teaching and differentiation where needed" and that she and the paraprofessional assigned to her class would assist the student with repetition (id. at pp. 39-40). The impartial hearing officer indicated that the hearing record reflected that the student exhibited needs in a number of areas including auditory processing and discrimination, attention, anxiety, and sensory processing and explained that the hearing record showed how the special education teacher would address her student's needs in each of these areas (id. at p. 40). She explained that the special education teacher believed that the student's goals were similar to those of the other students in her class and also that the class was not too high functioning for the student (id.). The impartial hearing officer also pointed out that the assigned school would also have been able to fulfill the related services recommendations on the student's May 2009 IEP and that the district would also have been able to provide the student with an FM device, which would have addressed his auditory needs (id.). With respect to the size of the assigned school as it related to the student's lunch and recess periods with a larger group of students, the impartial hearing officer pointed out that the student would have been supervised (id.). The impartial hearing officer also pointed to similarities in the strategies that would be used to assist the student in the assigned class with what was being provided for him at Mary McDowell (id.). She also pointed out that the hearing record showed that the student's needs relating to "anxiety, avoidance responses, frustration, apathy, and self-regulation" seemed to be present every year but that additionally, they appeared to become better as each of the years progressed, which reflected the student's increasing familiarity with classroom structure and routine (id.). Based on

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<sup>8</sup> The special education teacher explained that in "paired instruction," she paired a higher functioning student with a lower functioning student to assist each other (IHO Decision at p. 39).

<sup>9</sup> A spiraling curriculum is defined as one in which topics are addressed in more than one place and at more than one level, thereby facilitating student instruction and the learning of the curriculum (Tr. pp. 277-78).

these factors, the impartial hearing officer found that the recommended 12:1+1 placement and assigned classroom were appropriate for the student (id. at p. 41).

The parents appeal that part of the impartial hearing officer's decision which found that the district offered the student a FAPE.<sup>10</sup> The parents also assert that Mary McDowell was an appropriate placement for the student, and that equitable considerations support an award of tuition reimbursement.

With respect to whether the district offered the student a FAPE, the parents contend that the district did not provide the student with an appropriate IEP and placement recommendation tailored to the student's specific needs. In particular, the parents assert (1) that the May 2009 CSE was not properly composed because it lacked an appropriate regular education teacher, and that the special education teacher did not fully participate in the May 2009 CSE meeting; (2) that the hearing record does not show the amount of time the May 2009 CSE spent discussing each of the reports, or whether the student's teacher at Mary McDowell was asked if the results of the December 2008 classroom observation conducted by the district were indicative of the student's normal performance; (3) that the impartial hearing officer improperly found that the May 2009 CSE appropriately relied on current progress reports from Mary McDowell in its recommendations with respect to the level of OT and speech-language services in the May 2009 IEP; (4) that the impartial hearing officer improperly found that the parent was afforded a meaningful opportunity to participate in the May 2009 CSE meeting; (5) that the annual goals in the May 2009 IEP were inadequate in that they did not address the student's needs relating to attention, organizational skills, stamina, frustration tolerance, stress, anxiety, auditory processing and auditory discrimination; and (6) that the impartial hearing officer erred in finding that the academic management needs set forth in the May 2009 IEP adequately addressed some of the student's areas of needs which were not directly addressed through specific goals. Finally, the parents asserted that the impartial hearing officer improperly refused to admit the student's IEP from October 2008 into evidence, which during the impartial hearing they had contended was relevant to whether the subsequent, May 2009 IEP, was appropriate.

With respect to the student's recommended placement, the parents assert (1) that the impartial hearing officer erred in concluding that the 12:1+1 placement recommended for the student was appropriate; (2) that the range of the students' classifications, functional levels, and learning styles and abilities in the assigned class were not appropriate for the student, and that the hearing record was not clear as to how the student's needs would have been accommodated; (3) that the curriculum used in the assigned classroom was not appropriate for the student in light of his needs; (4) that the district did not show that the student's need for an FM unit would have been appropriately accommodated; and (5) that the assigned school was too large and that the student would have been assigned to lunch and recess periods in a group of 200 students.

The parents also contend that the student's unilateral placement at Mary McDowell provided him with an appropriate program and that the student made progress at that school during the 2009-10 school year. The parents also assert that equitable considerations supported an award

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<sup>10</sup> The parents have not appealed that part of the impartial hearing officer's decision regarding the student's pendency (stay-put) placement (IHO Decision at pp. 4-7).

of tuition reimbursement to the parents because, among other things, they cooperated throughout the CSE and IEP process for the 2009-10 school year.

In its answer to the parents' petition, the district requests that the impartial hearing officer's decision be upheld. The district contends that it offered the student a FAPE and denies that the student's October 2008 IEP should have been admitted into evidence at the impartial hearing. With respect to the parents' particular assertions, the district contends that the May 2009 CSE was properly composed because a regular education teacher was not a required CSE member. In the alternative, it asserts that the absence of any required regular education teacher CSE member was a "de minimus" procedural error and that the parents had not demonstrated how such an error impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. With respect to the parents' assertions that the hearing record lacks information with respect to the amount of time the May 2009 CSE spent reviewing the reports at the May 2009 CSE meeting and whether the district's December 2008 classroom observation reflected typical student behavior, the district asserts that the May 2009 CSE adequately considered the student's needs. The district further alleges that the May 2009 CSE's special education teacher member provided necessary information and that there was no basis to conclude that she was not a full participant at that meeting. Regarding the adequacy of the written information that the May 2009 CSE relied upon when making the OT and speech-language therapy recommendations for the May 2009 IEP, the district contends that its reevaluation was conducted in accordance with State regulations and that all specified considerations were taken into account. Additionally, the district disagrees with the parents' assertion that the impartial hearing officer improperly found that they were provided a meaningful opportunity to participate in the May 2009 CSE meeting, and contends that the parents had such an opportunity. The district further alleges that there is no basis to the parents' concerns regarding the adequacy of the annual goals in the May 2009 IEP.

With respect to the recommended placement, the district asserts that the recommended 12:1+1 placement was appropriate, that the special education teacher of the assigned class grouped the students based upon similar functioning levels and used appropriate instructional techniques, asserted reasons as to why the curricula used in the assigned classroom were not inappropriate for the student, and agreed with the impartial hearing officer that the testimony of the parents' witnesses regarding the curricula in the assigned class was "too remote" and not persuasive for other reasons. Regarding an FM unit, the district further contends that if a student required an FM unit, it would be provided and indicated that the hearing record did not show that the student would be distracted with the use of a personal FM unit. With respect to the size of the assigned school, the district asserts, among other things, that the student would be "closely supervised" when he was in groups of larger students for lunch and recess. In addition, the district contends that Mary McDowell was inappropriate because it did not have any mainstreaming opportunities and was therefore too restrictive, and because it did not provide the student with individual OT services. The district also alleges that equitable considerations do not support the parents' request for tuition reimbursement in that the parents never intended to place the student in public school, did not provide the district with notice of the student's reenrollment at Mary McDowell, and did not cooperate with the district.

In a reply to the district's answer, the parents assert that the district raised the issue of the lack of notice regarding the student's reenrollment at Mary McDowell for the first time on appeal;

that further, under the circumstances, the parents were not required to provide the district notice of the student's reenrollment at Mary McDowell; and, that in any event, the parents provided the required notice to the district.

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, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at \*2; E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419).

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

§§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). 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).

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]).

I will turn to the parents assertions that, among other things, the impartial hearing officer erred with regard to (1) the special education teacher's participation at the May 2009 CSE and her input regarding the December 2008 classroom observation; (2) the amount of discussion of the reports and evaluative data at the May 2009 CSE; and (3) the determination that the parent was afforded a meaningful opportunity to participate in the May 2009 CSE meeting. With respect to these contentions, it is well settled that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR

200.5[i][7][b]). A review of the parents' February 2010 due process complaint notice indicates that the issues identified above were not properly raised below (Parent Ex. A at pp. 1-5). While the hearing record contains some impartial hearing testimony relating to these issues, the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include any of these issues. Further, I note that at the outset of the impartial hearing, the attorney for the district set forth that the impartial hearing officer was "bound by the four corners" of the parents' due process complaint notice (Tr. p. 34). Additionally, the hearing record does not reflect that parents submitted or that the impartial hearing officer authorized an amendment of the parents' February 2010 due process complaint notice to include any of these issues. Therefore, these contentions, which are raised for the first time on appeal, are outside the scope of my review and therefore, I will not consider them (see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at \*6-\*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

With respect to the balance of the parents' contentions raised on appeal, after a careful and independent review of the hearing record, I am not persuaded by any of them that the district did not offer the student a FAPE for the 2009-10 school year. I therefore find no reason to modify the impartial hearing officer's conclusion that the district offered the student a FAPE for the 2009-10 school year. The impartial hearing officer appropriately recounted the positions of the parties and she set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2009-10 school year (see IHO Decision at pp. 7-31, 31-33). The decision shows that the impartial hearing officer carefully considered the testimonial and documentary evidence presented by both parties, and further, that she carefully marshaled and weighed the evidence in support of her conclusions. With respect to the composition of the May 2009 CSE meeting, regardless of whether the May 2009 CSE included the participation of a regular education teacher that was fully compliant with procedural requirements, I find that the impartial hearing officer correctly determined that the parents have not shown that such a procedural inadequacy (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]; see Winkelman, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at \*2; E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. at 419).<sup>11</sup> I also agree with the impartial hearing officer's conclusion that it was proper for the May 2009 CSE to rely upon the January 2009 Mary McDowell speech-language and OT mid-year progress reports as relevant evaluative data in determining the student's level of speech-language and OT services. A review of the progress reports reveals that they contained appropriate information regarding the student's relevant areas of need, and that the hearing record establishes that the May 2009 CSE had sufficient information to develop appropriate recommendations for the student's OT and speech-language needs (Dist.

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<sup>11</sup> Although the parents contended that the absence of a proper regular education teacher adversely affected the May 2009 CSE's ability to discuss the transition of the student into the district's assigned school, the hearing record shows that the district's recommended 12:1+1 program was appropriate for the student and there is no indication in the hearing record that it was likely that the student would exhibit significant difficulty transitioning into the recommended school or program.

Exs. 6 at pp. 1-3; 7 at pp. 1-2).<sup>12</sup> Further, I find that the student's annual goals demonstrated the requisite alignment with the student's needs and that the hearing record sufficiently supports a finding that the annual goals and management needs section of the May 2009 IEP appropriately addressed the student's deficits in the areas of attention, organization, stamina, frustration tolerance, and anxiety (see Dist. Ex. 8 at pp. 4-6, 8-9; see also Tr. pp. 135-36). In addition, the hearing record amply supports the impartial hearing officer's finding that the district's recommended 12:1+1 special class was an appropriate educational placement for the student as, among other things, that placement provided him with an appropriate structured, small classroom setting with 1:1 and small group, multisensory, and differentiated instruction that would provide him with appropriate access to the classroom curriculum, by a certified special education teacher who was assisted by a full time certified classroom paraprofessional. The hearing record also shows that suitable grouping for instructional purposes was available for the student in the proposed 12:1+1 special class.

Based upon my independent review of the entire hearing record, I further find that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the determination of the impartial hearing officer that the district offered the student a FAPE for the 2009-10 school year as requested by the parents on appeal (34 C.F.R. § 300.514[b][2][i], [ii]; Educ. Law § 4404[2]).

Having determined that the impartial hearing officer correctly concluded that district offered the student a FAPE, 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 considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
January 3, 2011**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**

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<sup>12</sup> On appeal, the parents do not challenge the level of speech-language therapy or OT recommended for the student.