



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-008

**Application of a STUDENT WITH A DISABILITY, by her 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 daughter's tuition costs at the Bay Ridge Preparatory School (Bay Ridge) for the 2009-10 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Bay Ridge, where she was unilaterally placed by her parents in September 2009 (Parent Ex. A at pp. 1-3). Bay Ridge has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

### **Background**

With regard to the student's educational history, the hearing record reflects that the student attended a nonpublic special education school (NPS) from fifth grade (2005-06) through eighth grade (2008-09) until "aging out" of the program, which did not offer classes to students beyond the eighth grade (Tr. pp. 326, 345; Parent Ex. C at p. 2).

On November 7, 2007, when the student was attending seventh grade at the NPS, a district school psychologist conducted a psychoeducational evaluation update of the student as part of her triennial reevaluation (Parent Ex. D). The evaluator noted that during testing the student demonstrated good motivation and responded appropriately to her success and failure throughout the testing process (id. at p. 1). However, at times during testing the student exhibited diminished attention and concentration and "displayed heightened levels of anxiety" (id.).

The evaluator administered numerous assessments measuring the student's cognition, visuo-spatial skills, executive functions, attention, academic skills, and social/emotional functioning (Parent Ex. D at pp. 1-9). Administration of the Stanford-Binet Fifth Edition (SB-V) yielded an abbreviated scale IQ (percentile rank) of 88 (21) which fell within the low average range (id. at p. 2). Administration of the Woodcock-Johnson III - Tests of Achievement (WJ-III ACH) yielded a broad reading standard score of 93 (31) which fell within the average range, including average performance on letter-word identification and reading fluency, but low average ability in passage comprehension (id.). She demonstrated average abilities in the areas of spelling and writing fluency (id.). With respect to math, the student's broad math standard score of 82 (12) fell within the low average range, including average performance in math fluency and low average performance in calculation and applied problems (id. at p. 3).

The Behavior Rating Inventory of Executive Functioning (BRIEF) results, which assessed her ability to demonstrate behavioral control/inhibition, shift attention, manage tasks, organize materials/belongings, and assess her own performance indicated that the student's global executive composite was within normal limits (Parent Ex. D at p. 3). The Rey Complex Figure Test (RCFT) results indicated that the student's visuo-spatial skills were at "expected levels" but the student's performance in the area of memory was below expected levels (id. at pp. 3-4). Regarding emotional adjustment, the student's results on the Conners' Parent Rating Scale fell within age level expectations (id. at p. 4). With regard to the Achenbach Child Behavior Checklist (CBCL) completed by the student's mother, the student demonstrated significant levels of anxiety and lack of attention (id.).

The evaluator included recommendations in the areas of attention, visual-spatial/visual memory, reading comprehension, math, and writing (Parent Ex. D at pp. 5-7). Recommendations included class seating within close proximity to the teacher, provision of instruction in planning/organization regarding long-term assignments, provision of verbal descriptions/outlines when using visual cues, and provision of taped books, peer readers, extended time, and modified instructional materials (id. at pp. 5-6). The evaluator also recommended the use of visual stimuli/flashcards and practical situations during math instruction and the use of a student daily journal to assist with writing (id. at pp. 6-7).

On February 26, 2008, the Committee on Special Education (CSE) convened to consider the student's triennial reevaluation and to develop her individualized education program (IEP) for the 2008-09 school year (Dist. Ex. 9). Meeting attendees included a school psychologist (who also acted as district representative), the student's mother, a social worker, a regular education teacher, and an additional parent member (id. at p. 2). The student's NPS teacher participated in the meeting by telephone (id.).

The February 2008 CSE discussed the student's needs and developed a statement of her present levels of performance in the areas of academic and functional performance, social/emotional performance, and health and physical development (Dist. Ex. 9 at pp. 3-6). The February 2008 CSE determined that the student was eligible for special education services as a student with a learning disability, and recommended a 12:1+1 special class in a community school (id. at p. 1). According to the resultant IEP, the student's academic and social/emotional management needs included visual aides/manipulatives, teacher prompts/redirection to increase attention, teacher check-ins for clarification of directions, graphic organizers/planners, and review and reinforcement of new/learned concepts (id. at pp. 4-5). Her academic and social/emotional management needs also included previewing assignments/scheduling, breaks from instruction, teacher instructions presented in a brief and gradual manner, and additional time to complete assignments (id. at p. 4). The February 2008 IEP contained seven annual goals and 63 corresponding short-term objectives in the areas of math, reading, and writing (id. at pp. 8-11). According to the February 2008 IEP, testing accommodations would provide the student with extended time (1.5), a "separate location (maximum eight students)," and directions read/reread aloud (id. at p. 15).

In June and October 2008, a private psychological evaluation was conducted of the student (Parent Ex. C). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded a full scale IQ of 88 (21), and standard scores of 95 (37) in verbal comprehension, 90 (25) in perceptual reasoning, 99 (47) in working memory, and 80 (9) in processing speed (id. at p. 4). The evaluating psychologist reported that the student's individual subtest scores ranged from well below average to average when compared to same-age peers (id. at p. 3). The student's verbal reasoning skills fell within the average range (id. at p. 4). Further, her responses to the verbally-based tasks reflected difficulty with verbal expression, language formulation, and articulation of ideas (id. at p. 5). The student's performance on the visual-perception subtests reflected significant variability in her skills (id. at p. 4). In addition, within the visual domain, the student demonstrated relative strengths in the areas of pattern analysis and understanding visual sequences/relationships (id. at p. 5). Regarding visual scanning and visual analysis, the student demonstrated significant weaknesses in understanding part-to-whole relationships (id.).

As part of the psychological assessment, the psychologist described the student's WJ-III ACH scores from a November 2007 psychoeducational evaluation conducted by the district (Parent Ex. C at p. 5). With respect to academic achievement, upon review of the November 2007 psychoeducational evaluation, the psychologist opined that the student's reading comprehension and applied math skills were of "greatest concern" (id.). The student "performed solidly" in the areas of decoding and fluency; however, her skills were approximately four years below grade level in the area of reading comprehension (id.). Her spelling and writing fluency fell within the expected range for her age (id.). However, the psychologist reported that the student's mother indicated that her daughter's writing deficits were more pronounced during less structured and more open-ended writing tasks (id.). With respect to math, the student exhibited uneven skills with slightly stronger ability in calculation compared to applied math (id.).

Administration of the Rorschach Inkblot Test, the Sentence Completion Test (SCT), and the Thematic Apperception Test (TAT) assessed the student's social/emotional functioning (Parent Ex. C at p. 3). The psychologist reported that compared to her previous assessment of the student, the student "present[ed] very differently" regarding her "self-concept and ability to manage her feelings in a positive way" (id. at p. 6). The student's responses to the projective tests reflected "an ability to recognize her own feeling states, an ability to take others' perspectives and understand others' feelings" (id.). The psychologist reported that the student continued to "express worries, particularly when faced with novel experiences" (id. at p. 7).

The psychologist recommended a self-contained special education school for the student in order to provide her with a challenging academic environment and appropriate support (Parent Ex. C at p. 8). Recommendations also included extended time on tests and participation in extracurricular activities, such as team sports, to develop her confidence and support her social development (id.).

In a fall 2008 first trimester report from the student's NPS, her teachers provided information regarding the student's academic curriculum and progress in academic achievement and social/emotional functioning (Dist. Ex. 2). The student's teachers described her classes and the student's progress in homeroom, literacy, math, history, science, current events, Spanish, art, media literacy, and physical education (id. at pp. 2-22). The report reflected that the student was a member of the soccer team and club and "proved to be a leader on and off the field" (id. at p. 2). Regarding the student's writing, the literacy teacher indicated that she "did a fine job" and "demonstrated good paragraph structure, including topic, supporting and concluding sentences" (id. at p. 6). The student read at grade level and earned a grade of 96 in reading (id.). According to her math teacher, the student's difficulty with memory and language negatively affected her progress (id. at p. 8). The math teacher reported that an important future goal for the student included becoming more independent (id. at p. 9). The student earned a grade of 99 in math and demonstrated early sixth grade math ability with supports and continuous review (id.). The history report reflected that the student was "an active class participant who frequently asked questions and shared her written responses with the class," that the student's class assignments reflected "a working knowledge of the government" and that she often produced "high quality" homework assignments (id. at p. 11). She earned a grade of 97 in history class (id.). Her science teacher reported that the student was "diligent and responsible" regarding her homework and was "a wonderful participant" during class and experiments (id. at p. 14). Her science teacher also reported that the student demonstrated difficulty with understanding abstract concepts, but sought assistance from the teacher as needed (id.). The student earned a grade of 94 in science class (id.). In current events, the report indicated that the student was hardworking and thoughtful, but demonstrated difficulty with understanding class discussions and news stories/topics (id. at p. 16). The student earned a grade of 95 in current events (id.). In Spanish, the report indicated that the student listened and spoke in Spanish, but sometimes lacked confidence in her skills (id. at p. 18). She earned a grade of 99 in Spanish (id.).

On November 13, 2008, the district regular education teacher conducted a 40-minute classroom observation of the student at the NPS during a writing class, which consisted of 11 students (Dist. Ex. 1). The district regular education teacher reported that the student asked

relevant questions regarding the assignment, that she was prepared for class including having her binder and daily planner, and that she related well with her classmates and teachers (id.). The district regular education teacher indicated that the student did not exhibit any maladaptive behaviors (id.).

A winter 2008-09 report from the NPS provided updated information regarding the student's academic and social/emotional progress (Dist. Ex. 3). The student's teachers reported that she was a "natural leader" on the basketball team and "carrie[d] herself with confidence" (id. at p. 1). The student's teachers described her as an active learner who consistently produced high quality class work and homework (id.). However, the report also indicated that the student "often assume[d] that she ha[d] the wrong answer" and needed to "trust her instincts and believe in herself as a thinker" (id.). In addition, the student's teachers reported that due to her cautious approach, the student was less likely to take risks, read with expression, and often would " censor her own best thoughts and ideas" (id. at pp. 2-3). With respect to math, the teachers reported that the student was reluctant to complete assignments and was often "paralyzed by new concepts" resulting in a lack of confidence and "a renewed sense of helplessness" (id. at p. 2). The report reflected that the student possessed the capability to succeed but needed prompting to complete assignments (id.). In art class, the student demonstrated difficulty with beginning an assignment due to her "belief that she [wa]s somehow 'not good enough' when, in fact with one on one attention and a clear plan she successfully complete[d] thoughtful and creative projects" (id.). The report reflected that the student would need to demonstrate increased independence related to completion of class assignments even though it may cause her anxiety (id.). The report indicated that the student demonstrated independent mastery in the area of organization (id.). In the areas of behavior and social interaction, the student demonstrated independent mastery regarding following classroom rules, fostering a learning environment, awareness of consequences, negotiating conflicts with peers and adults, reading/using appropriate body language, modulating her voice, maintaining appropriate eye contact, and conversational turn-taking (id.). The student demonstrated success in the areas of seeking assistance from the teacher, working independently, working in small groups, and reading/using appropriate facial expressions (id.). The student earned grades of 95 in literacy, 98 in math, 96 in science, 95 in history, 98 in current events, 97 in art, and passed physical education (id. at p. 3).

On February 9, 2009, the CSE convened for the student's annual review and to develop her IEP for the 2009-10 school year (Dist. Ex. 6). Meeting attendees included a school psychologist (who also acted as district representative), the student's mother, a district social worker, a district regular education teacher, and an additional parent member (id. at p. 2). Two of the student's teachers at the NPS participated at the meeting by telephone (id., Tr. p. 270). The February 2009 CSE considered the district's November 2008 classroom observation, the June/October 2008 private psychological evaluation, and the student's September 2008 - June 2009 first trimester report from the NPS (Tr. pp. 268-70, 279; Parent Ex. C; Dist. Exs. 1; 2; 7 at p. 1).

The February 2009 CSE discussed the student's needs and developed a statement of present levels of performance in the areas of academic and functional performance, social/emotional performance, and health and physical development (Dist. Ex. 6 at pp. 3-6). According to the resultant IEP, the student's academic management needs included graphic organizers, review and

repetition of new/learned concepts, class notes for math, and scaffolding/chunking of information as well as a multisensory approach to learning, repetition of concrete directions, and additional time to process verbal/non-verbal information (id. at pp. 3-4). The February 2009 IEP contained five annual goals in the areas of math, reading, and writing (id. at pp. 7-8). The February 2009 IEP also included testing accommodations which provided for extended time (2.0), separate location, directions read/reread aloud, and use of a calculator (id. at p. 14).

The February 2009 CSE determined that the student was eligible for special education services as a student with a learning disability, and recommended that the student be placed in a 15:1 special class in a community school (Dist. Ex. 6 at p. 1). The February 2009 CSE considered the student's placement in a general education setting or in an integrated co-teaching (ICT) class,<sup>1</sup> but determined that such placements would be insufficient to meet the student's educational and social needs (id. at p. 13). Minutes taken at the CSE meeting reflect that the student's mother was provided with a copy of a procedural safeguards notice, that the student's mother related concerns to the CSE regarding the student's educational needs, and that the CSE discussed those concerns and other matters (Tr. p. 306; Dist. Ex. 7).

The district issued a final notice of recommendation (FNR) to the parents dated May 28, 2009 (Dist. Ex. 8). The May 2009 FNR indicated the student's classification and summarized the placement recommendation made in the February 2009 IEP (id.). The notice also identified the name of the student's assigned school (id.).

In a letter to the CSE dated July 31, 2009, the parents described some initial difficulties they had in arranging a visit to the district's school, but noted that they had been able to tour the building with the assigned school's special education coordinator and watch some classes in session (Parent Ex. E at pp. 1-2). In the letter, the parents also noted that they did "not have sufficient information to determine whether this [wa]s an appropriate program" for the student and posed a number of questions to the district (id. at pp. 3-4). In a letter to the CSE dated August 24, 2009, the parents stated that they had not received a response to their letter dated July 31, 2009, that they remained willing to consider enrolling the student in the public school, and that "in the interim" they would place the student at Bay Ridge and would seek tuition reimbursement (Parent Ex. F).

In a letter to the district dated November 10, 2009, the parents thanked the district for sending "the demographic information for the special education class at [the assigned school]," and noted that the demographic information "confirmed some of our concerns" regarding the appropriateness of the assigned school (Parent Ex. H at p. 2; see Parent Ex. G). The parents expressed concerns with the age range and functional ability of the students in the assigned class and the effect that security measures at the assigned school would have upon the student (Parent

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<sup>1</sup> "Collaborative team teaching," also referred to in State regulation as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). An April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities" further describes integrated co-teaching services (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.html>).

Ex. H at p. 2). The parents reiterated many of the questions expressed in their July 29, 2010 letter to the district and restated their intention to place the student at Bay Ridge and seek tuition reimbursement (id. at pp. 2-3; see Parent Ex. E).

### **Due Process Complaint Notice**

In a due process complaint notice dated April 24, 2010, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) during the 2009-10 school year and requested reimbursement for the student's tuition at Bay Ridge, reimbursement for "support services/related services," and provision of transportation (Parent Ex. A). The parents argued that the IEP did not accurately reflect the student's present levels of performance and that the CSE lacked sufficient evaluative information to justify its recommendations and goals on the student's IEP (id. at p. 2). The parents asserted that the change from a 12:1 to a 15:1 class ratio was made solely because the student was transitioning to high school (id.). The parents also alleged that the CSE was improperly constituted because the two teachers who participated in the meeting did not attend for the entire meeting (id. at p. 1). The parents alleged that the goals on the IEP were inadequate in that they were too few, too general, and not measurable (id. at p. 2). Additionally, they contended that the goals did not address the student's specific difficulties with delays in receptive language, attention, auditory memory and recall, and self-expression linked to visual analysis of data (id.). The parents also asserted that the assigned school was too large, was unsafe, and that the age range and the range of functional abilities of the students in the assigned class were too large (id.). Lastly, the parents argued that the unilateral placement of the student at Bay Ridge was appropriate and that the equities favored reimbursement (id. at p. 3).

In a response dated April 27, 2010, the district identified the information upon which the CSE relied to develop the February 2009 IEP and asserted that it had offered the student a placement that was reasonably calculated to enable the student to obtain meaningful educational benefits (Parent Ex. B at p. 3).

### **Impartial Hearing Officer Decision**

An impartial hearing convened on June 17, 2010, and concluded on September 20, 2010, after a total of three days of testimony (Tr. pp. 1, 74, 148). During the impartial hearing, the district called two witnesses and entered eight documents into evidence (Tr. pp. 23, 250; Dist. Exs. 1-3, 6-10). The parents called two witnesses and entered 19 documents into evidence (Tr. pp. 153, 322; Parent Exs. A-S).

In a written decision dated December 3, 2010, the impartial hearing officer found that the district offered the student a FAPE during the 2009-10 school year and dismissed the parents' claims (IHO Decision at p. 8). In the decision, the impartial hearing officer described the relevant testimony and evidence entered by both parties (id. at pp. 2-7). The impartial hearing officer determined that there were no procedural violations that rose to the level of a denial of a FAPE (id. at p. 7). Substantively, the impartial hearing officer found that the district offered the student a FAPE because the program it offered "did not substantially differ from that being offered by Bay

Ridge" and that "at the very least . . . the DOE offered an education designed to permit the child to benefit educationally" (id., at p. 8).

### **Appeal for State-Level Review**

This appeal by the parents ensued. The parents argue that the impartial hearing officer erred in concluding that the district offered the student a FAPE during the 2009-10 school year for several reasons. First, the parents contend that the February 2009 CSE was inappropriately constituted because the team member who signed in as a regular education teacher was not teaching in any general education classroom at the time, and a general education setting was contemplated for the student.

Second, the parents contend that the February 2009 CSE failed to consider appropriate evaluative material and lacked information regarding the student's changing needs. According to the parents, the student's placement in a special class setting was modified without regard to her individual needs and the CSE failed to consider the information before it. As a result, the parents contend that the CSE's decision to change its recommendation from a 12:1+1 placement during the 2008-09 school year to a 15:1 placement during the 2009-10 school year was predetermined and made solely on the basis that the student was entering high school.

Third, the parents argue that the February 2009 CSE failed to develop an appropriate IEP for the student because the IEP goals were created after the CSE meeting by the school psychologist without input from the other CSE members; the goals and objectives on the IEP were too few, generic, and vague; the goals were not measurable; and that the CSE failed to include short-term objectives on the IEP. The parents also contend that the goals failed to address many of the student's identified needs, including her delayed receptive language, attention difficulties, difficulty with auditory memory and recall, deficits in processing speed, anxiety, self-confidence, and self-expression linked to visual analysis of data.

Fourth, the parents contend that the district's proposed school assignment for the student was inappropriate because the class contained students with a classification of emotional disturbance, the school was too large, and it had extensive security measures that would exacerbate the student's anxiety. The parents also contend that the class did not consist of an appropriate age group of similarly functioning peers and that the impartial hearing officer erred in relying on the district's evidence because the groupings described during the impartial hearing differed from those set forth in documents provided to the parents prior to the start of the school year and the parents relied upon that information in making the determination that the placement would have been inappropriate.

The parents also contend that the impartial hearing officer's decision was not rendered in accordance with State and Federal regulations because it does not adequately set forth the reasons and factual basis for the determination. Additionally, the parents assert that the impartial hearing officer erred by comparing the district's proposed school assignment to the parents' unilateral placement, which the parents argue is not the correct legal standard for determining whether the district offered a FAPE.

With regard to the student's unilateral placement for the 2009-010 school year, the parents argue that Bay Ridge was appropriate because it offered a special education program tailored to meet the student's individual needs, specifically because the Bridge Program<sup>2</sup> that the student attended at Bay Ridge offered standard high school mainstream instruction at a slower pace, with low student-teacher ratios in classes where the student would be grouped with peers that had similar classifications and disabilities as well as similar levels of functioning. Additionally, the parents assert that the student made progress at Bay Ridge in her core needs.

Lastly, regarding equitable considerations, the parents contend that they should be granted full tuition reimbursement because they cooperated with the district, were open to a public placement, and timely notified the CSE that they were unilaterally placing the student at Bay Ridge.

In its answer, the district argues that the impartial hearing officer's determination that it offered the student a FAPE during the 2009-10 school year should be affirmed. The district contends that the CSE was properly constituted because the member of the CSE identified as a regular education teacher was licensed both as a special education teacher and a regular education teacher, and was therefore qualified to be a member of the CSE in that capacity. The district also contends that the CSE considered appropriate evaluative material prior to developing the IEP because according to State regulations, during an annual review the CSE is not required to rely upon any particular new data or testing, and may rely on what the team as a whole considers necessary. The district further argues that the CSE developed an appropriate IEP for the student because the student did not require related services; the IEP identified the student's academic, functional, and developmental needs; and because the goals in the IEP were sufficient.

The district next argues that the assigned school was appropriate because measures were taken to ensure that the large school building was easily accessible and safe to all the students, the district's witnesses testified that the placement in the 15:1 class was appropriate for the student, and that in four of the student's classes there was an additional assigned paraprofessional to support the instruction based on the individual needs of the students in the class. Regarding the parents' argument that the age and functional range of the students in the assigned class were too great, the district contends that the class teachers took measures to individualize the instruction in each class and that, in any event, a wide range in age and functional levels does not automatically render a recommended placement inappropriate.

The district also argues that equitable considerations do not favor reimbursement because the parents never intended to place the student in public school and failed to give the district the requisite notice of unilateral placement, because they did not explicitly reject the proposed placement at the assigned school and did not express any specific concerns with the IEP.

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<sup>2</sup> The hearing record indicates that the Bridge Program provides students with learning disabilities an individually designed curriculum and small class instruction as well as an opportunity to pursue a Regents diploma (Tr. pp. 158-59).

Last, the district contends that the impartial hearing officer set forth the reasons and factual bases for her determinations with citations to the hearing record and otherwise complied with all requirements in State regulations for issuing a written decision.

### **Applicable Standards**

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

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

111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). 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]; Burlington, 471 U.S. at 369-70). 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]).

## Discussion

### Composition of the February 2009 CSE

I will first address the parents' contention that the CSE was inappropriately constituted because the team member who signed in as a regular education teacher was not teaching in any general education classroom at the time. Although the attendance of teachers at the February 2009 CSE meeting was one of the alleged problems identified in the parents' due process complaint notices (Parent Ex. A at p. 1), the impartial hearing officer failed to address this issue in her decision.

The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be attending a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]).

Here, the regular education teacher in attendance at the February 2009 CSE was certified in both special and general education (Tr. p. 251). In addition, the hearing record reflects that two of the student's teachers from the NPS participated in the meeting by telephone (Tr. pp. 270-71, 279). Thus, a regular education teacher participated in the February 2009 CSE meeting, albeit, one who was not then teaching in a general education classroom, though she had done so earlier in her career (Tr. pp. 250-55). Although the district did not establish that the regular education teacher was a teacher of the student (*id.*), the district recommended a special education environment and the parents argued from the outset that the student requires a "small structured special education environment" and neither party in this case argues that the district should have offered the student additional opportunities for mainstreaming or that she should have been placed in a general education setting for the 2009-10 school year (Parent Ex. A at p. 1; see Tr. pp. 213-19, 296, 335). Therefore, I find that while the regular education teacher at the February 2009 CSE meeting was not a teacher of the student, this defect did not result in a denial of a FAPE for the student (*W.T. v. Bd. of Educ.*, 716 F.Supp.2d 270, 287-88 [S.D.N.Y. 2010]; *M.N. v. New York City Dept. of Educ., Region 9 (Dist. 2)*, 700 F.Supp.2d 356, 365-366 [S.D.N.Y. 2010]; *Tarlowe*, 2008 WL 2736027, at \*5-\*6; see *Application of a Student with a Disability*, Appeal No. 10-076; *Application of the Dep't of Educ.*, Appeal No. 10-073).

### Evaluative Data and Present Levels of Performance

Turning next to the parents' assertion that the CSE failed to consider sufficient evaluative data to support their recommendations insofar as the CSE failed to conduct a new social history or consider the student's prior triennial reevaluation or previous social history, and that the IEP did not accurately reflect the student's levels of performance, I note that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2];

8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 C.F.R. § 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]).

As stated above, the hearing record shows that the February 2009 CSE considered the district's November 2008 classroom observation, the June/October 2008 private psychological evaluation, and the student's September 2008 - June 2009 first trimester report from the NPS (Tr. pp. 268-70, 279; Parent Ex. C; Dist. Exs. 1; 2; 7 at p. 1).<sup>3</sup> Additionally, the resultant February 2009 IEP included standardized cognitive test results and information from the NPS teachers regarding her academic achievement and social/emotional functioning (Tr. pp. 270, 279; Dist. Ex. 6 at pp. 3-6). The student's present levels of performance in the areas of academic and functional performance in the February 2009 IEP indicated that she demonstrated well-developed decoding skills and a "good memory for math facts" (Dist. Ex. 6 at p. 3).<sup>4</sup> The student's progress in math was negatively affected by her difficulties with memory, language, and problem-solving skills (id.). She demonstrated mid-sixth grade skills in the areas of reading comprehension, writing, and math problem solving (id.). In addition, she demonstrated sixth grade skills in math computation and eighth grade skills in decoding (id.). The February 2009 IEP indicated that the student's

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<sup>3</sup> Although Dist. Ex. 2 is titled "Middle School First Trimester Report September 2008 – June 2009" the sub-reports within it are titled and relate to "Fall 2008" (Dist. Ex. 2 at pp. 1, 2, 4, 7, 10, 12, 15, 17, 19, 22).

<sup>4</sup> Although the source of the notation is unclear, the IEP noted that the student was "confident in the face of academic challenges" (Dist. Ex. 6 at p. 4). The district regular education teacher testified that the student was not placed in a general education environment due to her difficulties with confidence and self-esteem as it related to her academic performance (Tr. p. 295). With the exception of the above statement, the present levels of performance accurately reflected the student's needs (Dist. Ex. 6 at pp. 3-6).

uneven cognitive skills negatively affected her academic achievement (id. at p. 4). According to the IEP, her "verbal abilities [we]re more age appropriate in comparison to her non-verbal abilities" (id.).

The social/emotional present levels of performance in the February 2009 IEP reflected the NPS teacher's description of the student as "dedicated and self-motivated" and a "model to the other students" (Dist. Ex. 6 at p. 5). The student demonstrated overall success in organization and work habits; however, she sometimes questioned her own responses that led to academic frustration (id.). The IEP reflected that "she engage[d] easily with her teachers and [wa]s described as having many friends" (id.). The IEP indicated that the student assisted her peers and was beginning to exhibit leadership skills (id.). Information from the 2008 private psychological evaluation provided by the parents for the CSE's consideration was included in the February 2009 IEP (compare Parent Ex. C, with Dist. Ex. 6). Specifically, the student's WISC-IV results were included in the IEP to provide information regarding the student's academic and functional performance (compare Parent Ex. C, with Dist. Ex. 6 at p. 4). The district regular education teacher stated that the CSE considered sufficient evaluative data to determine the student's educational needs for the 2009-10 school year (Tr. pp. 278-79). I find that the February 2009 CSE had sufficient evaluative data at the time it formulated the student's IEP, which accurately described the student's academic and social/emotional/behavioral needs. Furthermore, there is no evidence in the hearing record showing that the parents requested reevaluation of the student, and therefore, although it would be permissible to conduct a new social history as part of the student's annual review, the district was not required to do so in this instance (see 8 NYCRR 200.4[b][1], [4], [5]).

### **Annuals Goals and Short Term Objectives**

With regard to the parties' dispute over the adequacy of the annual goals and short-term objectives, 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]). In this case, the hearing record shows that five annual goals contained in the February 2009 IEP specifically targeted the student's needs as identified in the private psychological evaluation, classroom observation, and the NPS trimester report (Dist. Exs. 1; 2; Parent Ex. C). Additionally, none of the evidence in the hearing record suggests that the student was eligible to participate in the alternate assessment, and therefore, short-term objectives were not required on the IEP (see 8 NYCRR 200.4[d][2][iv]). Based on the information before the February 2009 CSE, the annual goals contained in the February 2009 IEP appropriately addressed the student's needs in the areas of reading, math, writing, and anxiety (Dist. Ex. 6 at pp. 7-8). The February 2009 IEP also offered annual goals designed to improve the student's abilities in math reasoning, math calculation, reading comprehension, vocabulary, and written expression (id.). The hearing record reflects that the student's anxiety and confidence needs

were related to her fear of academic failure; therefore success with her academic-based goals addressed her anxiety related needs (Parent Ex. C at p. 7; Dist. Exs. 3 at p. 2; 6 at p. 5). The student's annual goals and corresponding "progress report" contained in the February 2009 IEP, described skills that the student needed to demonstrate, and included assessment methods and schedules (Dist. Ex. 6 at pp. 7-11). For example, a reading comprehension annual goal specified that the student demonstrate critical analysis and comprehension skills at a seventh grade level as evaluated by classroom activities and teacher observation on a daily/weekly basis (Dist. Ex. 6 at pp. 7, 10). Each goal contained a specific evaluation criterion, evaluation procedure, and an evaluation schedule (*id.*; *see* 8 NYCRR 200.4[d][2][iii][b]).

The district regular education teacher participating in the February 2009 CSE testified that the IEP goals were developed based on information provided by the student's then-current teachers regarding the student's deficits (Tr. pp. 275-76). She also testified that the district school psychologist independently wrote the annual goals after the CSE meeting (Tr. pp. 288-89). Although the IEP annual goals were developed subsequent to the CSE meeting, testimony from the district regular education teacher indicated that the parents were provided opportunities to ask questions and present concerns during the February 2009 meeting (Tr. p. 279). She further testified that the IEP was mailed to the parents and that they did not respond with any concerns about the IEP annual goals or any other aspect of the IEP (Tr. p. 289). I find that the hearing record, viewed as a whole, shows that the parents had a meaningful opportunity to participate in the development of the student's IEP (*see E.G.*, 606 F. Supp. 2d at 388-89 [holding that the IDEA does not require districts to draft annual goals in the presence of parents]). In light of the above, although the IEP did not specify annual goals in the areas of language, attention, auditory memory, lack of confidence, and self-expression related to visual analysis of data, the student's IEP provided for multisensory instruction, additional time to process verbal and nonverbal information, and graphic organizers to assist the student with visual analysis of data and language (Tr. pp. 39-40, 49, 52-53, 63; Dist. Ex. 6 at pp. 3-4). In addition, to address the student's needs related to attention and auditory memory the IEP provided for class notes in math, as well as scaffolding and chunking of information (Dist. Ex. 6 at p. 3). The IEP also provided for review and repetition of newly learned concepts to address the student's lack of confidence (*id.*).

Upon review of the hearing record, I find that the February 2009 CSE addressed the student's needs through appropriate measurable annual goals and program accommodations listed on the February 2009 IEP.

### **Recommended Placement**

I now turn to the parents' claims that the February 2009 CSE's recommendation of a 15:1 special class placement was an inappropriate change from the student's prior 2008-09 IEP and was predetermined. I note that the issue of predetermination has been raised for the first time in this appeal. 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. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]), or the original complaint is amended prior to the impartial hearing per permission given by an 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. § 300.508[d][3][ii]; see M.P.G., 2010 WL 3398256, at \*8; see Snyder v. Montgomery County Pub. Schs., 2009 WL 3246579, at \*6 [D.Md. 2009]; Application of a Student with a Disability, Appeal No. 10-105; Application of the Bd. of Educ., Appeal No. 10-079; Application of a Student with a Disability, Appeal No. 10-056; Application of a Student with a Disability, Appeal No. 09-113; Application of the Dep't of Educ., Appeal No. 07-059; Application of the Dep't of Educ., Appeal No. 07-046; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-139). Here, although the parents' due process complaint notice may be reasonably read as setting forth a claim that the February 2009 CSE lacked an adequate basis upon which to recommend the 15:1 placement for the student or that the placement was not sufficiently tailored to the student's needs, it does not allege facts that would reasonably place the district on notice that the parents claimed that the district impermissibly determined that the student would be offered a 15:1 special class placement prior to the February 2009 CSE meeting (Parent Ex. A at pp. 1-2). Additionally, I am not persuaded by the language in the parents' due process complaint notice seeking to "reserve" a right to object to other aspects of the district's recommended program "as may be revealed during the course of the impartial hearing process" where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include the issue of predetermination or file an amended due process complaint notice (Parent Ex. A at p. 3). To hold otherwise would render the statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]). The issue of predetermination has been raised for the first time on appeal and, consequently, I decline to consider it.<sup>5</sup>

With regard to the parents' claim that the 15:1 placement recommended by the CSE was not appropriate, the February 2009 CSE recommended that the student attend a 15:1 special class in a community school for the 2009-10 school year (Dist. Ex. 6 at p. 1). Further, the February 2009 IEP contained program modifications and accommodations that included the use of graphic organizers, review and repetition of new/learned concepts, class notes for math, and scaffolding/chunking of information (*id.* at p. 3). Program modifications and accommodations also included a multisensory approach to learning, repetition of concrete directions, and additional time to process verbal/non-verbal information (*id.* at p. 4).

The hearing record reflects that none of the February 2009 CSE members expressed a need for related services on the student's IEP, that the student was not recommended to receive related services on her 2008-09 IEP, and that there is no evidence that the student required related services at the NPS during the 2008-09 school year (Tr. p. 276).

According to the principal of the assigned school, the 15:1 special class students were provided instruction by content area teachers certified in special education (Tr. p. 29). The principal testified that the teachers used criterion referenced assessments to evaluate a student's strengths and weaknesses (Tr. p. 34). The principal stated that the district implemented rubrics to

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<sup>5</sup> Even if I were to consider the parents' claim that the district predetermined the recommended placement, the hearing record supports the conclusion that members of the CSE demonstrated the requisite open mind and were willing to consider information provided by the parents in the development of the student's IEP (Tr. pp. 259, 263-64, 268, 270-80; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]).

assess student progress in the area of writing (Tr. p. 35). The principal of the assigned school described how the district used strategies in the 15:1 special class, including modeling, scaffolding, questioning, use of graphic organizers, multisensory instruction, visual cues, oral cues, charts, and guided practice to provide differentiated instruction to address variety academic levels (Tr. pp. 39-40, 49, 52, 63). In addition, with regard to language and attention, the district used strategies such as repetition, varying of activities, breaks, verbal approaches, and nonverbal approaches, depending on the needs of the students (Tr. p. 53). To address auditory memory and recall needs, the district provided students with tailored instruction regarding introduction of new material (Tr. p. 63). Based on the foregoing, I find that the 15:1 special class placement and program modifications and accommodations offered by the district were appropriate to address the student's needs as identified in the student's February 2009 IEP.

I also note that the director of the Bridge program at Bay Ridge stated that the February 2009 IEP accurately described the student's skills and the hearing record showed that the student demonstrated solid skills in all of her classes for both the fall and winter terms of 2008-09 school year (Tr. pp. 193-94; Dist. Exs. 2 at pp. 2-22; 3 at p. 1-3). Based upon a careful review of the evidence contained in the hearing record, I conclude that the February 2009 IEP proposed for the 2009-10 school year was reasonably calculated to enable the student to receive educational benefits in the LRE and that the student was offered a FAPE (see Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

### **Age Range and Functional Ability**

The parents contend that there was an unacceptably broad range of students in the assigned classroom. 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][ii], 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]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8

NYCRR 200.6[g][7]). However, State 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). Finally, State regulations provide that the age range of students in a special education class who are less than sixteen years old shall not exceed thirty-six months (8 NYCRR 200.6[h][f]).

The hearing record reflects that during the 2009-10 school year, when the student would have been in ninth grade, she would have been in a 15:1 special class with approximately nine students (Tr. p. 30). The principal of the assigned school testified that the students in the 15:1 special class all had educational classifications of learning disability, and that none of the students had behavioral intervention plans (Tr. p. 31). Moreover, the rubrics and writing assessment results discussed above were used by the district to target student needs and to place students in similar instructional groupings (Tr. p. 36). According to the principal, student instruction occurred in both homogenous and heterogeneous groupings based on the needs of the students and designed to address varying levels of functioning (Tr. pp. 36-37). In addition, the principal testified that the district's 15:1 special class provided daily 1:1 instruction, whole group instruction, and small group instruction (Tr. pp. 42-43, 47-48, 51).

The hearing record also includes an undated class profile of a district 15:1 special class for the 2009-10 school year, which was comprised of 10 students with educational classifications of learning disability, other health impairment, speech or language impairment, and emotional disturbance (Parent Ex. G). The age range (15 to 19) and grade range (9 to 12) of the students were listed in the proposed profile (*id.*). However, I note that the class profile included not only students who were listed as "attending" the recommended class, but also three students who were listed as "awaiting authorization," and who may not have attended the recommended class (*id.*). The only student on the profile listed as age 19 was also listed as "awaiting authorization," as such, including that student would increase, perhaps in error, the range of ages and functional levels as reflected by the class profile (*id.*). The principal testified that the age range in the proposed 15:1 class had changed to 14 to 18 (Tr. p. 97; Parent Ex. G). The principal of the assigned school also explained that the district is required to continue to modify class assignments in a proposed classroom after a class profile is created because as the school year begins and progresses, some students decide to attend school in the district, others do not, and still others must change classes as their needs change (Tr. pp. 97-98). I note that if a parent decides to place a student with a disability in the public school, a district is required to suitably group students for instructional purposes with other students having similar individual needs school (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]); however, the IDEA does not expressly require the district to provide parents with class profiles (Cerra, 427 F.3d at 194 [holding that a district did not fail to offer a student a FAPE where the hearing record described how grouping would be developed]).

With regard to academic achievement, the math and reading instructional grade level ranges listed in the class profile were 2.6 to 7.5 and 1.9 to 7.5 respectively (Parent Ex. G). However, the principal testified that the class profile was based on teacher estimates (Tr. pp. 112-13). Further, the principal testified during the impartial hearing that within the 15:1 special class, the students' math abilities ranged from fourth to ninth grade (Tr. p. 110). The principal further

testified that the student's reading level was similar to the students' reading levels in the ninth grade 15:1 special class (Tr. pp. 67-68). The student's reading and math levels were from a mid-sixth to an eighth grade level and a mid-fifth to a sixth grade level respectively (Dist. Ex. 6 at p. 3). The principal testified that the student's overall academic and functional levels were similar to the students in the ninth grade 15:1 special class (Tr. pp. 65, 68). According to the principal, she based her testimony on the data provided by "ERIS" an on-line informational system which contained the most updated information regarding students (Tr. pp. 103, 110-111).<sup>6</sup> Further, the hearing record demonstrates that the teacher of the district's recommended class differentiated instruction based on the varying needs of the students across the levels of functioning in the recommended classroom and divided the class into sub-groups with varying instruction categorized by functional levels (Tr. pp. 36-37, 39-40, 42-43, 47-49, 51).

Based on the evidence in the hearing record, including the principal's and the teacher's testimony, I am not persuaded that the student could not have been suitably grouped for instructional purposes within the recommended 15:1 special class (see M.P.G., 2010 WL 3398256, at \*10-\*11 [noting that student was not denied a FAPE when the hearing record showed that the student was suitably grouped for instructional purposes]; W.T., 716 F.Supp.2d at 290-292 [S.D.N.Y. 2010] [holding that a district did not fail to offer a FAPE where the age range within a student's proposed class exceeded 36 months because the student could have been functionally grouped with other similarly-aged students within the class who had sufficiently similar instructional needs and abilities in both reading and math]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

### **Proposed School Site**

Turning to the parents' allegations that the size of the school building would be inappropriate for the student because it would exacerbate the student's anxiety, I note that this issue is in part speculative insofar as the parents did not accept the recommendations of the CSE or the program offered by the district and, furthermore, I note that the hearing record, in its entirety, does not support the conclusion that, had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]). Additionally, the parents concerns are not adequately supported by the evidence in the hearing record. The hearing record reveals that the 15:1 special class in a community school recommended by the CSE shared a building with five other high schools, resulting in a total enrollment of approximately 2,600 students (Tr. p. 79). The six schools shared an entrance to the building, but had staggered start times (Tr. pp. 80-81). The students entered the building by passing through scanners/metal detectors while being monitored by school safety agents and school administrators (Tr. p. 80).

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<sup>6</sup> The acronym "ERIS" is not defined in the hearing record (see Tr. p. 103).

During hallway transition times, the students were monitored by five or six adults as well as teachers, who would stand outside their classes during transitions (Tr. pp. 83-84). The students attended lunch in the cafeteria with approximately 220 other students with five or six supervising adults (Tr. pp. 82-83). The parents do not cite any evidence in the hearing record which establishes that the size of the recommended school would prevent the student from being offered a FAPE. In view of the forgoing, I find the parents' concerns regarding the size and safety of the building, had the district been required to implement the student's IEP, are not supported by the preponderance of the evidence contained in the hearing record.

### **Adequacy of the Impartial Hearing Officer Decision**

The parents contend that the impartial hearing officer's decision was not rendered in accordance with State and federal regulations because it did not adequately set forth the reasons and factual basis for the determination. Additionally, the parents claim that the impartial hearing officer erred in the standard she applied by comparing the proposed placement with the parents' unilateral placement.

State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity (see Application of a Student with a Disability, Appeal No. 10-035; Application of a Student with a Disability, Appeal No. 10-007; Application of a Student with a Disability, Appeal No. 09-084; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-138; Application of a Student with a Disability, Appeal No. 08-043). Moreover, State regulations further require that an impartial hearing officer "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any impartial hearing officer decision (see Application of the Dep't of Educ., Appeal No. 09-092; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-064).

Here, the impartial hearing officer offered a summary of the testimonial and documentary evidence in the hearing record with appropriate and accurate citations (IHO Decision at pp. 2-6). The impartial hearing officer also briefly set forth applicable legal standards with citations to applicable statutes and case law (*id.* at pp. 7-8). Although the "the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent" (see M.H. v. New York City Dept. of Educ., 2011 WL 609880, at \*11 [S.D.N.Y. Feb. 16, 2011] quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at \*9 [S.D.N.Y. Mar. 12, 2002]), for the reasons described above, there is no need to disturb the impartial hearing officer's conclusion that the district offered the student a FAPE.

**Conclusion**

Having determined that the district offered the student a FAPE for the 2009-10 school year, it is not necessary to reach the issue of whether Bay Ridge was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that I need not reach them in light of my conclusions herein.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
March 7, 2011**

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