The University of the State of New York

The State Education Department
State Review Officer
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No. 10-002

Application of a STUDENT WITH A DISABILITY, by his parent, 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 Neal Howard Rosenberg, attorneys for petitioner, Neal H. Rosenberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, New York City Department of Education, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs at the Mary McDowell Center for Learning (Mary McDowell) for the 2008-09 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for that year. The appeal must be dismissed. The cross-appeal must be sustained.

The hearing record reveals that the student has been offered a diagnosis of an attention deficit hyperactivity disorder (ADHD) (Dist. Ex. 6 at p. 1). He has difficulty with attention, organization, decoding, encoding, inferential comprehension, and in generating ideas when writing (Dist. Ex. 2 at pp. 1, 3, 4). The student also exhibits deficits in his receptive, expressive, and pragmatic language skills (id. at pp. 3, 5). At the start of the 2008-09 school year, the student was attending Mary McDowell (Tr. p. 199; Parent Exs. C at p. 2; D). Mary McDowell has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with an other health impairment is not in dispute in this proceeding (Tr. p. 34; see 34 C.F.R § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

A psychoeducational evaluation dated January 11, 2007 was performed by the district psychologist at the request of the Committee on Special Education (CSE) (Dist. Ex. 7 at pp. 1, 4). Administration of the Wechsler Abbreviated Scale of Intelligence (WASI) resulted in a verbal intelligence quotient (IQ) score (functioning range) of 110 (high average), a performance IQ score of 92 (average), and a full scale IQ score of 101 (average) (id. at p. 2). Administration of the Woodcock Johnson III Tests of Achievement (WJ-III ACH) resulted in grade equivalent (age equivalent) scores of 4.2 (9-8) in broad reading, 4.2 (9-9) in broad math, 4.0 (9-6) in math calculation skills, 4.1 (9-5) in academic skills, 4.2 (9-7) in academic fluency, 4.2 (9-7) in letter-word identification, 4.1 (9-6) in reading fluency, 3.8 (9-3) in math fluency, 4.1 (8-11) in spelling, 4.6 (10-0) in writing fluency, 5.1 (10-3) in passage comprehension, and 4.4 (10-1) in applied problems (id. at p. 3). In assessing the student's social/emotional functioning, the psychologist reported that the student got along well with peers and school staff, was well behaved, was polite and cooperative, was friendly, engaged easily, and had good eye contact (id. at p. 2). The psychologist noted that there were no self-esteem or emotional concerns (id.).

A social history update dated January 11, 2007 was completed by the district social worker (Dist. Ex. 6 at p. 5).[1] The social worker reported that the student began to receive early intervention (EI) services at age two to address delayed speech and fine motor tasks (id. at p. 1). The social worker also reported that the student attended the same private nursery school for three years where he received special education itinerant teacher (SEIT) services, sensory integration therapy, individual speech-language therapy, and individual occupational therapy (OT) (id. at pp. 1-2, 5). Thereafter, the student began attending Mary McDowell as a kindergarten student and he has remained at the school since that time (id. at p. 2). At the time of the report, the student was in fifth grade and receiving speech-language therapy, OT, and counseling (id. at pp. 2, 5). The social worker reported that the student displayed mathematical skills close to grade level and delays in his reading comprehension skills (id.). He was also reported to become tired in the afternoon after his medication wore off, and he had difficulty focusing at home when working on homework assignments (id.). The social worker also reported that the student was being seen by a psychologist and a psychiatrist (id.). He was also being seen monthly for medication management related to his attention and concentration issues (id.).

An observation of the student in his Mary McDowell classroom was conducted by a district regular education teacher on November 30, 2007 (Dist. Ex. 5; see Dist. Ex. 2 at p. 2). The district teacher reported that although the classroom was wired for sound amplification, the student's teacher did not wear a microphone (Dist. Ex. 5). During the observation, the student reportedly required teacher prompting to refocus him (id.). He also required reminders to write his name and date on the top of a review packet and a reminder to put away the pencil he was playing with (id.).

A 2007 fall trimester report from Mary McDowell indicated that the student traveled with thirteen other sixth grade students to the following classes: science, social studies, current events, art, Spanish, computer, healthy choices, study hall, and gym (Dist. Ex. 8 at p. 2). The student was also reported to receive OT and speech-language therapy (id. at p. 2).

[1] The report indicates that the date of interview was January 11, 2007 (Dist. Ex. 6 at p. 1).

The 2007 fall trimester report reflected that the student attended a 5:1 literacy group, which met for four 75-minute sessions per week and one 45-minutes session per week (Dist. Ex. 8 at pp. 3, 5). The literacy group worked on decoding, word analysis, spelling, vocabulary, reading comprehension, following directions, fluency and writing skills, as well as prefixes, suffixes, and recognizing consonant blends at the beginning of words (id. at p. 5). According to the report, the "Scientific Spelling" program was used for encoding, spelling, and phonemic awareness (id.). Students were also responsible for answering questions on character, symbolism, mood and plot (id.). During the literacy group lessons, the student was required to read aloud, read silently, and read to reach individual goals (id. at pp. 5-6). The literacy group's writing instruction focused on writing techniques such as brainstorming, using webs, outlining notes, use of a storyboard or pictures in a comic strip, and editing (id. at pp. 6, 10). The group also focused on poetry forms such as cinquain, haiku, kiamonte, and "I Am" poems (id.). During the fall term, the student was reported to have difficulty focusing, processing large amounts of oral or written information, and finishing projects (id. at p. 10). He also reportedly struggled to incorporate the Scientific Spelling lessons into his overall decoding and encoding strategies (id.). The 2007 fall trimester report noted that the student missed three homework assignments, and received grades of "17.5/20," "9/10," and "5/5" in the literacy group (id. at p. 9). According to the literacy group teacher, the student was decoding at a fourth grade level and his comprehension was at a high third grade level (id. at p. 11).

The 2007 fall trimester report also indicated that the student participated in an 8:1 math group that met for five 40-minute sessions per week (Dist. Ex. 8 at pp. 2, 12). The group was working at an early fourth grade level and using a "Houghton Mifflin" textbook and teacher created worksheets (id. at p. 12). The students in the group worked with manipulatives, participated in small group problem solving activities, and received nightly homework assignments (id.). The group also learned about shapes, angle types and sizes, polygon names and properties, skip counting, multiplication, parallel and perpendicular lines, computing areas of various figures, place values, rounding, multi-digit addition and subtraction, and reading charts (id.). Although the student was reported to become distracted and needed reminders to focus, he received a grade of "A-" on two quizzes (id. at p. 15).

The 2007 fall trimester report also described the student's social studies class (Dist. Ex. 8 at pp. 16-18). According to the report, the social studies curriculum focused on ancient civilizations (id. at p. 16). The class utilized a "Harcourt Brace" textbook entitled Ancient Civilizations, took field trips to the Metropolitan Museum of Art and the Brooklyn Museum of Art, and learned new vocabulary words (id.). The student reportedly benefitted from teacher reminders and structured activities such as note taking to help him attend (id. at p. 18). The student missed one assignment, submitted three assignments late, received grades of "105/106" and "B+" on two quizzes (id.).

Additionally, the 2007 fall trimester report described the student's science class (Dist. Ex. 8 at pp. 19-21). According to the report, the science class utilized a "Globe Fearon" textbook entitled Concepts and Challenges: Earth Science (id. at p. 19). The classes "followed a regular pattern of guided textbook reading" followed by structured experiments or explorations (id.). The curriculum introduced common scientific practices such as observation, comparison, classification, measurement, and the use of maps (id.). The class was required to draw everyday objects; create categories of similar objects; use descriptive vocabulary; and record data using

metric rulers, graduated cylinders, and scales (id.). The report indicated that instruction in the earth science unit included its four main branches: geology, meteorology, oceanography, and astronomy (id.). The student's teacher reported that the student struggled with language and memory and demonstrated difficulty understanding complex scientific concepts (id. at p. 20). This difficulty affected the student's ability to keep up with the rest of the class (id.). The science teacher also reported that the student required verbal and written multi-step directions to be repeated or broken down into smaller component parts (id. at p. 21). He also required reminders and teacher prompts to stay focused and avoid social distractions (id.). The report indicated that with supports, the student received a grade 85 on a test (id. at p. 20).

The 2007 fall trimester report summarized the student's progress by noting that he demonstrated gradual improvement in his overall receptive and expressive skills; his ability to comprehend word relationships, associations, and analogies; the organization of his verbal narratives; his ability to follow complex direction; and his ability to interpret written directions (Dist. Ex. 8 at p. 22). However, the student was noted to have difficulty staying focused and engaged (id.). He was also noted to exhibit continued weakness in his ability to interpret figurative language (id.). The student's homeroom teacher reported that during unstructured times, such as homeroom time and study hall, the student often had difficulty managing and using the time productively (id. at p. 2).

On January 28, 2008, the student's father executed a Mary McDowell enrollment contract indicating that he agreed to pay all of the student's tuition fees and charges for the 2008-09 school year (Parent Ex. C at pp. 1-2).[2]

On February 7, 2008, the CSE convened to develop an individualized education program (IEP) for the student's 2008-09 school year (Dist. Ex. 2 at p. 1). Attendees included the parent, a district school psychologist, a regular education teacher, a district school social worker, the student's special education teachers from Mary McDowell, and an additional parent member (id. at p. 2). The parent, the special education teachers, and the additional parent member all participated by telephone (id.). The IEP indicated that the student demonstrated difficulty with inferential comprehension, generating ideas when writing, processing large amounts of oral/written information, staying focused and engaged, social pragmatics, seeking help from teachers, negotiating conflicts with peers, working independently, and incorporating spelling lessons into his decoding and encoding strategies (id. at pp. 3, 5). The CSE also noted several academic management needs including: preferential seating; an FM unit; a multisensory approach for reading; use of concrete examples when presenting new information; use of graphic organizers when writing; a list of sentence starters; writing oral directions on index cards; and frequent repetition, rephrasing, and redirection (id. at pp. 3-4). The CSE recommended that the student be classified as having an other health impairment and that he be placed in a 10-month 12:1+1 special class in a community school with one 30-minute session of 3:1 counseling per week, two 30-minute sessions of 3:1 speech-language therapy per week, and one 30-minute session of OT per week (id. at pp. 1, 18). The CSE developed annual goals and short-term objectives to address the

[2] A notarized affidavit signed by an accountant for Mary McDowell on November 20, 2008 indicated the dates and amount of tuition paid by the parents (Parent Ex. E). The affidavit indicated that the parents' initial payment had occurred on July 1, 2008 and the tuition for the entire 2008-09 school year was completely paid by November 18, 2008 (id.).

student's needs in: writing skills, pragmatics, auditory processing skills, attention, mathematics, reading comprehension, vocabulary, behavior and organizational skills (id. at pp. 7-11).

By Final Notice of Recommendation (FNR) dated July 29, 2008, the district notified the parent of the specific school location for the student for the 2008-09 school year (Dist. Ex. 3). The FNR also summarized the CSE's recommendations as indicated in the February 7, 2008 IEP (id.).

By letter dated August 20, 2008 to the district's CSE chairperson, with the subject line "Re: Transportation Request," the parent's attorney advised:

> Our office represents the following children, who will start the school year in the private schools listed below. The proposed placements were either inappropriate to meet their education needs, as the District's recommended classes failed to offer sufficient individualized attention or were not in the least restrictive environment, etc., or the parents did not receive the notice of placement until it was too late to visit the proposed class, and have not yet been provided with sufficient information to judge the appropriateness of the recommendation without visiting the proposed program. We will be filing requests for impartial hearings for each of these students in the fall, as necessary, seeking tuition reimbursement, transportation and related services. Where applicable, each I.E.P. will be challenged on substantive grounds; however, the parents are not waiving any procedural arguments they may have.

(Parent Ex. F at p. 1). The letter then contained a list of more than thirty students in the district who the attorney represented, along with the names of the private schools that each of those students would attend during the upcoming school year (id. at pp. 1-3). The list indicated that the student would start the school year at Mary McDowell (id. at p. 2).

By letter dated August 21, 2008, the district's office of pupil transportation advised the parent that, starting September 2, 2008, the district would transport the student to and from Mary McDowell (Parent Ex. I). The letter also advised the parent of the morning pick-up schedule and afternoon drop-off schedule that the district would utilize (id.).

A winter 2008-09 report from Mary McDowell indicated that the student's seventh grade class was comprised of thirteen students and two teachers (Parent Ex. G at p. 1). The student started his day by attending literacy and math classes taught by one teacher and containing only a small group of peers (id.).[3] The student's other classes were history, science, current events, Spanish, physical education, woodworking, media literacy, and health choices (id.). The student also received push-in and pull-out "language services" as needed (id.). The report noted that the student struggled with concept formation, reading comprehension, written expression, abstract concepts, peer social interactions, homework consistency, and completing his assignments (id. at pp. 1-2). The report also indicated that inconsistency with completion of homework and assignments affected the student's understanding of new concepts and limited his classroom participation (id. at p. 1). The student was also noted to have difficulty prioritizing tasks and

[3] The student's literacy class included instruction on using structured outlines when writing and how to create structured paragraphs using topic sentences, supporting details, and concluding sentences (Parent Ex. G at pp. 1-2).

managing his time efficiently (id.). The report indicated that the school began monitoring the student by checking in with him to ensure that he understood his assignments and completed what was expected of him (Parent Ex. G at p. 1; see Tr. p. 160). Although the student's social skills were reported to be improving, the report also noted that the student often presented as "aggressive and bossy," and needed to be reminded to talk to his classmates with respect (Parent Ex. G at p. 2).

A spring 2009 report from Mary McDowell reflected that the student's classes included American history, science, current events, Spanish, and computers (Parent Ex. H at p. 2). The report also noted that the student continued to participate in small groups for both reading and math (id.). The ten-page report contained narrative comments from each of the student's teachers and reported the numeric grade that the student had received for each class (id. at pp. 2-10). The student's homeroom teacher indicated that the student had been learning to avoid difficult social situations through the use of positive strategies such as seeking out a teacher or leaving an activity that was becoming contentious (id.). The homeroom teacher also reported that the student maintained an organized binder and that his homework record improved (id.).

The student's literacy teacher reported that the student's class read short stories; engaged in expository writing; and participated in comprehension, decoding, fluency, spelling, and vocabulary activities (Parent Ex. H at p. 4). The class also completed research papers on Charles Lindbergh (id.). The literacy teacher reported that comprehension and recall of text remained an area of challenge for the student (id.). The teacher also reported that on occasion, the student became short tempered with his peers (id.). His literacy grade was reported as "95" (id.).

The math teacher reported that the student's small math group met for 40 minutes each day and focused on story problems, fractions, and percentages (Parent Ex. H at p. 4). The group also reviewed previously learned material (id.). The math teacher reported that the student was provided fewer problems on his homework assignments and extra time on quizzes and tests, which resulted in improved performance (id. at p. 5). The student's math grade level was reported as "beginning 6th with support" and his grade was reported as "90" (id.).

The student's current events teacher reported that the student's class focused on two different units: (1) the Sudan and the plight of the Darfurian refugees and (2) the United States Constitution (Parent Ex. H at p. 5). The current events teacher reported that the student was an active participant in class discussions and had received a grade of "91" (id.).

The student's history teacher reported that the student's class focused on the American Revolution (Parent Ex. H at p. 5). According to the teacher, the student's assignments were not always completed thoroughly, his class participation was inconsistent, and in answering written questions, he was prone to write brief responses (id. at p. 6). The teacher noted that, with prompting, the student was able to be refocused back to the task at hand (id.). The student's history grade was reported as "93" (id.).

The student's media literacy teacher reported that the student's class produced filmed interview segments of the class interviewing students and adults (Parent Ex. H at p. 6). The class also learned about digital editing and about websites (id.). The teacher reported that the student was easily distracted, struggled to stay focused and productive, had difficulty collaborating with

peers, and often came to class late (id.). The student's grade in media literacy was reported as "89" (id.).

The student's science teacher indicated that the student's class was learning about the microscopic world and had performed a number of labs (Parent Ex. H at p. 7). The teacher reported that the student struggled with turning in his homework assignments and that this was affecting his ability to understand new topics covered in class (id.). The student received a grade of "81" in science (id.).

The student's Spanish teacher reported that the class had covered several units including: calendars, age, telling time, and schools (Parent Ex. H at p. 8). The class also read Where the Wild Things Are in Spanish (id.). The teacher reported that the student was not consistent in completing his homework, which affected his ability to integrate new material (id.). The teacher also reported that the student also failed to ask for help when he had difficulty (id.). The student's grade in Spanish was reported as "82" (id.).

The student's speech-language provider reported that the student received one 40-minute session per week in a group of two students along with push-in sessions during whole group academic classes (Parent Ex. H at p. 9). The students in the group worked on oral presentations, which included instruction in appropriate voice, rate, fluency, clarity, intonation, eye contact, and posture (id. at pp. 8-9). Goals focused on teaching the students to develop organized, sequential, and clear expressive language as well as on enhancing their pragmatic skills (id. at p. 9). Structured outlines, charts, webs, graphs, pictures and class discussion were employed in the class (id.). The speech-language provider reported that the student demonstrated difficulty with conversational turn taking and often became verbally hostile when he did not have control of a social situation (id.). He also needed reminders to adjust his language for different listeners or settings (id.).

An end of year testing report for the 2008-09 school year reflected that an administration of the Gates-MacGinitie Reading Tests-Fourth Edition resulted in grade equivalent scores (and percentiles) 6.6 (48) in vocabulary, 6.4 (46) in comprehension, and a total score of 6.4 (47) (Parent Ex. H at p. 11). Administration of the Iowa Tests of Basic Skills Mathematics resulted in a grade equivalent scores (and percentiles) of 4.7 (10) in concepts and estimation, 9.1(61)) in problem solving and data interpretation, and 6.3 (26) in computation (id.).

By letter dated May 13, 2009, the parent advised the CSE chairperson that she did not receive a placement notice from the CSE and had placed the student at Mary McDowell for the 2008-09 school year (Parent Ex. A). The parent then stated that she had recently learned from her attorney that the CSE had sent an FNR recommending a specific school, and that she had visited the recommended school to determine if the placement was appropriate (id.). She stated that she believed that the recommended placement was inappropriate because: (1) the school was too large and would exacerbate the student's distractibility and attention issues; (2) the student would not be appropriately grouped; (3) during the portions of the day when the student was mainstreamed he would not receive special education support; and (4) an FM unit would not be provided (id.).

By due process complaint notice dated May 26, 2009, the parents, through their attorneys, requested an impartial hearing (Dist. Ex. 1). The parents asserted that the district's February 7, 2008 IEP contained procedural and substantive errors and denied the student a free appropriate

public education (FAPE) (id.). The parents alleged that: the February 2008 CSE was invalidly composed, the IEP goals and objectives did not appropriately address the student's special education needs, the CSE failed to review the appropriate documents, the CSE failed to follow proper procedures in conducting the meeting, the parents did not receive a placement for the 2008-09 school year, the district's proposed program/placement inappropriately grouped the student with other students that have emotional and behavioral issues, the proposed placement was too large and distracting, and the proposed placement failed to provide an FM unit (id.). The parents requested tuition reimbursement, transportation, related services, and pendency (id.).

The impartial hearing began on September 17, 2009, and concluded on October 26, 2009 (Tr. pp. 1, 98, 254). On December 8, 2009, the impartial hearing officer rendered his decision (IHO Decision at p. 32). He determined that the additional parent member, a telephone participant at the February 7, 2008 CSE meeting, was "de facto absent" from the CSE meeting because there was no evidence in the record to indicate that the additional parent member had access to the same documents that were available to the other CSE participants (id. at pp. 23, 24, 25). He found that this "de facto" absence rendered the resulting IEP to be a nullity, and for this reason, he determined that the district had failed to offer the student a FAPE for the 2008-09 school year (id. at p. 25). The impartial hearing officer found that the student's private placement at Mary McDowell was appropriate to meet his needs (id. at p. 26). The impartial hearing officer found that at Mary McDowell, the student's work was individualized, his tasks were broken down into smaller units, he was provided with access to an FM unit, he had progressed in his ability to stay focused, his confidence level had improved, and he had progressed in reading and writing (id.). The impartial hearing officer also noted that at Mary McDowell, the student had passed all of his classes, had access to a social worker, and had received speech-language therapy from a certified speech-language pathologist (id.).

In addressing equitable considerations, the impartial hearing officer found that the parent had signed consent forms, attended the February 2008 CSE meeting, and cooperated in the development of the IEP (IHO Decision at p. 26). However, the impartial hearing officer denied the parents' request for tuition reimbursement because he found that the parent's August 20, 2008 letter was inadequate to function as a proper notice of unilateral placement under 20 U.S.C. § 1412(a)(10)(C)(iii)(I) (id. at p. 28). He determined that the April 20, 2008 letter failed to specifically state the parents' concerns with the student's IEP and with the district's recommendations (id.).[4] Regarding the parent's assertion that she did not receive the district's FNR dated July 29, 2008 (id.; see Tr. p. 204; Dist. Ex. 3), the impartial hearing officer found that the district's administrative clerk "credibly testified" that the FNR was addressed to the parent and not returned to the district (IHO Decision at p. 28). The impartial hearing officer further found that the district clerk's failure to follow the district's standard operating procedures manual was not dispositive on the issue of whether the district failed to send the FNR and it did not have any bearing on the issue of equitable considerations because the manual itself indicated that it did not create enforceable rights, remedies, entitlements, or obligations (id. at pp. 28-29). Having found that equitable considerations did not favor the parents, the impartial hearing officer denied the

[4] The impartial hearing officer also found that neither the due process complaint notice dated May 26, 2009 nor the parent's May 13, 2009 letter provided proper notice of the student's unilateral placement because neither document was provided ten business days before the student's removal (IHO Decision at p. 28).

parents' request for tuition reimbursement, transportation, and related services for the 2008-09 school year, but determined that the parents were entitled to pendency at Mary McDowell from the date of the due process complaint notice until the date of his decision (id. at p. 32).

The parent appeals and asserts that the impartial hearing officer erred in determining that equitable considerations did not support an award of tuition reimbursement.[5] The parent disagrees with the impartial hearing officer's finding that the parent's August 20, 2008 "transportation request" failed to provide proper notice of the parent's unilateral placement of the student at Mary McDowell. The parent contends that the August 20, 2008 letter provided proper notice because it advised the district: (1) of the reasons that the parent rejected the public placement, (2) that the parent would place the student at Mary McDowell, and (3) that the parent would file an impartial hearing request and would seek tuition reimbursement. The parent also asserts that there is nothing to prohibit a 20 U.S.C. § 1412(a)(10)(C)(iii)(I) notice of unilateral placement letter from containing multiple names of students. The parent further asserts that the district's August 21, 2008 letter, indicating that it would provide the student with transportation to Mary McDowell, revealed that the district had knowledge of the parent's discontent with the program and of her intention to seek reimbursement for tuition. The parent also contends that the district should have contacted her after receiving the August 20, 2008 transportation request in order to discuss her concerns about the student's program. Alternatively, the parent asserts that it was the district who failed to advise the parent about the amount of specificity required for a notice of unilateral placement. The parent also asserts that equitable considerations should not favor the district because the district failed to provide the parents with an FNR. Moreover, the parent contends that the presumption of mailing does not apply to establish that the district's FNR was delivered to the parent because the district failed to comply with standard office practices as set forth in the district's standard operating procedures manual. The parent asserts that the FNR was handwritten, it was not recorded in the computer system, and it left a blank space for the date in which the parent had to respond. According to the parent, the district should have attempted to contact her when it did not receive a response regarding the FNR from the parent. Finally, the parent asserts that the impartial hearing officer erred in completely denying tuition reimbursement rather than simply reducing the amount of tuition reimbursement.

In its answer, the district asserts that the impartial hearing officer correctly found that the equities favor the district because the parent failed to give the district adequate notice of her intention to re-enroll the student at Mary McDowell. The district asserts that the parent's attorneys' August 20, 2008 letter was entitled "Transportation Request," it listed the names of 32 students including the student, and it made only broad allegations regarding all 32 students. Moreover, the district asserts that the parent's testimony at the impartial hearing reveals that the letter was not a notice of the parent's concerns with the proposed IEP, but rather to request for bus service and to reserve her due process rights. The district further asserts that its August 21, 2008 letter agreeing to provide transportation to the student did not relieve the parent of her requirement to provide the district with a proper notice of unilateral placement. The district disputes the parent's assertion

[5] Although the parent agrees with the impartial hearing officer's determination that the additional parent member was "de facto absent" from the February 7, 2008 CSE meeting, the parent further asserts that neither the IEP nor the placement were calculated to allow the student to make meaningful progress (Pet. ¶ 14). I will not address these assertions because the parent indicates that she is not appealing the impartial hearing officer's decision under prongs one and two of the Burlington/Carter analysis (Pet. ¶ 6).

that the district failed to notify the parent about the amount of specificity required in providing notice of a unilateral placement and contends that not only was this issue not raised at the impartial hearing, but that the parent was reminded of her due process rights on January 11, 2007, and further that she was continuously represented by counsel. The district also asserts alternatively that, even if the transportation request is deemed to constitute proper notice, it was still untimely because it was not served ten days before the student's father executed the Mary McDowell enrollment contract on January 26, 2008. The district also contends that the parent never intended to place the student at a public school because the January 26, 2008 Mary McDowell contract was for the student's re-enrollment at Mary McDowell, and the student's father signed the contract prior to the CSE meeting.

The district also cross-appeals and asserts that the impartial hearing officer's pendency award was erroneous. The district contends that the parent's unilateral placement can constitute pendency only if it was agreed upon by the district, or if it was ordered by an administrative or judicial body. According to the district, the parties never had an agreed upon placement. The district asserts that the parent has disagreed with the district's recommended program and has sought tuition reimbursement every year since the student was in kindergarten. Moreover, the district asserts that it has entered into prior settlement agreements with the parent and the district has never been administratively or judicially ordered to provide tuition reimbursement for the parent's unilateral placement of the student at Mary McDowell. The district submitted with its cross-appeal a settlement agreement concerning the student's 2007-08 school year and argues that such agreement contains provisions that preclude a finding that Mary McDowell is the student's pendency placement. Lastly, on the issue of pendency, the district asserts that the parents only vaguely referenced pendency in their due process complaint notice and did not assert that they were entitled to pendency at the impartial hearing.

The district also cross-appeals the impartial hearing officer's determination that the district denied the student a FAPE because the additional parent member at the CSE participated only by telephone. The district asserts that the impartial hearing officer should not have considered this issue because: (1) it was not alleged in the due process complaint notice; (2) a CSE is only required to include an additional parent member for initial referrals of students; and (3) there is no evidence that the additional parent member had insufficient materials or documents to participate at the February 7, 2008 CSE meeting. The district alternatively asserts that even if the additional parent member issue had been properly raised by the parent and it was determined that the CSE was invalidly composed, the hearing record fails to indicate that this procedural error resulted in harm to the parent. Regarding the FNR, the district contends that the parent has not rebutted the presumption of mailing because she had failed to establish that the district's routine office practice was not followed or was so careless that it would be unreasonable to assume that the FNR was mailed. The district further asserts that its recommended program was appropriate because it provided: a class that functionally grouped the student, preferential seating, an FM unit, multisensory instruction, concrete examples, graphic organizers, sentence starters, repetition, rephrasing and redirection. The district also asserts that it was appropriate to mainstream the student in non-academic classes such as music, art, and gym. According to the district, the parent's placement was inappropriate and too restrictive because it failed to provide the student with OT, counseling, an opportunity to interact with mainstream peers, and with consistent access to an FM unit or a sound amplification system.

The parent answers the district's cross-appeal and asserts that the impartial hearing officer was entitled to grant pendency. According to the parent, the district's argument opposing pendency rests entirely on the district's newly submitted evidence and the parent objects to the submission of such evidence. The parent reasserts that the impartial hearing officer's determination regarding the additional parent member's inability to meaningfully participate in the CSE process was proper. The parent also reasserts that the district is not entitled to utilize the presumption of mailing to establish mailing and receipt of the FNR. In addressing the alleged inadequacies of the district's proposed placement, the parent asserts that: (1) the district's proposed placement was actually more restrictive than Mary McDowell because the 2008-09 12:1+1 class contained only six students whereas the Mary McDowell class contained thirteen students;[6] (2) the proposed placement's plan to assist the student in achieving his goals was vague; and (3) the district's plan to mainstream the student in music, art, and gym deviated from the recommended 12:1+1 class placement in the IEP. The parent also reasserts that the Mary McDowell program was appropriate because: (1) the class ratio did not deviate from the program recommended by the IEP; (2) Mary McDowell did not inappropriately mainstream the student in art, music, and gym; (3) the student had access to a social worker; and (4) the student received speech-language therapy from a certified speech-language pathologist. The parent also asserts that although Mary McDowell did not have an FM system, the student benefited from the facility's public sound amplification system that was the functional equivalent to an FM unit.

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.

[6] The parent references the testimony of the teacher in the district's proposed class where the teacher indicated that there were only six students in the 2008-09 12:1+1 class (Tr. p. 69).

of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at

370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

Returning to the instant case, I will first address whether the district is entitled to benefit from a presumption of mailing to establish that it mailed the FNR and that the FNR was received by the parent. New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]; see News Syndicate Co. v. Gatti Paper Stock Corp., 256 N.Y. 211, 214 [1931] [stating that the presumption is founded on the probability that the officers of the government will do their duty and the usual course of business]). As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing" (Nassau Ins. Co., 46 N.Y.2d at 829-30); In re Lumbermens Mutual Casualty Co. v. Collins, 135 A.D.2d 373, 374 [1st Dep't 1987]; Gardam & Son v. Batterson, 198 N.Y. 175, 178-79 [1910] [stating that "the rule upon the subject requires… in the absence of any evidence as to its being deposited with the post office authorities, that the proof shall establish the existence of a course of business, or of office practice, according to which it naturally would have been done"]; but see Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., 106 A.D.2d 725, 726 [3d Dep't 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]). In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (Nassau Ins. Co., 46 N.Y.2d at 829-30).

In the case at hand, the hearing record contains a photocopy of the July 31, 2008 FNR handwritten by the district's clerical associate (Tr. pp. 118, 129; Dist. Ex. 3). A review of the hearing record reveals that the parent's address as indicated on the FNR is the same as: (1) the address for the parent listed in the prior February 2008 IEP, (2) the district's August 21, 2008 letter to the parent, and (3) the parent's May 13, 2009 letter to the district (compare Dist. Ex. 3, with Dist. Ex. 2, and Parent Exs. A; I; see also Tr. pp. 114-15). The clerical associate who prepared the FNR testified that she is the employee who addresses the FNR, puts the stamp on the envelope, puts the FNR in the mailbox, and saves a copy of the FNR on the computer and in the case record (Tr. pp. 112-15, 117-18, 129-30). She testified that she was trained 22 years ago when she began working for the district (Tr. pp. 112, 126). She also testified that she had attended a workshop to

learn about the standard operating procedures manual (Tr. p. 126).[7] The clerical associate also testified that although she was familiar with the standard operating procedures manual, she did not have to refer to the manual when she prepared and sent out an FNR because the FNR was "self-explanatory" (Tr. p. 131; see Tr. p. 124). She further testified that, although most of the district's FNRs are generated by the district's computer system and appear typewritten, at the time this student's FNR was being prepared, she handwrote the FNR because his case information had not yet been transcribed over to the district's new computer system (Tr. pp. 118, 120). She testified that "quite a few" cases had to be handwritten in order to get correspondence out (Tr. p. 120). She also testified that if she had addressed the FNR incorrectly, it would have been returned (Tr. p. 116). She further testified that she had checked with another district clerical associate who handles returned mail and that associate indicated that the student's FNR had not been returned (id.). The hearing record also contains portions of the district's standard operating procedures manual (Parent Ex. J at pp. 9-12). These materials describe, among other things, what is included in an FNR and the procedures used for issuing an FNR after an annual review (id.).

The copy of the FNR in the hearing record, coupled with the clerical associate's testimony establish that the clerical associate prepared the FNR, the FNR had the parent's proper address, the FNR was mailed, and copies of the FNR were retained for record keeping purposes (Tr. pp. 112-115, 117-18, 129-30). The clerical associate's testimony also established that she had been trained in the district's standard office procedures at or about the time she started working with the district and again when the district issued its standard operating procedures manual (Tr. p. 126). I find that this evidence gives rise to a presumption of mailing and receipt (see Nassau Ins. Co., 46 N.Y.2d at 829).

I am not persuaded by the parent's contention that the presumption of mailing has been rebutted because the FNR was handwritten, or because the student's information was not yet entered into the district's computer system. These aspects of the FNR process have no bearing on whether this FNR was properly addressed or mailed. As the hearing record shows, the parent's testimony, the district clerical associate's testimony, and multiple other documents in the hearing record confirm that the address on the FNR was correct (compare Dist. Ex. 3, with Dist. Ex. 2, and Parent Exs. A; I; see also Tr. pp. 114-15, 118, 218). Moreover, the clerical associate testified that the FNR was mailed (Tr. pp. 112-18, 120). I am also not persuaded by the parent's assertion that the presumption of mailing has been rebutted because the FNR did not indicate a deadline for the parent's response, and because the district failed to call the parents to determine whether the parents agreed with the district's recommendations. Although these two aspects of the FNR process varied from the district's standard operating procedures manual, they also have no bearing on whether the FNR was properly addressed or physically mailed by the clerical associate (compare Dist. Ex. 3, with Dist. Ex. 2, and Parent Exs. A; I; see also Tr. pp. 114-18, 120, 218). I find that the clerical associate's handling of the FNR mailing procedure was not so careless that it would be unreasonable to assume that the FNR was mailed (Nassau Ins. Co., 46 N.Y.2d at 829-30). The

[7] The standard operating procedures manual was prepared in 2008 (Tr. p. 126).

parent's claims that she did not receive the FNR and her assertion that the district's routine office practice was not followed are insufficient to rebut the presumption of mailing (id.).[8]

I now turn to the district's assertion in its cross-appeal that the impartial hearing officer erred in determining that the district failed to offer a FAPE because the additional parent member was "de facto" absent from the February 7, 2008 CSE meeting.

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

In the instant case, the impartial hearing officer found no evidence to indicate that the additional parent member, a telephone participant at the February 7, 2008 CSE meeting, had access to the same documents available to the other CSE participants and therefore concluded that the additional parent member was "de facto absent" from the CSE meeting (IHO Decision at p. 25). State regulations authorize a parent and district representative of the CSE to agree to use alternative means of CSE meeting participation, such as videoconferences and conference calls (8 NYCRR 200.4[d][4][i][d]).[9] The parent, the additional parent member, and the student's special education teachers from Mary McDowell all participated at the February 2008 CSE meeting by telephone (Tr. pp. 21, 35-38, 52, 203, 216-17; Dist. Ex. 2 at p. 2). There is no indication in the hearing record that the parent objected to any CSE member's telephonic participation. Nor is there any evidence in the hearing record to substantiate the impartial hearing officer's finding that the additional parent member may not have had all the materials that were available to other CSE participants. Although

[8] The hearing record also contains testimony from the parent that the district notified her of the name of the district's contact person that the parents would receive a placement from (Tr. p. 204; see Tr. p. 132; Dist. Ex. 3). The hearing record also reveals that soon after the July 31, 2008 FNR, in August 2008, the district and the parent's attorneys were actively engaged in correspondence concerning the 2008-09 school year (Parent Exs F; I). Additionally, the hearing record indicates although the student never attended public school, he has been classified as a student in need of special education services since age two, and he had previously received offers of services from the district (Tr. p. 227; Dist. Ex. 6 at pp. 1-2).

[9] Such regulation, effective December 2005, does not incorporate the requirements for telephonic participation that were set forth in a June 1992 State Education Department field memo entitled, "The Use of Teleconferencing to Ensure Participation in Meetings to Develop the Individualized Education Program (I.E.P.)" which provided, among other things, that individuals who participate by telephone at CSE meetings must have access to the same material as other participants (see Application of the Dep't of Educ., Appeal No. 09-078; Application of a Child with a Disability, Appeal No. 05-129).

the parents' due process complaint notice alleged, among other things, that the CSE was invalidly composed and that the CSE failed to follow proper procedures in conducting the CSE meeting, the parents did not provide any specificity regarding such claims and there was no allegation by the parents that the additional parent member's participation by telephone was a procedural error that rose to the level of denying the student a FAPE (see Dist. Ex. 1). Moreover, the hearing record does not show that the additional parent member's telephone participation at the February 2008 CSE meeting was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]; Mills, 2005 WL 1618765, at *5; see also E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419). The school psychologist who participated at the February 2008 CSE meeting testified that the parent participated in the CSE meeting, the parent did not object to telephone participation by the student's special education teachers or the additional parent member, nor did the parent or the student's teachers express disagreement with any aspect of the IEP or request that it be changed (Tr. pp. 35-36). As the impartial hearing officer noted, the parents were familiar with the functioning of the CSE (IHO Decision at pp. 23-24). A review of the hearing record also demonstrates that the student has attended private school every year since kindergarten (Tr. p. 200; Dist. Ex. 6 at pp. 1-2). As indicated more fully below, the hearing record establishes that the recommended 12:1+1 special class placement, at the time of the CSE's recommendation, was reasonably calculated to confer educational benefits to the student. Based on the foregoing, I find that the hearing record does not support the impartial hearing officer's determination that the additional parent member's participation by telephone at the February 2008 CSE resulted in a denial of a FAPE (see Application of the Dep't of Educ., Appeal No. 09-078; Application of a Child with a Disability, Appeal No. 05-129).

I now turn to the district's assertion that it recommended an appropriate program.

The hearing record reflects that at the time of the meeting, the February 2008 CSE reviewed a January 2007 district psychoeducational evaluation report, a January 2007 social history update completed by a district social worker, a November 2007 report of an observation of the student in his Mary McDowell classroom completed by the district regular education teacher who participated in the CSE meeting, and a fall 2007 Mary McDowell progress report (Tr. p. 22; see Dist. Exs. 5-8). The student's academic performance and learning characteristics as reflected in the February 2008 IEP are consistent with the student's needs as identified in the aforementioned documents reviewed by the CSE and accurately reflect, among other things, the student's demonstrated difficulty staying focused and engaged, working independently, comprehending inferential information, generating ideas when writing, processing large amounts of oral/written information, incorporating spelling lessons into his decoding and encoding strategies, and his deficits in math specific to more advanced number concepts and problem solving skills (Dist. Ex. 2 at p. 3; see Tr. p. 43; Dist. Exs. 5; 6 at p. 2; 7 at p. 3; see, e.g., Dist. Ex. 8 at pp. 2-3, 10, 13-15, 17-22). The February 2008 IEP also accurately reflected the student's social/emotional needs, specifically his difficulties in social pragmatics, seeking help from teachers, and negotiating conflicts with peers (Dist. Ex. 2 at p. 5; see Tr. pp. 45-47; Dist. Ex. 8 at pp. 2-5, 20-21).

The CSE recommended a 10-month 12:1+1 special class in a community school with related services of counseling, speech-language therapy, and OT for the student; an FM unit; a variety of modifications including the use of a multisensory approach for reading; graphic

organizers; "sentence starters;" preferential seating; and frequent repetition, rephrasing and redirection (Dist. Ex. 2 at pp. 1, 3-4, 18). The CSE developed 12 annual goals with 42 corresponding objectives to address the student's needs in attention, auditory processing, pragmatics, organizational skills, writing, mathematics, reading comprehension, vocabulary, and behavior (id. at pp. 7-11). The district school psychologist provided extensive testimony regarding the program recommendations made by the CSE and the annual goals and corresponding short-term objectives developed to address the student's identified deficits, which demonstrated the CSE's consideration of the information provided by the CSE members and the documentation the CSE had before it (Tr. pp. 24-34).

The district's special education teacher who taught "social studies and English" to the students in the recommended 12:1+1 class testified that for the 2008-09 school year, the class was comprised of six students between the ages of 12 and 13 and in the seventh grade, of whom four were classified as students with a learning disability and two as students with an emotional disturbance (Tr. pp. 69-70).[10] The special education teacher further testified that his classroom curriculum was in compliance with State standards and individualized (Tr. pp. 70-71). He indicated that he utilized a multisensory approach and conducted his own assessments of the students including performance assessments, oral assessments, checklists, and observations (Tr. p. 71). He also testified that the students in the class were "mainstreamed for health, phys[ical] ed[ucation], lunch, [and] art" and that they "transfer[ed] from class to class" throughout the school day (Tr. pp. 81, 85). He also indicated that a paraprofessional with over 15 years of experience accompanied the students from the recommended 12:1+1 class to the mainstream classes and lunch to ensure that "everything was organized" and structured for the students (Tr. pp. 86-87). According to the special education teacher, there are approximately 20 to 25 students in the health, physical education, and art classes (Tr. pp. 86-88).

The special education teacher indicated that typically when the students arrived in his class there was an "aim and do" on the board (Tr. p. 74). The aim and do identified what the students would be learning in that day's lessons and challenged them to "infer" the interactive activities they would participate in based on the lesson (id.). He stated that if any student in the class required additional help, he provided it (id.). The special education teacher opined that based on his review of the student's February 2008 IEP, the student would have "fit" in the recommended 12:1+1 class during the 2008-09 school year because he exhibited the same characteristics as the other students in the class and his needs could have been addressed (Tr. pp. 74-75, 81). According to the special education teacher, the students' instructional levels in reading and math during the 2008-09 school year ranged between the fourth and the fifth grade (Tr. p. 70). The special education teacher testified that he and the special education teacher who taught the students in math collaborated on a daily basis and "wr[o]te the IEPs" jointly (Tr. p. 93). The special education teacher also testified how he would have addressed the student's weakness in spelling, lack of focus, and difficulties with multi-step directions and that he would have been able to provide the student with the modifications identified on the February 2008 IEP (Tr. pp. 76-80). He further testified that an FM system was available in his class and other classrooms if a student had required one, and that he has utilized an FM system in the past (Tr. pp. 85-86). He also testified that counseling, speech-

[10] The particular district school recommended for the student has a population of approximately 700 students in grades six through twelve (Tr. p. 82).

language therapy, and OT were available for the students in the recommended 12:1+1 class during the 2008-09 school year (Tr. pp. 91-92).

Based on a review of the entire hearing record, I find that the district's recommended program for the 2008-09 school year was reasonably calculated to confer educational benefits on the student and therefore offered the student a FAPE in the LRE (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The hearing record reveals that the February 2008 IEP accurately reflected the student's needs as identified by his then current teachers and his parent, contained annual goals and short-term objectives aligned with those needs, and recommended appropriate special education and related services. Although the student did not attend the recommended program, the hearing record shows that the IEP could have been properly implemented in the proposed 12:1+1 class and that the student would have been functionally grouped with similar peers for instruction.

Having found that the district offered the student a FAPE for the 2008-09 school year, I need not reach the issue of whether the parent's placement at Mary McDowell was appropriate and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

Next, I turn to address the district's assertion that the impartial hearing officer's pendency award was erroneous. As previously noted, the district submitted additional evidence with its answer and cross-appeal (Answer Ex. I), which the parent requests not be considered on appeal. The exhibit is a seven-page stipulation of settlement and discontinuance dated August 7, 2008 (id.). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 09-085; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, although the exhibit offered by the district was available at the time of the impartial hearing, it is necessary for my review regarding the student's pendency. Accordingly, I will consider it.

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

062). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). Moreover, a prior unappealed impartial hearing officer's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

Here, the district asserts on cross-appeal that there is no pendency for the student at Mary McDowell for the 2008-09 school year as a result of the parties' settlement agreement. In cases involving stipulations between parents and boards of education, the determinative issue when deciding whether a stipulation becomes the basis for a student's pendency placement is whether the stipulation was explicitly limited to a specific school year or definite time period (Evans, 921 F. Supp. at 1184; Application of a Child with a Disability, Appeal No. 04-064; Application of the Bd. of Educ., Appeal No. 03-028; Application of the Bd. of Educ., Appeal No. 02-061; Application of a Child with a Disability, Appeal No. 98-25). In Zvi D., the Second Circuit determined that the

agreement expressly limited the time period the school district had agreed to pay tuition and as such the private school was not the student's pendency placement (Zvi D., 694 F.2d at 907-08; see Verhoeven v. Brunswick Sch. Comm., 207 F.3d 1, 9-10 [1st Cir. 1999]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2002 WL 818008, at *4-*5 [N.D. Ill. 2002]; Mayo v. Baltimore City Pub. Sch., 40 F. Supp. 2d 331, 334 [D. Md. 1999]; Application of a Child with a Disability, Appeal No. 04-064; Application of the Bd. of Educ., Appeal No. 02-061; Application of a Child with a Disability, Appeal No. 98-25).

In the instant case, a review of the settlement agreement at issue reflects that the parties' stipulation was intended to settle their differences with respect to the 2007-08 school year (Answer Ex. 1). The stipulation explicitly provided that it "shall not be relied upon by any party to indicate, establish or support the position that [Mary McDowell] is, or should be considered as, the 'then current placement' for the 2007-08 school year or any subsequent school year" (id. at ¶ 15). The settlement agreement also expressly provided that such stipulation or the district's agreement to reimburse the parent for the student's tuition at Mary McDowell for the 2007-08 school year shall not constitute an agreement by the parties that Mary McDowell constitutes an appropriate placement (id. at ¶ 14). The settlement agreement also provided that it represented the entire agreement between the parties and could not be modified except by a "written, signed agreement between the parties" (id. at ¶ 21). Under the circumstances, I find that the settlement agreement was limited to the 2007-08 school year under the express provisions of the stipulation. the parent waived any future right to assert that Mary McDowell was the student's pendency placement.

In light of the foregoing, I am unable to find that Mary McDowell constitutes the student's pendency placement for the 2008-09 school year, and will therefore annul that portion of the impartial hearing officer's decision directing the district to reimburse the parent for the student's tuition at Mary McDowell and other costs pursuant to the pendency provisions of the IDEA.

Lastly, I concur with the impartial hearing officer's reasoning and determination that the parent's August 20, 2008 letter to the district did not comport with 20 U.S.C. § 1412 (a)(10)(C)(iii)(I) and, therefore, did not provide adequate notice of the unilateral placement.

I have examined the parties' remaining contentions and find that it is unnecessary for me to address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's determination that the district failed to provide the student a FAPE for the 2008-09 school year is hereby annulled; and

IT IS ORDERED that the impartial hearing officer's determination that the parent is entitled to reimbursement at Mary McDowell pursuant to pendency is hereby annulled.

Dated: **Albany, New York**
March 31, 2010

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PAUL F. KELLY
STATE REVIEW OFFICER