



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-039

**Application of the NEW YORK CITY DEPARTMENT OF
EDUCATION for review of a determination of a hearing officer
relating to the provision of educational services to a student with
a disability**

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Karyn Thompson, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondents, Jenna L. Pantel, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Mary McDowell Center for Learning (Mary McDowell) for the 2009-10 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was enrolled at Mary McDowell in a classroom composed of eleven students and two teachers (Tr. pp. 144, 206-207, 242-43; Parent Ex. F at pp. 2, 14, 18, 19). Mary McDowell is a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (Tr. p. 27; see 8 NYCRR 200.1 [d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The student has received diagnoses of an attention deficit hyperactivity disorder (ADHD) and a learning disorder in the area of reading (Dist. Ex. 6 at p. 3). His cognitive skills are in the average to high average range, as are his academic skills with the exception of reading and handwriting (id. at pp. 1-3). The student receives occupational therapy (OT) services to address

sensory needs and graphomotor deficits, as well as language therapy to address auditory processing and expressive and pragmatic language needs (Dist. Exs. 8; 9; Parent Ex. F at pp. 14-19). The student's teachers report that the student exhibits difficulty sustaining attention and focus in the classroom (Dist. Ex. 7 at pp. 2-7).

The student attended a private Montessori school during preschool and kindergarten (Tr. p. 267). In January 2007, an OT evaluation of the student was conducted and he began receiving one hour per week of OT services to address "concerns about fine motor development" (Dist. Ex. 6 at p. 1). For first grade, during the 2007-08 school year, he attended one of the district's elementary schools in a general education program consisting of 19 students and one regular education teacher (Tr. pp. 267-68). The student's mother reported that during first grade her son "had a really hard year," demonstrating difficulty with reading and focusing on school work (Tr. p. 268; Dist. Ex. 5 at p. 1). She further stated that the student's grades declined and he exhibited behavioral problems due to his difficulty with attention (*id.*). During the 2007-08 school year, the parents obtained private, weekly tutoring services for their son (Dist. Ex. 5 at p. 3).

Over five dates between February 6 and March 5, 2008, private evaluators including a neuropsychologist conducted a neuropsychological and educational assessment of the student (Dist. Ex. 6). The evaluation report stated that the parents had requested an assessment of their son to better understand his learning style and reading skills, noting that he also had difficulty focusing in class and was easily distracted (*id.* at p. 1). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student yielded a verbal comprehension index score at the 75th percentile, a perceptual reasoning index score at the 90th percentile, a working memory index score at the 68th percentile, a processing speed index score at the 58th percentile, and a full scale IQ score at the 82nd percentile (*id.* at pp. 4-5). The evaluators indicated that while all of the student's WISC-IV scores were in the average to above average range, the discrepancy between the student's perceptual reasoning score and his processing speed score was "significant and unusual" and required an understanding of his strengths and weaknesses to fully understand his cognitive functioning (*id.* at pp. 3-5, 12). The evaluators provided an analysis of the student's cognitive assessment subtest scores, which although in the average range, revealed to them his difficulty with visual attention and attention skills (*id.* at p. 5).

The evaluators characterized the student's performance during assessments of his expressive and receptive language skills as "good" and "strong," revealing subtest scores in the average to above average range (Dist. Ex. 6 at p. 6). Assessments of the student's memory and learning skills indicated "variable" performance, with subtest scores ranging from the 16th to the 95th percentile, and difficulty noted when the student was required to remember information in the visual domain and retain information after a period of time (*id.* at pp. 6-7). Measures of the student's attention and executive functions completed by the parents revealed endorsement of items "indicating clinically significant behaviors of [h]yperactivity/[i]mpulsivity" (*id.* at p. 7). The parents also endorsed items of inattention but not at a clinically significant level (*id.*). The student's performance was in the average range on a measure of his ability to selectively attend to auditory information and on a measure of his ability to attend to auditory information while screening out background noise (*id.*). The student's mother's responses to an executive functions questionnaire revealed that when compared to same age and gender peers, her son exhibited clinically significant difficulty in the areas of emotional control, task initiation, working memory, and self-monitoring

skills (id. at pp. 7-8). Measures of the student's social perception yielded scores in the average range and the evaluation report described him as an "engaging and well-related boy" (id. at p. 9). Although the student was observed to become easily frustrated at times, with adult support and intervention he was able to work through his frustration and persevere at the task (id.).

Assessments of the student's prereading skills revealed that the student's phonological awareness and rapid naming skills were in the average range, indicating that he possessed the cognitive skills to learn to read (Dist. Ex. 6 at p. 8). Administration of the Gray Oral Reading Tests-Fourth Edition (GORT-4) yielded rate, accuracy, fluency, and comprehension subtest scores "at the bottom of the average range" (25th percentile); performance characterized as "lower than would be expected given [the student's] intellectual ability" (id.). The student exhibited "well developed conceptual writing skills," with below average handwriting ability (id.). Assessments of the student's mathematics skills revealed "excellent ability to solve math calculation problems" and average math fluency skills (id. at p. 9). The evaluators commented that the student's math fluency score would have been higher had he attended to the details of the mathematical operations (id.).

The evaluators concluded that the student met the criteria for an ADHD, combined subtype, and a learning disability in the area of reading with "weaknesses" in the areas of attention, executive functions, working memory, and handwriting (Dist. Ex. 6 at p. 10). Regarding class placement, the evaluators opined that the student required "a small class setting in a school for children with [learning disabilities] with teachers who are specially trained to work with students with [a]ttention and [r]eading disorders" (id.). The evaluators further indicated that the student's disability was interfering with his ability to learn in a general education setting and that his "needs necessitate that he be in a special education environment" (id.). The evaluators' recommendations included individual reading instruction using an "Orton-Gillingham based system" and continued OT services (id. at p. 11). The evaluation report also contained classroom accommodation recommendations such as preferential seating, use of a token system to improve attention and provision of extra support during challenging tasks, frequent feedback, and movement breaks (id. at pp. 10-11).

According to the student's mother, his first grade teacher suggested that the student be evaluated, and on July 31, 2008, a district social worker prepared a social history based on interviews with the parents (Dist. Ex. 5 at p. 1). The social history indicated that first grade staff reported that the student lost focus easily, was "distractible, impulsive [and] restless," and also was "cooperative, friendly [and] had satisfactory relationships with peers and adults" (id.). According to the parents, the student's first grade teacher had expressed that she was at her "wits end" due to the student's behavior and also that she was not a special education teacher and therefore was unable to change all of her teaching methods to suit one child (id.). The parents indicated to the social worker their belief that their son, who was offered a diagnosis of an ADHD, required a smaller educational setting and might benefit from self-contained special education classes (id. at p. 2). The student's mother opined that her son might also benefit from counseling services to help him better "manage in the classroom" (id.).

The hearing record indicates that the district offered the student a placement in an integrated co-teaching class for the 2008-09 school year (second grade); however, the parents

decided to send their son to Mary McDowell (Tr. pp. 46-47; Dist. Ex. 2 at pp. 2, 11).^{1, 2} During the 2008-09 school year, the student attended Mary McDowell in a "self-contained class composed of ten students and two teachers," equipped with an FM system that the student used (Tr. p. 161; Dist. Exs. 7; 8; 9). In addition to "regular academic subjects" including reading, writing, mathematics, social studies, and science, the student also received twice weekly language therapy in a small group and one session per week of small group OT, as well as one session per week of joint language/OT in a large group within the classroom (Dist. Exs. 7 at pp. 2-19; 9 at p. 3).³

On February 1, 2009, the parents executed an enrollment contract for the student to attend Mary McDowell for the 2009-10 school year (third grade) (Tr. p. 290; Parent Ex. G). Also on February 1, 2009, as required by the contract, the parents made payment to Mary McDowell of a \$6,500 non-refundable deposit (Tr. p. 297; Parent Ex. H). The parents selected the payment option that required them to pay 60 percent of the tuition by July 1, 2009, and the balance of the tuition, fees, and charges by December 1, 2009 (Parent Ex. G). The hearing record reflects that the parents made the second payment to Mary McDowell on or about July 6, 2009 (Tr. p. 298; Parent Ex. I) and apparently paid the balance of the tuition, fees, and charges in November 2009 (Tr. pp. 289-90). The student's mother stated that at no point in time did she communicate to the district's Committee on Special Education (CSE) regarding the payments she had made to Mary McDowell (Tr. p. 301).

On May 12, 2009, the CSE convened for the student's annual review and to develop his individualized education program (IEP) for the 2009-10 school year (Dist. Exs. 2 at pp. 1, 2; 4 at p. 1). The CSE met for approximately one hour (Tr. p. 24). Attendees included the student's mother; a district school psychologist who also served as the district representative; a district regular education teacher; a district social worker; an additional parent member; and by telephone, the student's special education teacher from Mary McDowell (Dist. Exs. 2 at p. 2; 4 at p. 1).⁴ According to the district's regular education teacher who attended the CSE meeting, the May 2009 CSE reviewed the student's January 2009 Mary McDowell progress reports and the special

¹ "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]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services ([see http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf](http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf)).

² The terms "integrated co-teaching" and "collaborative team teaching" (CTT) are used interchangeably in the hearing record to describe the student's program recommended for the 2009-10 school year ([see e.g.](#), Tr. pp. 30, 35, 44; Dist. Ex. 2 at p. 1). For consistency within this decision, I will refer to the student's recommended program as an integrated co-teaching class ([see](#) 8 NYCRR 200.6 [g]).

³ The student also received instruction in art, music, theatre arts, and physical education (Dist. Ex. 7 at pp. 20-23).

⁴ While the district representative testified that both parents attended the May 2009 CSE meeting (Tr. p. 23), a review of the hearing record indicates that only the student's mother attended this meeting (Tr. p. 269; Dist. Exs. 2 at p. 2; 4 at p. 1).

education teacher from Mary McDowell provided information to the CSE regarding the student's needs and abilities (Tr. pp. 24, 26, 30, 34, 37-38, 270; see Dist. Ex. 7). The CSE determined that the student was eligible for special education services as a student with a learning disability and due to the strength of his academic skills, recommended that the student be placed in a 12:1 integrated co-teaching class in a community school for the upcoming 2009-10 school year (Dist. Ex. 2 at pp. 1, 11). The hearing record indicates that at the CSE meeting, the student's mother and his special education teacher expressed their opinion that the student needed placement in a small class setting (Tr. pp. 30, 37-38, 46, 48, 271-72, 274-75, 295). The May 2009 CSE also considered, but rejected, both a "general education" program as well as a 12:1 special class (Dist. Ex. 2 at p. 12). The May 2009 IEP meeting minutes noted that the CSE did not recommend that the student receive any speech-language or OT evaluations based on discussion with the student's Mary McDowell teacher and that, allegedly, "no OT concerns [were] noted by the teacher" (Tr. pp. 275-76, 295; Dist. Exs. 2 at pp. 1, 13; 4 at p. 2). The student's mother did not object during the May 2009 CSE meeting to the student's classification as a student with a learning disability or to the fact that the May 2009 IEP did not recommend related services (Tr. pp. 30-31, 32, 295). Further, the student's mother did not advise the CSE either at its May 2009 meeting or before that time that an enrollment contract had been signed with Mary McDowell in February 2009 for the 2009-10 school year, or that the parents had paid a non-refundable deposit at that time in furtherance of the enrollment contract (Tr. p. 297). The hearing record reflects that the district sent the May 2009 IEP to the parents on June 8, 2009 (Tr. p. 308; Dist. Ex. 2 at p. 2).

The parents received a Final Notice of Recommendation (FNR) dated June 30, 2009, from the district "around the first of July [2009]" (Tr. p. 296; Parent Ex. A). Among other things, the FNR reflected that the CSE had met, had recommended an integrated co-teaching class in a community school as the student's program, and provided the specific location of the recommended program (Parent Ex. A).⁵ The FNR stated that the parents had "the right to visit" the recommended school "site" and provided contact information regarding whom they could contact to arrange such a visit (id.). The FNR further stated that if the district did not hear from the parents within 10 days of the date of the letter, the recommended services would be put into effect (id.). Lastly, the FNR informed the parents of the district's office, and its location, to which a request for mediation or an impartial hearing could be made (id.).

The parents wrote to the district on July 9, 2009 (Tr. pp. 277, 298-99; Parent Ex. B).⁶ The parents indicated in the letter that they were "unable to determine the appropriateness of [the proposed] placement" because they had not yet visited the "CTT class in the school" because it was summer (Tr. p. 300; Parent Ex. B at p. 1). The parents stated that the student had previously attended the school recommended by the district in a general education program (Parent Ex. B at p. 1). The parents also stated that they had visited an integrated co-teaching class at a different school from the one that the district was recommending, and that the parents had deemed the

⁵ The hearing record also contains an FNR dated July 6, 2009 (Dist. Ex. 3), which the student's mother testified she never saw (Tr. p. 276).

⁶ The student's mother stated that her attorney "helped [her] write" this letter, as well as her subsequent letters to the district dated August 12 and September 18, 2009, and that the "opinions" in the letters were hers (Tr. pp. 307, 309).

program to be inappropriate (id.). Based on this prior visit, the parents indicated that they were "concerned about the size of the school and [the integrated co-teaching] program" (id.).

The parents further indicated in the July 9, 2009 letter that the student had an ADHD and expressed the opinion that the student required "a lot of one-to-one attention and support to address his learning and attentional difficulties" (Parent Ex. B at p. 1). The parents also indicated that the integrated co-teaching class at the school that they had previously visited "consisted of 20 students and appeared very distracting" and that when it was observed, all of the students were "sitting on the rug" (id.). The parents believed that this would be "very distracting" for the student and expressed a concern "that the recommended placement, if following the same curriculum where learning often takes place in one large group [would] be ineffective for [the student]" because they believed he "would be unable to sit for an extended period of time with other students surrounding him, and he would not be able to focus and attend to the teacher" (id.). The parents further wrote that the student's "most recent neuropsychological from March 2008" indicated that the student "would benefit from learning to read through an Orton-Gillingham-based curriculum" and indicated their belief that this was not the curriculum used at the recommended school (id.). The parents also wrote that the student's March 2008 assessment "also recommended that [the student] be placed in a small, special education environment and not in the large public school environment," and conveyed their opinion that the student "require[d] constant redirection and feedback to help him remain on task, which [the parents believed] would not be adequately addressed in the recommended setting" (id.).

In their July 9, 2009 letter, the parents advised the district that they planned to visit the recommended placement in September 2009 and asked the district to provide them with specific information regarding the suggested placement (Parent Ex. B at p. 1). In particular, the parents advised that they were "interested in learning about the student population of the children in the [recommended] class, specifically their ages, functional levels, and classifications," as well as "information on the school curriculum and how it [would] address [the student's] special educational needs" (id.).

The student's mother stated that the district did not respond to the parents' July 9, 2009 letter and that she therefore wrote the district again on August 12, 2009 (Tr. pp. 277-78, 299; Parent Ex. C at p. 1). In her August 12, 2009 letter, the student's mother referenced the parents' July 9, 2009 letter, stated that no response to that letter had been received, and indicated that she "look[ed] forward to receiving the documentation" that had been requested (Parent Ex. C at p. 1).⁷ The student's mother also advised the district that until she was able to determine whether the recommended program was appropriate, the student would remain at Mary McDowell where he would "receive appropriate special education support" (id.). The student's mother further stated that if the district's recommendations were not appropriate, she would "be forced to seek reimbursement for [the student's] tuition" (id.). The student's mother advised the district that upon

⁷ Consistent with the parents' July 9, 2009, letter, the student's mother wrote that she was "interested in learning about the student population of the children in the CTT class, specifically their ages, functional levels, and classifications," and that she "also would like information on the school curriculum and how it will address [the student's] special education needs" (Parent Ex. C at p. 1).

visiting the recommended program in September, she would get back to the district about the appropriateness of the placement (id.).

The hearing record reflects that subsequent to the August 12, 2009 letter, the parents received a chart from the district that contained information with respect to 27 students in an integrated co-teaching class at the district's proposed school, including information relating to their ages, gender, disability classifications, grades, and math and reading levels (Tr. pp. 6-8, 60-61, 278-79, 299; Parent Ex. D). The hearing record does not reflect that the district provided the parents with the information that they had requested regarding the recommended program's curriculum (see Tr. pp. 278-79; see also Parent Exs. B; C).

The student attended Mary McDowell during the 2009-10 school year in a self-contained class of eleven students and two teachers (Parent Ex. F). In addition to academic courses, the student also received two sessions per week of language therapy and one session per week of OT (id. at p. 2).

The student's mother visited the district's recommended school and the proposed class during the second week of the district's school year (Tr. pp. 279, 300). She met, and mostly spoke with, the school's assistant principal (Tr. pp. 279, 280-81, 301, 309). The student's mother also observed the class that had been proposed for the student "for about 15 minutes" during a lesson (Tr. pp. 279, 280, 303, 304-305). The class' regular education teacher sat with the student's mother while she visited the class and the student's mother spoke with that teacher "for a couple of sentences" (Tr. pp. 304, 305).⁸ According to the student's mother, the proposed classroom was "the same setup" and functioned in the same manner as, the previous integrated co-teaching class that she had observed and to which she felt the student would not respond well (Tr. pp. 283-84; Parent Ex. E). The assistant principal of the recommended school confirmed to the student's mother during her visit that the "profile" that she had received was of a second grade integrated co-teaching class at the school and not of the third grade integrated co-teaching class recommended for the student (Tr. pp. 279, 303; see Parent Exs. D; E).

The student's mother wrote to the district on September 18, 2009, after she had visited the recommended placement (Parent Ex. E). She informed the district that after visiting the recommended placement, "it appear[ed]" that the "profile" the district provided her in August was incorrect because it was for a first/second grade class, while the student was in third grade (Parent Ex. E at p. 1). The student's mother wrote that the class she had observed included 22 students, was "structured the same as a [general] education class," and that the "teachers use[d] a workshop approach" (id.). With respect to her visit to the class, the student's mother indicated that the teachers "beg[an] with a whole group lesson on the rug," and she opined that this would be "extremely difficult" for the student because of the "distractions of all the kids moving on the rug," and because the student's "attentional issues are significant" and would make it "impossible" for the student "to sustain focus in the whole group lesson -- even with two teachers present" (id.). The student's mother also expressed the view that the student "need[ed] a much smaller setting,

⁸ The student's mother did not speak with the special education teacher as the teacher was involved in instructional activities during the mother's visit (Tr. pp. 280, 304, 305, 309).

where he w[ould] be provided with small group support throughout the day and [where] his distractions w[ould] be minimized" (id.). She believed that the proposed class was "too distracting" for the student; that "[t]he sheer number of students in the room w[ould] make it impossible for him to focus and learn," and that "even when provided with small group work, [the student] w[ould] be constantly distracted and unable to concentrate on the lessons being taught" (id.).

The student's mother also expressed the belief that the student would not receive "individualized instruction in essential subjects" at the recommended placement (Parent Ex. E at p. 1). She stated that "[t]he curriculum is also not multisensory throughout the day," that the recommended class used a reading curriculum that "is not a program that focuses on phonemic awareness in a multisensory manner," and that "[i]t has been strongly recommended" that the student "be instructed in reading using a multisensory program like Orton Gillingham" (id.). The student's mother further indicated that the student was previously at the recommended school and "was unsuccessful using their curriculum" and that "[b]ecause of his ADHD, he was unable to learn and his academic levels all fell behind" (id.).

The student's mother also stated in her September 18, 2009 letter that while she observed the students in the recommended class, the class was working on an assignment that required writing on a piece of paper "not much bigger than a credit card" and that this was a task which would have been "nearly impossible for [the student] because of his fine motor skills and would have frustrated him causing him to shut down" (Parent Ex. E at p. 1). The student's mother further indicated that the books in the recommended classroom were arranged by reading level and that this "always created a great deal of anxiety for [the student] because the kids are all aware of what level everyone else is on, creating a competitive environment," and that the student "has a lot of anxiety around his performance in the classroom and this made reading an anxiety-provoking time in school, further inhibiting [the student's] ability to learn and further eroding his self-esteem" (id. at p. 2). In addition, apparently referring to the fact that the student had previously attended the recommended school during first grade (Tr. pp. 267-68), the student's mother wrote that the student "had a lot of trouble with the chaos of the lunchroom and the school in general" and that "[h]e is easily overwhelmed in chaotic and loud environments" (Parent Ex. E at p. 2).

The student's mother advised in her September 18, 2009 letter that based on the above, she "must reject the placement" because it was not appropriate to meet the student's needs; that she believed the student "require[d] a small class setting where he c[ould] receive individualized support;" that "[h]is attentional deficits require[d] a small learning environment, which [the proposed class] does not provide;" that the student "w[ould] be too distracted and unable to focus and therefore unable to learn in such a large environment;" and that although there were two teachers in the recommended class, it was "still much too large a setting" for the student given his attention deficits (Parent Ex. E at p. 2). Lastly, the student's mother advised the district that she would seek tuition reimbursement for the student's placement at Mary McDowell (id.). The hearing record reflects that no one from the district contacted her in response to her September 18, 2009 letter (Tr. p. 284).

The parents, through their attorney, filed a due process complaint notice dated October 13, 2009 (Dist. Ex. 1). After describing the nature of the problem, including facts relating to the

problem, the parents asserted that the May 2009 IEP was inappropriate (id.). The parents requested an impartial hearing, indicated that the student was currently at Mary McDowell, and requested tuition reimbursement as well as the provision of transportation and related services (id.).

The parents, through their attorney, filed an amended due process complaint notice dated January 25, 2010 (Dist. Ex. 10). The parents contended that the integrated co-teaching program was an inappropriate program recommendation for the student; that the May 2009 CSE failed to include the "requisite committee members;" that the May 2009 CSE failed to rely on sufficient evaluative information to support its recommendations; that the documentation relied on by the May 2009 CSE did not support its recommendation; that while the May 2009 IEP indicated that the student required a classroom behavior management plan, the IEP failed to include one; that the academic management needs set forth in the May 2009 IEP were insufficient to address the student's needs, especially in an integrated co-teaching program; that the May 2009 IEP's goals and objectives were insufficient to address the student's academic needs; that the May 2009 IEP failed to appropriately address the student's attentional, speech-language, social, and sensory integration needs; that, while the parents received a class profile after asking for it twice, it was "not clear" whether the CSE provided the parents with the proper profile; and that the CSE failed to respond to the parents' written concerns regarding the recommended integrated co-teaching program (id. at p. 1).

The parents also contended that the recommended placement was substantively inappropriate for the student in that the class had 22 students and was structured as a general education classroom utilizing a "workshop approach;" the student was unable to sustain focus in a whole group lesson of that size; the student has significant attentional issues that require frequent prompting, even in small groups; the class was too large and distracting for the student; the students in the class had a wide variety of special educational needs; the curriculum was not multisensory; the student previously attended the recommended school and was not successful in using its curriculum and functioning in its classroom environment; the integrated co-teaching program was not set up to address the student's specific needs; the "setup" of the integrated co-teaching program would exacerbate the student's anxiety and erode his self-esteem; and the size of the lunchroom and the school would overwhelm the student because of his attentional deficits and sensory needs (Dist. Ex. 10 at p. 1).

The parents alleged that based on these "procedural and substantive failures," the district had denied the student a free appropriate public education (FAPE) and that the student required "full-time special education in a small class with ample opportunity for individualized and small group instruction" (Dist. Ex. 10 at pp. 1-2). Therefore, they requested tuition reimbursement, and provision of transportation and related services at Mary McDowell (id. at p. 2).

The impartial hearing began on January 28, 2010, and concluded on March 8, 2010, after two days of proceedings. The impartial hearing officer rendered a decision dated March 29, 2010 finding that the district failed to offer the student a FAPE for the 2009-10 school year, that the parents' placement of the student at Mary McDowell was appropriate, and that the equities favored the parents (IHO Decision at p. 16). Based on her decision, the impartial hearing officer ordered the district to "provide the parents tuition reimbursement for the 2009-10 school year [at Mary McDowell] upon proof of payment acceptable to the district" (id.).

Specifically, the impartial hearing officer found that the March 2009 IEP "fail[ed] to adequately address the student's needs" and that the recommended integrated co-teaching class was not an appropriate placement for the student "given his special needs" (IHO Decision at p. 11). The impartial hearing officer based this finding on a number of factors, including: (1) her conclusion that the student's needs as set forth in the May 2009 IEP⁹ could not be addressed in the recommended integrated co-teaching class where a general education and special education teacher were "expected to meet the needs of twenty-one students, seven of who[m] require[d] additional individual support to unknown varying degrees;" (2) the findings, recommendations, and test results contained in the student's March 2008 private evaluation (see Dist. Ex. 6); (3) testimony by the student's current teacher at Mary McDowell with respect to the student's ability to sustain focus, his "attention issues," and his increased ability to pay attention in smaller groups and the impartial hearing officer's conclusion that while the evidence established that the recommended class provided some instruction in "smaller groups," there was "no evidence in the record to establish how small these groups were and how the two class room teachers managed the needs of all twenty one students even in smaller groups;" (4) that the size of the class would make it unlikely that the student would "routinely receive the individualized attention" he required to refocus and stay on task and also that the class size, as well as the number of students attending the school, "would cause the student to become more distracted and more than likely increase his impulsivity;" (5) that she was "not persuaded by the evidence that the general education curriculum in the recommended integrated co-teaching class [was] sufficiently modified to meet [the] student's needs" because there was "insufficient evidence in the record to establish the degree to which the multi-sensory approach [was] integrated into each of the academic areas and daily teaching;" (6) that the student's May 2009 IEP "fail[ed] to recommend" OT; (7) that the May 2009 IEP "lack[ed] any information regarding the student's auditory processing needs;" and (8) her finding "that the CSE did not adequately consider the student's need for [OT] or an enhanced listening system or device to improve his ability to focus on auditory information" (IHO Decision at pp. 9-11).

The impartial hearing officer further found that Mary McDowell was "able to address the student's complex academic and social needs and [was] an appropriate placement" (IHO Decision at p. 14). She concluded that instruction was provided in appropriate groups, that Mary McDowell provided OT and language therapy, and that the student had progressed during the school year in all of his subjects (id. at pp. 13-14). The impartial hearing officer also concluded that Mary McDowell "offered [the student] a placement in a small structured class in a supportive special education classroom with a low student to teacher ratio and individualized attention to address his ADHD, learning disability in the area of reading and motor deficits" (id. at p. 14).

Finally, the impartial hearing officer found that equitable considerations "should [not] preclude an award of tuition reimbursement" (IHO Decision at p. 16). She concluded that "the parents fully cooperated with the CSE throughout the process;" that they "timely notified" the district by their letter dated September 18, 2009, of their intentions to enroll the student in Mary McDowell and to seek tuition reimbursement; and that the parents' February and July 2009

⁹ The impartial hearing officer determined that the student's needs as reflected on the May 2009 IEP required "a lot of support to focus on tasks," "anxiety," "sensory issues," and "a classroom behavior management plan, teacher redirection, and programmatic supports" (IHO Decision at p. 9; see Dist. Ex. 2 at pp. 3, 4).

payments to Mary McDowell pursuant to their enrollment contract "were made to secure a space for the student in the event that the parents['] concerns regarding the recommended program proved true" (id.).

The district appeals, contending that it offered the student a FAPE, that the parents' unilateral placement was not appropriate for the student, and that the equities favored the district. The district contends that the impartial hearing officer erred in finding that it had failed to offer the student a FAPE for the 2009-10 school year. In particular, the district asserts that: (1) the impartial hearing officer found that the district's recommended program would not provide the student with sufficient individualized attention and that in reaching this conclusion she relied upon testimony by the district's witness that the program might be insufficient if the student required "constant one-to-one support," but that there was no evidence that the student requires 1:1 support and, further, that the student did not receive such support at Mary McDowell where the class ratio was 11:2; (2) the student would have received sufficient support in the district's proposed class; (3) "the recommended program would have been sufficiently modified to meet the needs of the [s]tudent, who has ADHD, but is at grade level in math, and only slightly delayed in reading;" (4) with respect to the May 2009 CSE's decision not to recommend OT, this issue should not have been considered because it was not alleged in the parents' due process complaint notice and was not properly raised at the impartial hearing, and that the May 2009 CSE did not recommend OT because the student's teacher from Mary McDowell advised the CSE that the student did not require OT, supported the May 2009 CSE's decision not to recommend OT, and that even if OT should have been recommended, such an error would not have rendered the May 2009 IEP insufficient "in its entirety;" and (5) the impartial hearing officer relied on the fact that the May 2009 CSE did not recommend "an enhanced listening system," and that this issue should not have been considered as it was not raised in the due process complaint notice or raised at the impartial hearing, and even if this issue was raised, the absence of an enhanced listening system from the May 2009 IEP would not constitute a deprivation of FAPE as the May 2009 IEP would have been amended to provide the student with such a system if one were required.

The district additionally asserts that the parents' unilateral placement of the student at Mary McDowell was not appropriate for the student because he was "not making academic progress" and the school was "too restrictive" for the student. Finally, the district alleges that the impartial hearing officer's finding that the equities favored the parents was "erroneous." It contends that the equities are in its favor because the parents "never intended to place the [s]tudent in public school" and because the parents failed to provide the district with the required timely notice that they had concerns with the district's recommended program and were reenrolling the student in private school at public expense.

The parents answered the district's petition, contending that the impartial hearing officer's findings were correct and that the recommended May 2009 IEP and program were not appropriate for the student. The parents assert, among other things, that: (1) the impartial hearing officer's decision was not premised on the conclusion that the student needed constant 1:1 support, her decision only "partially" relied upon witness testimony that the program might be insufficient if the student required constant 1:1 support, and "the district failed to establish that the student would be provided personalized instruction with sufficient support services to permit him to benefit educationally from that instruction;" (2) the impartial hearing officer "correctly concluded that

there was insufficient evidence that the curriculum in the recommended ... class was sufficiently modified to [meet the student's] needs;" (3) the need for OT was properly raised as an issue in the due process complaint notice and during the impartial hearing, and that the absence of OT was "just one reason" why the May 2009 IEP failed to address the student's sensory deficits, that the student's sensory issues impacted his ability to learn in the classroom but there was no testimony how these issues would be addressed in the recommended class, and that the impartial hearing officer correctly determined that the recommended program did not appropriately address the student's OT/sensory issues; (4) the district's assertion that the CSE did not recommend OT at the meeting in response to being advised by the student's teacher at Mary McDowell that the student did not require OT is incorrect; and (5) the impartial hearing officer discussed an enhanced listening device as it related to the student's attentional needs, that the impartial hearing officer did not conclude that the absence of such device resulted in an inappropriate IEP or a denial of FAPE, and that the absence of such a device "was yet another example how [the district] failed to establish the specific techniques/methodologies/tools to tailor instruction to [the student]." The parents also contend that the May 2009 IEP's "goals and objectives were not written at the meeting," that the student's mother "was not given a chance to review a completed copy of the IEP," that the May 2009 CSE "did not include academic management criteria to address [the students'] sensory and attentional deficits ...," and that the goals in the May 2009 IEP were "not complete and d[id] not address [the student's] attentional and sensory issues."

With respect to the appropriateness of the student's private placement, the parents dispute the district's contention that the student has not made progress at Mary McDowell. The parents also deny that Mary McDowell is "overly restrictive" and contend that under the circumstances of this case, least restrictive environment (LRE) considerations should not preclude a finding of appropriateness. The parents further allege that the impartial hearing officer's finding regarding the equities must be upheld. They contend that the execution of an enrollment contract with Mary McDowell for the 2009-10 school year in February 2009 and their subsequent payments to that school should not preclude an award of tuition reimbursement. The parents further contend that they cooperated with the district, did not obstruct the district's placement process or its ability to provide the student with a FAPE, and that the parents timely notified the district of the student's placement at Mary McDowell.

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

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

Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The 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, therefore it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

Among other things, the parents assert on appeal that the May 2009 IEP did not appropriately address the student's attentional, speech-language, social and sensory integration needs; that the May 2009 IEP did not recommend appropriate modifications to address the student's academic management needs, especially in an integrated co-teaching class; and that the proposed integrated co-teaching class was substantively inappropriate and would not address the student's needs. Based on a careful review of the hearing record, as discussed below, I find that it supports the parents' contentions noted above and the impartial hearing officer's conclusion that the district has not established that the May 2009 IEP and recommended special education program for the 2009-10 school year were appropriate for the student. In particular, the May 2009 IEP did not accurately reflect the student's needs as described in the evaluation reports and information considered by, and available to, the May 2009 CSE.¹⁰ Moreover, the May 2009 IEP did not offer adequate supports to meet the student's needs.

The evaluation reports, progress reports, and teacher input at the May 2009 CSE meeting provided information about the student's attentional and sensory processing needs. As discussed

¹⁰ The hearing record reflects that the May 2009 CSE reviewed information including the January 2009 Mary McDowell teacher reports, the January 2009 Mary McDowell language therapy report, the January 2009 Mary McDowell OT report, the information provided at the CSE meeting by the student's special education teacher from Mary McDowell, and the March 2008 private neuropsychological and educational assessment report (Tr. pp. 24-26, 38-40; Dist. Exs. 6; 7; 8; 9).

above, in March 2008, the private neuropsychological and educational evaluators reported that although the student possessed cognitive skills in the average to high average range, he exhibited "a vulnerable attention system that seem[ed] to be negatively influencing his learning" (Dist. Ex. 6 at pp. 1, 4-6). The evaluators also reported that they "carefully considered behaviors consistent with the hallmarks of an attention disorder" and determined that the student was "somewhat hyperactive," "distractible," and "sometimes impulsive in his response style" (*id.* at pp. 1-2). During the assessment, the student was observed to frequently stand up from his seat, move about in his seat and prefer to have something in his hands at all times (*id.*). The evaluators reported that during their meetings with the student, he required frequent breaks as he exhibited difficulty "staying on task and sitting still for periods longer than 10-15 minutes" (*id.* at p. 2). When presented with challenging tasks, the student became increasingly distractible and required an increase in encouragement and reinforcement to continue (*id.*). The evaluators indicated that the parents' report of the student's difficulties with attention, focus and staying on task at home and in the classroom was consistent with the results of their assessment, and their observations of his behavior paired with his performance on tests "suggest[ed] that these difficulties [were] more pervasive and [were] not solely a function of [the student's] reading difficulties" (*id.*). Classroom recommendations provided in the evaluators' report included preferential seating, frequent feedback, a token system to help the student maintain his attention and decrease his "impulsive and hyperactive behavior," extra support and attention during challenging tasks, allowing the student to stand during some activities, and movement breaks (*id.* at pp. 10-11).

Further, the January 2009 Mary McDowell teacher reports also provided multiple examples of how the student exhibited consistent difficulties with attention, impulsivity, focus, and distractibility (Dist. Ex. 7 at pp. 2-3, 5-7, 11, 13-14, 19). The student's 2008-09 Mary McDowell special education teacher reported that during group instruction if the student was not called on he could become distracted and make noises and faces at his peers (*id.* at p. 2). Providing the student with gum or having a teacher sit next to the student were techniques used to help him attend to the lesson (*id.*). The special education teacher indicated that the student received support and verbal prompting to attend to language and mathematics activities, and to stay in a "listening" and "learning" position during academic instruction (*id.* at pp. 3, 11, 14). During mathematics instruction, the special education teacher reported that the student was "easily distracted and had difficulty working in a small group" (*id.* at p. 13). During mathematics lessons, the student was observed talking to classmates, singing, kicking his feet under the table and calling out (*id.*). One of the student's goals was for him to "listen to teacher's reminders to stay on task and focus on lessons more consistently so that he [could] help himself and others learn the new material" (*id.*). The special education teacher's report observed that the "small classroom environment allow[ed] [the student] to receive the support that he need[ed]" (*id.* at p. 3). The special education teacher's report also noted that the "small class size and low student to teacher ratio allowed [the student's classroom teachers] to observe" situations where the student was having difficulty relating to classmates and to "problem solve" with the student (*id.*).

The Mary McDowell teacher reports also indicated that the instructor who provided the student with reading services at Mary McDowell during the 2008-09 school year reported that the student often needed teacher support to help him transition to the reading group, as he became distracted by conversations he was having with other students (Dist. Ex. 7 at p. 5). The teacher

further described the student's difficulty with self-monitoring during reading activities and that he exhibited impulsive behavior during reading group sessions (id. at p. 6). The reading instructor indicated that during reading groups, the student became distracted by his classmates and materials, and "engage[d]" other students at inappropriate times (id.). She reminded the student "repeatedly, with visual and verbal prompts" to attend to the lesson (id.). The reading instructor reported that she helped the student recognize when he might benefit from use of a "fidget, a movement or water break" to help him attend (id.). She observed that throughout reading group sessions, seemingly unaware of his actions, the student was observed to hum or sing tunes/songs and despite bringing it to his attention, the student would "start up again on and off through the session" (id. at p. 7). The student's humming and singing behavior was also reported by his Mary McDowell science instructor, who also indicated that the student was "usually unable to stop because he appeared unaware that it was happening" (id. at p. 19). According to the Mary McDowell teacher reports, the science instructor provided the student with gum and asked that he lower his voice "when he couldn't stop" (id.). Additionally, the science instructor offered that the student needed reminders to refrain from calling out without raising his hand (id.).

With respect to the student's academic needs and present levels of performance, the May 2009 IEP set forth that the student was a "strong" academic student who had demonstrated significant growth in reading, possessed "competent" mathematics skills, and was able to produce written products (Dist. Ex. 2 at p. 3). The May 2009 IEP identified the student's reading level and indicated that he exhibited word attack strategies and loved reading non-fiction material (id.). According to the May 2009 IEP, the student's prediction/inference skills were "weaker," and during writing tasks the student required "support to aid instruction" and used organizational aids (id.). The May 2009 IEP noted that in mathematics the student was learning "simple fractions," multiplication, and advanced subtraction (id.). The May 2009 IEP indicated that the student had been offered a diagnosis of an ADHD and that he required "a lot of support to focus on tasks; he use[d] a 'privacy shield' to remain on task" (id. at pp. 3, 5). To address the student's academic needs, the May 2009 IEP recommended that the student receive a multisensory instructional approach, breaks to refocus attention to task, and use of graphic organizers and outlines during writing assignments (id. at p. 3; see Tr. p. 28).

The May 2009 IEP reflected that socially, in the past the student was readily interested in making new friends (Dist. Ex. 2 at p. 4). It further indicated that the student required teacher redirection to be more compliant with adult requests and to cooperate with peers socially (id.). According to the May 2009 IEP, the student exhibited "anxiety centered around performance in class" and "sensory issues throughout the school day" such as humming, putting things in his mouth, and calling out (id.). The May 2009 CSE determined that the student's behavior did not seriously interfere with instruction, and could be addressed by the special education teacher; offering the student a classroom behavior management plan, teacher redirection, and "programmatic supports" (id.).¹¹

¹¹ The hearing record does not explain what the recommended "programmatic supports" on the May 2009 IEP entailed.

According to the district's regular education teacher who participated in the May 2009 CSE meeting, the student's present levels of performance contained in the May 2009 IEP "came right from [the student's Mary McDowell] teacher" (Tr. pp. 23, 26, 30). At the meeting, the May 2009 CSE discussed the student's needs, which the regular education teacher identified as support to sustain focus and stay on task, acknowledging that the student exhibited "some attentional issues" (Tr. pp. 27, 48). The regular education teacher who participated at the May 2009 CSE meeting testified that she was unaware whether the student experienced difficulty with attention during reading and math instruction (Tr. p. 51). According to the regular education teacher who participated in the May 2009 CSE meeting, the student's attention needs would have been met by the CSE's recommendation for using a multisensory approach to learning, providing breaks to refocus his attention to tasks, and using graphic organizers (Tr. p. 28; Dist. Ex. 2 at p. 3).

According to a special education teacher who accompanied students in the recommended integrated co-teaching classes to "specials," such as art, physical education and technology, integrated co-teaching classes at the recommended school were composed of one regular education and one special education teacher who provided instruction to no more than 25 students, 60 percent of whom were general education students and 40 percent of whom were students receiving special education services (Tr. pp. 65-67). During the 2009-10 school year, the recommended third grade integrated co-teaching class contained 21 students; 7 of whom had IEPs and were classified as students with learning disabilities, speech or language impairments, or other health impairments (Tr. pp. 72-73). Reading and mathematics abilities of the students in the recommended integrated co-teaching class were in the second to fourth grade range (Tr. pp. 90-91). The hearing record reflects that information available at the time of the May 2009 CSE meeting indicated that the student exhibited difficulty with attention and distractibility in classrooms of approximately ten students and two teachers, and during small group activities (Dist. Ex. 7 at pp. 2-7, 11, 13, 19), and that while he was in the district's first grade general education program, district staff reported that the student easily lost focus and exhibited distractible, restless, and impulsive behaviors (Dist. Ex. 5 at pp. 1-2).

The hearing record reflects that the present levels of performance reflected in the May 2009 IEP accurately depicted the student's academic skills in that he exhibits "competent" mathematics skills and a relative weakness in reading skills (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 6 at pp. 8-9). The May 2009 CSE's regular education teacher testified that at the time of the May 2009 CSE meeting, the student "did not really have great academic deficits" (Tr. p. 28). She further testified that it was the opinion of the school psychologist, who had previously taught in an integrated co-teaching class and who participated in the May 2009 CSE meeting, that the student was a "good candidate" for placement in an integrated co-teaching class "given his strong academic[] [skills]" (Tr. pp. 36-37). When asked what the May 2009 CSE specifically relied on in determining that the student's placement in the integrated co-teaching class was appropriate, the regular education teacher who had participated in the May 2009 CSE meeting testified that it was the student's academic skill level (Tr. p. 45). However, the hearing record also reflects that the student's attention and sensory deficits were his greatest areas of need and primarily contributed to his difficulty in the classroom (Tr. pp. 271-72; Dist. Exs. 6; 7). Further, although the special education teacher who testified about the recommended integrated co-teaching class stated that based upon the information contained in the May 2009 IEP he thought the student would have "fit"

into the recommended program, he qualified that statement by adding "the only unknown is that I don't know how much- -if [the student] needs constant one-to-one support, that might be a different issue" (Tr. p. 76).

Although the May 2009 IEP acknowledged that the student had a diagnosis of an ADHD, required "a lot of support to focus on tasks," and used a "privacy shield" at Mary McDowell to remain on task, as indicated by the above information before the May 2009 CSE, the May 2009 IEP did not fully depict the degree of the student's difficulty sustaining focus and attention during instructional tasks (Dist. Ex. 2 at pp. 3-5; see Tr. pp. 24, 33, 34, 39-40, 293; Dist. Exs. 6 at pp. 1, 4-6, 10-11; 7 at pp. 2-3, 5-7, 11, 13-14, 19). The May 2009 IEP did not adequately identify the extent to which the student's attention difficulties and distractibility affected his classroom performance and did not offer the student adequate supports designed to address his attention needs in an integrated co-teaching classroom. Additionally, while the May 2009 CSE's recommendations for multisensory instruction, breaks to refocus attention to tasks, and teacher redirection were appropriate for this student to partially address his attention difficulties, the hearing record does not show that the recommended integrated co-teaching program would have been able to provide the level of individual support required to address the student's distractible behaviors and attention needs given the size of the recommended classroom.

I now turn to whether the May 2009 IEP appropriately addressed the student's sensory, language, and social skills needs with respect to its related services recommendations. I will first address the student's sensory and OT needs and the absence of any related service recommendation for OT.¹² The hearing record reflects that while at Mary McDowell during the prior 2008-09 school year, the student received one 30-minute session of OT in a group of two students per week and a weekly joint 45-minute OT/language therapy session in the classroom (Dist. Exs. 7 at p. 2; 9 at p. 3). Initially, contrary to the district's contention that OT at Mary McDowell was a "programmatic service," the director of the private school testified that related services were not provided to all students, but only after students were individually assessed by staff who determined that the student required OT or speech-language therapy (Tr. p. 123). With respect to the student's OT needs, a January 2009 Mary McDowell OT mid-year progress report indicated that the student was a "very active boy" who exhibited moderate difficulty with sensory-seeking behavior and who sought out sensory input throughout the day (Dist. Ex. 9 at pp. 2, 3). The occupational therapist

¹² The district asserts that this issue was neither raised in the parents' amended due process complaint notice nor during the impartial hearing. 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. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]). In this case, the parents' amended due process complaint notice was accepted at the impartial hearing with no objection from the district (Tr. pp. 4, 13, 14). In the complaint, the parents asserted that the May 2009 IEP "failed to appropriately address the student's ... sensory integration needs" (Dist. Ex. 10 at p. 1). I also note that there was considerable testimony at the impartial hearing with respect to the May 2009 IEP's lack of inclusion of a recommendation for OT and the discussion at the May 2009 CSE meeting regarding the student's OT concerns and the district did not object to this testimony (Tr. pp. 31-32, 34, 40-41, 76-77, 237-38, 240, 243, 273, 275-76, 293, 294). Under these circumstances, the impartial hearing officer did not exceed her jurisdiction by addressing this issue.

reported that occasionally the student's sensory-seeking behavior made it difficult for him to respond to directions, perform gross or fine motor tasks with increased accuracy, and keep his body "calm" (*id.* at p. 3). Examples of the student's behaviors included difficulty standing in line without exhibiting excessive movement, occasionally bumping into other students, laying his upper body on his desk, and occupying peers' desk space (*id.*). The occupational therapist reported that the student benefited from "whole-group" sensory breaks that involved movement and "joint input," noting that the student was learning to identify when he needed such a break (*id.*). The student on occasion, used a "fidget tool" and gum to help him improve his focus and function in the classroom (*id.*). The occupational therapist further reported that OT services focused on improving the student's handwriting, which she reported still required continued practice and support (*id.* at pp. 1, 3). Additionally, according to the student's January 2009 OT progress report, the student demonstrated "severe difficulty" with form perception, visual sequential memory, and visual closure skills (*id.* at p. 1). Further, the March 2008 private neuropsychological evaluation report reviewed at the May 2009 CSE meeting recommended that the student continue to receive OT services (Dist. Ex. 6 at p. 11).

The student's May 2009 IEP, while noting that the student exhibited "sensory issues throughout the school day" such as humming and putting things in his mouth, did not provide for OT services. Nor did the May 2009 IEP include any of the specific strategies identified by the student's Mary McDowell teachers as being appropriate to use with the student to meet his sensory needs. The district's special education teacher, during testimony about his review of the student's May 2009 IEP, acknowledged that the student had "sensory concerns," testified that he was "surprised" that the IEP did not offer OT services, and further testified that it "sound[ed] like [the student] might benefit from [OT]" (Tr. pp. 76-77). Based on the above, the hearing record reflects that the student's May 2009 IEP did not offer appropriate supports and services to address the student's handwriting, visual perceptual, and sensory needs. I note also that there was no testimony at the impartial hearing as to what services the integrated co-teaching program would have provided to the student to meet those needs.¹³

The hearing record reflects that the student also has language and social skills needs. During the 2009-10 school year while at Mary McDowell, the student received two 30-minute language therapy sessions in a group of two students per week, in addition to the one 45-minute joint OT/language classroom session (Dist. Exs. 8 at p. 1; 9 at p. 3). Mary McDowell's speech-language pathologist reported that therapy addressed improving the student's phonological awareness skills, problem solving skills, sequencing and organizational skills, word retrieval skills, expressive organization of ideas, sentence generation, and self-monitoring of expressive utterances and also pragmatic language skills such as turn-taking, and his ability to listen and respond appropriately to communication partners, and use an appropriate tone of voice with peers and adults (Dist. Ex. 8 at pp. 1-2). The student's January 2009 Mary McDowell teacher report

¹³ The district's contention that the May 2009 CSE did not recommend OT for the student because the student's teacher from Mary McDowell, who was present at that meeting, advised the CSE that the student did not require OT is not supported by the hearing record. Rather, the hearing record indicates that the student's special education teacher advised the May 2009 CSE that the student, who was already receiving OT at Mary McDowell, did not need an OT evaluation; not that the student did not need OT services (Tr. pp. 32, 40-41, 275-76, 294; see Dist. Ex. 4 at p. 2).

described his difficulty with social interactions and his need for adult assistance when problem solving with peers (Dist. Ex. 7 at pp. 2-3). The student's May 2009 IEP also indicated that he needed assistance to cooperate with peers socially (Dist. Ex. 2 at p. 4).

The May 2009 IEP did not include any related services to address the student's language and social skills needs. When asked if the May 2009 IEP identified any speech-language needs the student may have had, the district's special education teacher responded that the IEP did not offer speech-language therapy, and that "according to this IEP," "it's hard for me to say" (Tr. p. 97). In light of this, the hearing record reflects that the May 2009 IEP did not offer appropriate supports and services to meet the student's language and social skill needs. Additionally, the hearing record provides no information regarding how the student's language and social skills needs would have been met in the recommended integrated co-teaching class.

For the combined reasons set forth above, and under the circumstances of this case, I find that the district failed to offer the student a FAPE for the 2009-10 school year.

Having determined that the district did not offer the student a FAPE for the 2009-10 school year, I must now consider whether the parents have met their burden to prove that Mary McDowell was an appropriate placement for the student for the 2009-10 school year (Burlington, 471 U.S. at 369-70). A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

For the reasons set forth below, I concur with the impartial hearing officer and find that the hearing record shows that Mary McDowell was an appropriate placement for the student for the 2009-10 school year in that it provided the student with educational instruction specially designed to meet the unique needs of the student, supported by such services as were necessary to permit the student to benefit from instruction.

The hearing record reflects that Mary McDowell provides instructional services to approximately 228 students in grades kindergarten through eighth grade (Tr. p. 115). Students who attend Mary McDowell possess average to above average cognitive skills and learning disabilities that according to the director of the school require full-time special education instruction (Tr. pp. 114-15). Generally, "head" teachers have acquired a Masters degree and special education certification, and most assistant teachers are working toward a Masters degree in special education (Tr. p. 115). Mary McDowell provides its staff with training in the Orton-Gillingham approach to instruction, behavior management, and learning disabilities (Tr. pp. 115-16). Mary McDowell uses curriculum adapted from "mainstream schools" and offers OT and speech-language therapy (Tr. pp. 118, 123). Classes at Mary McDowell are generally composed of 10-12 students and two teachers, with reading and mathematics instruction provided in smaller groups of 2-7 students (Tr. pp. 118-19).

The student's head teacher during the 2009-10 school year testified that she is certified in New York State as a special education teacher and has nine years of experience at Mary McDowell as a head teacher for second and third grade students (Tr. p. 139).¹⁴ The head teacher testified that she provided the student with instruction in mathematics, writing workshop, social studies, social

¹⁴ The assistant teacher in the student's classroom has a Bachelor's degree in education and at the time of the impartial hearing, was working toward her Masters degree in general education (Tr. p. 141).

skills, and handwriting, and that the student also participated in journal writing and "morning meeting" sessions (Tr. pp. 145-47, 233; see Parent Ex. F at pp. 2-3, 7-10, 11, 12-13). The assistant teacher provided the student with reading instruction and the student also attended library, music, art, physical education, theater arts, and science classes (Tr. pp. 145-46; see Parent Ex. F at pp. 2-3, 4-6, 20, 21, 22-23, 24). The head teacher also testified that the curriculum is modified for students and that she used teaching methods such as charts, visuals, graphic organizers, "chunking" lessons into smaller concepts, and review of previously learned material (Tr. pp. 154-57).

The head teacher testified that she assessed the student at the beginning of the 2009-10 school year, reviewed his records from the previous school year, and met with his 2008-09 school year teachers and therapists (Tr. pp. 150-51). At that time, the student's teacher determined that the student's special education needs were in the areas of expressive and pragmatic language skills, attention, sensory deficits, reading, spelling, writing, and voice modulation (Tr. pp. 152-53). Goals were developed for the student in all curricular areas and for language and OT (Tr. p. 153). The head teacher testified that a "main goal" for the student was for him to sustain his attention for longer periods of time during lessons, and for him to increase awareness of when he lost focus (Tr. pp. 153-54). She further testified that the student exhibited difficulty with attention "across the board" in all of his classes (Tr. pp. 191-92).

The head teacher testified that at the beginning of the school year, she provided "a lot" of reminders to the student to stay on task and that she observed him moving in his seat and becoming "immediately distracted" by peers in his group (Tr. pp. 158-59). She indicated that the student was "not really following along" because he was engaging in conversations with other students, moving in his seat, playing with something in his desk or humming (Tr. p. 159). The head teacher testified that having two teachers in the classroom "helped a lot" to address the student's attention needs, in that one teacher provided instruction while the other circulated in the room ensuring that students were focusing on the activity (Tr. pp. 159-60). Other techniques the teacher and the classroom's assistant teacher used to improve the student's attention were to sit with him, provide physical prompts, take away distracting items, and to use hands-on activities, visuals, a movement break chart, an FM system, and "hand fidgets" to keep his hands busy (Tr. pp. 159-61, 192). The head teacher testified that these techniques benefited the student because he demonstrated that he retained what was taught and he produced work (Tr. pp. 162-63). She indicated that the student was better able to maintain focus for longer periods and had increased his self-awareness of when he was losing focus (Tr. p. 193). The student's mid year report from Mary McDowell indicated that the use of the classroom FM system "assisted in keeping [the student] focused ... " (Parent Ex. F at p. 2).

With regard to reading, the head teacher testified that after reviewing the student's prior school year records and asking him to read to her, goals for the student included improving his reading decoding, fluency, comprehension, and encoding (spelling) skills (Tr. pp. 163-64, 171). The student received small group reading instruction with students who were also reading at a second grade level and who exhibited needs similar to the student's (Tr. pp. 164-67). According to the head teacher, students in the reading group needed lessons broken down into smaller steps; directions repeated; use of visuals, charts, and hands-on activities; movement breaks; and taking turns reading aloud (Tr. p. 166). The head teacher testified that the student benefited from the reading instruction provided at Mary McDowell, which was exhibited by his ability to

appropriately participate in group lessons and to show his work through class work and homework (Tr. p. 171). She further testified that the student demonstrated progress in decoding, fluency, comprehension, encoding, and written language skills (Tr. pp. 171-74).

With regard to mathematics, the head teacher conducted a mathematics assessment of the student at the beginning of the 2009-10 school year, noting that the student had difficulty organizing problems on the page and with word problems (Tr. pp. 174-76). The student received mathematics instruction in a group of three other students who exhibited similar needs to those of the student and whose math skills were at a third grade level (Tr. pp. 176, 178). The head teacher testified that the student demonstrated progress in mathematics during the 2009-10 school year, in that he exhibited mastery of the concepts and skills taught thus far (Tr. pp. 181-82). She also testified that the student had made progress in his written language skills since the beginning of the school year, and based on her observation of the student's journal entries; he demonstrated improvement in capitalization and punctuation and his ability to write in complete sentences (Tr. pp. 182-90).

The head teacher described the student as one who sought sensory input and exhibited weak graphomotor skills (Tr. p. 200). To address the student's sensory needs in the classroom, the head teacher testified that the student was provided with specific movement breaks that provided "deep," "vestibular" input; gum to decrease humming, singing, and chewing on his shirt; and a seat cushion to enable him to move his body in a "more ... controlled manner" (Tr. pp. 192, 204-05). The head teacher testified that the sensory techniques used with the student were beneficial in that the student's ability to attend improved, and humming, singing and shirt-chewing decreased (Tr. pp. 204-06). During twice weekly OT sessions, the occupational therapist worked on increasing the student's balance, improving his coordination and awareness of his body in space; addressing his need for sensory input, and also on improving his graphomotor skills (Tr. pp. 200-02; Parent Ex. F at pp. 16-19). One of the student's weekly OT sessions was in the form of a "sensory motor class, " which consisted of six students and two therapists, the goal of which was to "increase arousal state, organize the body, and improve focus and attention to promote optimal classroom learning and performance" (Tr. pp. 206-07; Parent Ex. F at p. 19). Testimony reflects that Mary McDowell staff determined that the student should attend the school's sensory motor class because it helped him "better attend and focus during more of the academic times" (Tr. p. 207). The student attended the sensory motor class "right before reading group" (id.).

At the beginning of the 2009-10 school year, the student's language skills were assessed both formally and informally and he received twice weekly language therapy in a group of three students (Tr. p. 197; Parent Ex. F at p. 14). The assessment results revealed that the student had expressive and pragmatic language needs as well as difficulty processing auditory information in the presence of background noise (Tr. pp. 197-99). The student's program included language therapy, which focused on improving the student's ability to follow directions, answer "WH" questions, comprehend vocabulary, formulate sentences, and retrieve words (Parent Ex. F at pp. 14-15). The speech-language pathologist who provided the student with language therapy reported that the student also exhibited auditory processing weaknesses in the areas of auditory attention, memory, and interpretation of directions (id. at p. 14). She indicated that the use of an FM amplification system in both the student's classroom and therapy room supported his processing of verbal information in the presence of background noise (id. at pp. 14-15). To improve the

student's pragmatic language skills, the hearing record indicates that the speech-language pathologist focused on appropriate initiation of conversations with peers and adults, topic maintenance, turn-taking, listening to conversation partners, and asking and responding appropriately to questions (*id.* at p. 15). The student's head teacher testified that the student demonstrated progress in the areas addressed by language therapy (Tr. pp. 197-99).

In addition to the student's pragmatic language instruction, the student received one 45-minute session per week of "social emotional learning curriculum" instruction (Tr. p. 207). The student's head teacher described the social emotional class as "explicitly teach[ing] kids various social skills," such as identifying feelings and facial expressions, and social problem solving skills (Tr. p. 208). She stated that this class helped the student to "better use his words" when involved in a verbal conflict with other students and to use a visual aid to identify increasing feelings of frustration (Tr. pp. 208-09). The head teacher testified that in the student's 2009-10 class, the student had the opportunity to model other students who were more independent with problem solving in social settings (Tr. pp. 217-18).

Additionally, the district contends Mary McDowell was "too restrictive" and requires a finding that Mary McDowell is not an appropriate placement. The parents agree that Mary McDowell is a school for special education students. While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 2010 WL 1253698, at *19 [S.D.N.Y. Mar. 21, 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]; Application of the Dep't of Educ., Appeal No. 10-042; Application of a Child with a Disability, Appeal No. 99-083). I find that in light of the student's sensory, behavioral and attentional needs, and the required level of supports needed by the student, LRE considerations do not preclude a finding that the parent's unilateral placement was appropriate.

Accordingly, I find that the hearing record shows that the student's program at Mary McDowell for the 2009-10 school year was appropriate in that, as discussed above, Mary McDowell provided the student with educational instruction specially designed to meet his unique needs, supported by such services as are necessary to permit the student to benefit from instruction (see Gagliardo, 489 F.3d at 112, citing Frank G., 459 F.3d at 364-65).¹⁵

¹⁵ I have considered the district's assertion that the student was "not making academic progress" at the private school, and in particular, that the student remained in the same reading and math groups during the 2009-10 school year. I have reviewed the hearing record and, contrary to the district's assertion, I find that it reflects that the student made progress at Mary McDowell during the 2009-10 school year. As indicated above, the student demonstrated progress in decoding, fluency, comprehension, encoding, written language and mathematics skills; areas that were addressed by language therapy, his ability to maintain focus for longer periods of time, and his ability to better use his language when involved in verbal conflicts or disagreements with other students (Tr. pp. 171-74, 181-82, 193, 197-99, 208-09).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27); see Frank G. 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The district asserts that the parents' request for tuition reimbursement should be denied on equitable grounds because the parents did not provide the district with the notice required by the IDEA. The parents contend that they complied with the IDEA notice requirement and that they fully cooperated with the district. The impartial hearing officer concluded that the parents "timely notified" the district of their intention to enroll their son in Mary McDowell and seek tuition reimbursement by their letter dated September 18, 2009 and that the district "failed to satisfy its burden to establish that equitable considerations should preclude an award of tuition reimbursement" (IHO Decision at p. 16).

In this case, I find that the hearing record does not support the impartial hearing officer's determination. Upon a review of the hearing record, I find that the parents failed to provide the district with the notice required by the IDEA of their intent to enroll the student in a private school at public expense, including a statement of their concern's with the district's recommendations for the 2009-10 school year. In particular, the parents did not advise the district that they were rejecting the IEP and placement proposed by the district, including stating their concerns and their intent to enroll the student in a private school at public expense, until their letter to the district dated September 18, 2010. The impartial hearing officer's conclusion that such correspondence was timely was erroneous. As set out above, the IDEA requires that the parents' notice be given either 10 business days prior to the removal of the child from the public school or at the last CSE meeting prior to the removal of the student (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). In this case, the hearing record reflects that the student was enrolled at Mary McDowell at the beginning of the 2009-10 school year and the parents did not provide the requisite notice 10 days prior to the start of the school year.

The parents assert that they satisfied the IDEA notice requirement by virtue of their letters dated July 9, 2009 and August 12, 2009 (see Parent Exs. B; C) and that the student's mother noted her concerns regarding the program recommendation at the May 2009 CSE meeting. However, the July 9, 2009 letter did not advise the district that the parents were rejecting the recommended IEP or placement, that the parents intended to enroll the student in Mary McDowell, or that the parents would be seeking tuition reimbursement for the student's placement at Mary McDowell (see 20 U.S.C. § 1412[a][10][C][iii][I][bb]; see also 34 C.F.R. § 300.148[d][1][ii]). Likewise, while the parents' August 12, 2009 letter advised the district that "until [the parents are] able to determine" whether the recommended placement is appropriate, the student would "remain" at Mary McDowell and indicated that if the parents determined that the recommended placement was inappropriate when they visited the placement in September 2009, the parents would be "forced to seek tuition reimbursement for [the student's] tuition," the parents did not advise the district by that letter that the parents were rejecting the placement, that the parents intended to enroll the student in Mary McDowell, or that the parents would be seeking tuition reimbursement for the student's placement at Mary McDowell (see Parent Ex. C; see also 20 U.S.C. § 1412[a][10][C][iii][I][bb]; 34 C.F.R. § 300.148[d][1][ii]). With respect to the May 2009 CSE meeting, the hearing record does not reflect and the parents do not contend that they advised the district at the May 2009 CSE meeting that they intended to enroll the student in Mary McDowell, or that they would be seeking tuition reimbursement for such a placement (see Pet. ¶ 55; Answer ¶ 55; 20 U.S.C. § 1412[a][10][C][iii][I][aa]; see 34 C.F.R. § 300.148[d][1][i]). I therefore find that the parents did not comply with the IDEA's statutory notice requirement.

In light of the fact that the parents have not complied with the IDEA's statutory notice requirement, I therefore, in the exercise of my discretion, find that the equities do not support the parents' request for tuition reimbursement (Stevens v. New York City Dep't of Educ., 2010 LW 1005165, at *10 [March 18, 2010]; S.W., 2009 WL 857549, at *11; Arlington Cent. Sch. Dist. v. D.K. and K.K., 2002 WL 31521158, at * 11 [Nov. 14, 2002]; Application of the Dept. of Educ., Appeal No. 09-059; Application of the Dept. of Educ., Appeal No. 09-046; Application of the Dept. of Educ., Appeal No. 07-032; Application of a Student with a Disability, Appeal No. 09-048).

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that she ordered the district to reimburse the parents for tuition at Mary McDowell for the 2009-10 school year.

Dated: **Albany, New York**
 July 14, 2010

PAUL F. KELLY
STATE REVIEW OFFICER