



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-042

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, Tracy Siligmuller, Esq., of counsel

Educational Advocacy Service, attorneys for respondents, Jennifer A. Tazzi, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Mary McDowell Center for Learning (Mary McDowell) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Mary McDowell (Parent Ex. R). Mary McDowell has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. p. 42; see 8 NYCRR 200.7, 200.1[d]). The student's eligibility for special education services as a student with an other health impairment (OHI) is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The student has received a diagnosis of an attention deficit hyperactivity disorder (ADHD) inattentive type "with some hyperactive features (impulsive, fidgety, restless behaviors)," for which she has taken medication (Tr. pp. 229-30, 272-74; Parent Exs. E at p. 5; X; Y at p. 28). The student is described as demonstrating academic delays in reading, spelling, expressive writing, math fluency, and graphomotor skills as well as exhibiting distractibility, disorganization, difficulty regulating a consistent level of attention, and anxiety related to academic tasks (Tr. pp. 156, 157, 158; Parent Ex. Y at pp. 4-7).

The hearing record reveals that the student attended "pre-k" at a district school (Tr. p. 214). From kindergarten through third grade, she attended a dual language program at a private school

(Tr. pp. 214, 245-46; Parent Ex. Y at p. 7).¹ The student's mother reported that she first became aware that the student was experiencing educational difficulties during first grade when the school psychologist called and informed her that the student was falling behind her peers in reading and writing (Tr. p. 215). At that time, the student began receiving an extra 1/2 hour of daily individual reading and writing support after school (Tr. pp. 215, 241; Parent Ex. Y at p. 8). During summer 2006, the student met with a private reading tutor for two 30-minute sessions per week (Tr. pp. 215-16; Parent Ex. Y at p. 8) The student reportedly "caught up a little bit" (Tr. p. 216). For second grade (2006-07), she worked in a slower reading group and received an extra period per week of group support with a learning specialist at the private school (Parent Ex. Y at p. 8). The student continued to fall behind and began waking up at night, distressed about her inability to read (Tr. p. 216; Parent Ex. Y at p. 8). The private school began to de-emphasize the Hebrew language component of the curriculum, focused on English, and continued to provide the student with individual reading and writing support services and tutoring services (Tr. p. 217). The student's after school tutoring was later discontinued because the student was reportedly "miserable" and often too tired to participate after the school day (Parent Ex. Y at p. 8). Midway through the 2006-07 school year, the tutoring was reinstated and it continued through summer 2007 (*id.*). During summer 2007, the student received tutoring twice per week from a private special education tutor and also received private speech-language therapy (Tr. pp. 219, 221).

On June 13, 20, and 22, 2007, the student underwent a private psychological evaluation by a licensed psychologist (Parent Ex. Y at p. 1).^{2,3} The psychologist administered cognitive, academic, and behavioral assessments (*id.* at pp. 1-6). Administration of the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) yielded a full scale IQ of 119, in the high average range (*id.* at p. 1). The psychologist reported that as the student's subtest scores ranged from the lower limits of the average range to the very superior range, non-intellective factors such as level of task focus, attention and motivation may have interfered with her performance, and further that her cognitive potential appeared to be greater than her overall IQ suggested (*id.* at p. 13). The psychologist reported that the student displayed weaknesses in her executive functions including: sustaining attention, holding larger amounts of information in her working memory, retrieving information, inhibiting impulsive responding, planning and organizing approaches to tasks, integrating multiple details, differentiating salient information from less relevant information, and incorporating feedback in order to discern rules in ambiguous situations (*id.* at p. 28). The psychologist also reported that the student exhibited relative weaknesses in receptive and expressive language, in phonological/auditory processing, and in visual-motor integration (*id.*). She opined that the student's challenges in these areas appeared to underlie and/or contribute to her delays in reading, spelling, and written expression and may have partially accounted for the variability in her academic performance (*id.*). Administration of the Woodcock - Johnson Tests of Achievement-Third Edition (WJ-III ACH) resulted in standard scores ranging from the very

¹ This school will be referred to in the hearing record as "the private school" or "the prior private school" in order to distinguish it from Mary McDowell.

² The private evaluation report referenced prior evaluations including a private speech-language evaluation and a private occupational therapy (OT) screening (Tr. pp. 218-19; Parent Ex. Y at p. 9). The hearing record does not contain either of these evaluations.

³ The student's mother reported that by the middle of the 2006-07 school year it was clear that the student was unable to keep up with her classmates (Tr. pp. 217-18). In May 2007, the parents requested that the district evaluate the student (Tr. p. 218). Although the district initiated an evaluation, according to the parents chose to pursue a private evaluation in order to expedite the process (*id.*).

low range in the spelling of sounds subttest to the high average range in the math calculations subttest (id. at pp. 4-5). The psychologist reported a discrepancy between the student's intellectual functioning and her level of academic achievement and also noted that the student had begun to express anxiety regarding her academic performance (id. at p. 28). The report noted that the student met the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) criteria for diagnoses of a reading disorder and a disorder of written expression (id.). Although the student's math skills were deemed to be an area of relative strength for the student, the psychologist indicated that the student's executive challenges may require support to recall and implement multistep tasks and to solve complex word problems (id.). With regard to behavior, the evaluation report reflected that the student's test performance, history and the information obtained from the reports of her parents and teacher on behavior rating scales were consistent with a DSM-IV diagnosis of ADHD, inattentive type with some hyperactive features (impulsive, fidgety, and restless) (id.).

The evaluation report included recommendations for the student's third grade school year (2007-08) for, among other things, use of repetition; a multisensory approach to learning; tasks broken down into smaller, highly structured, sequential steps; continued work with a learning specialist utilizing a highly repetitive, multisensory, sequential, cumulative approach to teaching, reading and spelling such as the Orton-Gillingham program; use of a keyboard and dictation for writing activities; seating close to the teacher; shortened assignments; and extended time limits (Parent Ex. Y at pp. 29-30). The psychologist also recommended an auditory processing evaluation, a psychiatric evaluation, an OT evaluation, speech-language therapy services, and play therapy (id. at pp. 29-31). The psychologist also indicated that if the student continued to experience significant academic difficulty after being provided with the recommended supports and accommodations, a specialized learning environment designed for bright students with learning challenges should be considered for her (id. at p. 31).

The student returned to the private school for third grade (2007-08) (Tr. pp. 221, 223). The student continued to receive 1:1 sessions with her regular education teacher at the private school (Tr. p. 228). She also continued to receive private speech-language therapy and private tutoring (Tr. p. 243; Dist. Ex. 12 at p. 1; Parent Ex. C at p. 1).

On April 8, 2008, the student's third grade "general studies" teacher at the private school completed a teacher report for the student's upcoming CSE meeting (Dist. Ex. 10). The teacher reported that the student was cooperative, demonstrated a positive attitude, had strong social skills, and got along well with both teachers and peers (id.). Her estimated functional levels in reading and math were reportedly at the 2.0 and 2.5 grade level, respectively (id.). The report noted that the student's reading strengths were in the areas of reasoning and critical thinking skills and that she had difficulty with decoding, word retrieval, and sustaining focus (id.). The report indicated that the student needed to preview texts before reading and completing assignments (id.). In math, the student was reported to work quickly and accurately on short, structured tasks (id.). However, she had not mastered math facts and required time and support to grasp new concepts (id.). With regard to language, the report noted that the student was able to express herself fairly well verbally, but her receptive language skills varied according to the task and with her level of attention to the task (id.). The teacher also reported that the student had difficulty with writing mechanics and in putting ideas together effectively (id.). The teacher strongly recommended 1:1 services in order to allow the student to "bolster her skills and work up to her potential" (id.).

A private speech-language therapy update from April 2008 indicated that the student was receiving two 30-minute sessions of language therapy per week in a 1:1 setting (Parent Ex. C at p. 1). The speech-language pathologist reported that the student participated cooperatively on all activities and tasks, but that she demonstrated difficulties with attention and focus (id.). The report also noted that the student utilized a vestibular seat cushion to assist her in focusing and in attending to desk top work (id.). The student exhibited receptive language and comprehension weaknesses and she was noted to have difficulties with activities that required her to read brief passages and respond to questions about the passage's main idea, details, and sequence (id.). She also had difficulty with predicting outcomes and with making inferences from the passages (id.). The speech-language pathologist also reported that the student exhibited central auditory processing weaknesses that made it difficult for her to discriminate among acoustically similar sounds, which in turn impeded her decoding and encoding abilities (id.). The student was also reported to be weak in recalling auditory information and in following complex auditory directions (id.). As a result, she required multiple repetitions of auditory information and required lengthy, complex auditory information to be broken down into smaller steps (id.). In order to assist the student with her auditory processing skills, the speech-language pathologist taught compensatory strategies including: "chunking," self repetition, and clarification (id.). She also utilized an FM amplification system during therapy sessions (id.). To assist with the student's expressive language needs, the therapist focused on improving her ability to formulate narratives more concisely (id. at pp. 1-2). Her verbalizations were reported to run on without an appropriate beginning, middle, and end (id. at p. 2). She also demonstrated difficulty with word finding and as a result, lost her train of thought in mid-sentence (id.). To address this weakness, the speech-language pathologist used mental visualization techniques (id.). To assist the student with writing, the speech-language pathologist worked on topic sentences and paragraphs, and utilized "word webs" (id.). The student's difficulty with phonological processing was reported to affect her spelling (id.). Although the speech-language pathologist noted gradual improvement in the student's comprehension of main idea, in recognizing details, and in her ability to formulate simple paragraphs; she recommended a continuation of the speech-language services and suggested a vestibular cushion to help the student focus and attend to desk top work throughout the school day (id.). Goals for her future therapy sessions were listed as: (1) improving her auditory processing skills; (2) improving her critical thinking skills and comprehension skills; and (3) improving her verbal organization and word finding skills (id.).

On April 16, 2008, a social history update of the student was completed by a district social worker (Parent Ex. D at pp. 1, 2). Information for the social history was obtained through an interview with the parents and by reviewing information from the student's file (id. at p. 2). The update indicated that the parents requested a reevaluation because they disagreed with the student's classification of a speech or language impairment and also with a recent recommendation of a general education program with related services (id.). The parents' responses reflected that the student had been attending a private school for the past four years and that there had been some progress in sound recognition, a little progress in reading and writing fluency, and less progress in spelling and reading comprehension (id.). The update report also indicated that although the parents believed that the private school was a nurturing and responsive environment, the student was not working up to her potential and needed more services (id.). The update reported that the student was unable to keep pace with her peers in reading and writing fluency, and that she performed better in science, Jewish studies, gym, art, and music (id.). The student's conceptual skills in math were reportedly strong, but she had difficulty with math calculations and working memory deficits also affected her performance (id.). The update indicated that the student required the use of a calculator as a testing accommodation (id.). The update also recommended the use of

an "AlphaSmart" for written language (id.).⁴ The update reported that the student tended to "zone out" in class and required that the teachers check in with her during lessons (id.). The update also noted that the student could become fidgety and have difficulty remaining still, but overall her medication was reported to have a positive effect during school (id.). The student was also described as having age appropriate social skills and good behavior (id.). The update report noted that the student experienced trouble sleeping, verbalized resistance to going to school, and had articulated self-deprecating remarks about her academic ability, but that as a result of the support services put in place, the student's overall level of distress had decreased (id.).

Also, on April 16, 2008, a district school psychologist completed a psychoeducational evaluation of the student (Dist. Ex. 7 at p. 1). The psychoeducational evaluation report reflected behavioral observations of the student which indicated that the student was highly cooperative, displayed a good level of effort, and was focused and able to express her thoughts and concerns effectively (id.). Administration of the WJ-III ACH yielded standard scores in the low average range on the academic skills and academic fluency cluster tests; however, the student's individual subtest standard scores ranged from the low end of the low range (72 in writing fluency) to the average range (100 in applied problems) (id. at p. 4). With regard to social/emotional functioning, the evaluator indicated that the student presented as a polite and friendly girl who indicated that she got along well with both teachers and peers (id. at p. 3). The student reported that she liked school, but that reading and writing were difficult for her (id.).

On April 20, 2008, the student's private special education tutor prepared a progress report (Dist. Ex. 12 at p. 1). The progress report reflected that the student was hard working and eager to learn (id.). The tutor reported that the student had made much progress since the tutoring began, but only after the student had begun to take medication to address her "intense impulsivity and motor restlessness" (id.). The special education tutor indicated that the student had improved her decoding skills and developed multiple strategies to read text (id.). According to the progress report, the student was reading at a beginning second grade level and in addition to difficulty with decoding, the student exhibited significant language weaknesses that impeded her ability to comprehend text (id.). The special education tutor indicated that the student met the criteria for both a reading disorder and a writing disorder and indicated that her learning disability interfered more with her writing than with her reading (id. at pp. 1-2). With regard to writing skills, the progress report reflected that the student had difficulties with graphomotor skills (handwriting), spelling, organization, and word retrieval skills (id. at p. 2). According to the report, the student's handwriting was very difficult to read, she struggled to remember the direction of letters, and she was both embarrassed and frustrated by her writing deficits (id.). The special education tutor indicated that the student had been "receiving a tremendous amount of support both in and out of school to help her manage her particular learning disability and to help her build skills so that she could function in school and feel better about herself as a learner" (id. at p. 1). She also indicated that the student's learning challenges had affected her overall self-esteem and that she was "very much at risk for developing a negative self image" (id. at p. 2). The special education tutor surmised that the student was "an incredibly bright girl with a language-based learning disability and ADHD, who desperately need[ed] services to meet her needs"(id.). The special education tutor opined that the student also required "speech and language therapy to address her expressive

⁴ Presumably, AlphaSmart refers to a portable word processing keyboard.

and receptive language weaknesses, as well as occupational therapy to address her grapho-motor and organizational challenges" (id.).

On May 1, 2008, a district social worker observed the student in her classroom at the private school during a language arts lesson (Dist. Ex. 6 at p. 1). The resultant observation report reflected that the class was comprised of 21 students and that the student participated appropriately in the lesson, followed instructions, focused on the lesson, and displayed a positive attitude (id. at pp. 1, 2, 3). The student's teacher reported that the student worked best using a multisensory approach and that her math skills were stronger than her reading skills (id. at p. 2). The teacher also indicated that although the student had difficulty copying down her homework assignments and did not complete the worksheet presented during the observation as quickly as other students, she did complete her assignments (id. at pp. 2, 3).

On May 14, 2008, the CSE convened for a review of the student's program at the request of the parents (Parent Ex. E at p. 1). The meeting was attended by a special education teacher who also served as the district representative, a school psychologist, a school social worker, and the parents (Tr. p. 28; Parent Ex. E at p. 2). The student's regular education teacher and her learning specialist from the private school also participated in the meeting by telephone (Parent Ex. E at p. 2). The student's father signed a declination letter waiving the participation of an additional parent member at the student's CSE meeting (Dist. Ex. 5; see Parent Ex. E at p. 2). The CSE recommended that the student's classification be changed from a student with a speech or language impairment to a student with an OHI (Dist. Ex. 4 at p. 1; Parent Ex. E at p. 1). The CSE also recommended a general education program with five periods of 8:1 special education teacher support services (SETSS) sessions per week in a separate location, and two 30-minute individual sessions of speech-language therapy per week (Parent Ex. E at pp. 1, 9, 11).⁵ The IEP included six goals in the areas of math, reading decoding/comprehension, comprehension, verbal expression, auditory processing, and critical thinking (Tr. pp. 36-41; Parent Ex. E at pp. 6-8).

A summary of the May 2008 CSE meeting completed by the district's social worker reflected that the CSE considered the student's social history update, the letter from the student's developmental behavioral pediatrician, the classroom observation of the student, the teacher report, the progress report from the student's private tutor, the speech-language progress report, and the psychoeducational report (Dist. Ex. 4 at p. 1; see Tr. p. 57). The hearing record also reflects that the parents supplied the district with a private psychological evaluation dated June 2007, but it is unclear from the hearing record whether the private psychological evaluation was considered at the CSE meeting (see Tr. pp. 221-23, 265-66, 294). The CSE summary reflected that the CSE considered the student's language processing problems, attentional problems, and auditory processing difficulties (Dist. Ex. 4 at pp. 1-2). The summary also noted that the parents would possibly be pursuing a central auditory processing evaluation (id. at p. 2). The summary noted further that the student previously had used an FM unit, a vestibular cushion, and an Alpha Smart (id.). None of these devices were recommended by the CSE (id.).

The district provided the parents with a final notice of recommendation (FNR) dated May 14, 2008, stating that the student was classified as a student with an OHI and was recommended for a general education program with SETTS and two 30-minute 1:1 sessions of speech-language

⁵ The hearing record also reflects that the student would have received an extra period of "intervention" on Mondays, Wednesdays, and Fridays (Tr. p. 110).

therapy (Dist. Ex. 13; Parent Ex. F). The FNR identified a specific public school as a recommended placement for the student for the 2008-09 school year and provided a contact person and phone number for the recommended public school (id.).

On June 19, 2008, by facsimile, the parents' educational advocate notified the district that the student's father had visited the recommended placement and found that "a part time special education class" was inappropriate for the student (Parent Ex. G). The facsimile stated further that the student's father would be enrolling the student at Mary McDowell and would "be requesting an impartial [hearing]" (id.).

By letter dated August 15, 2008, the parents, through their educational advocate, again notified the district that they were enrolling the student at Mary McDowell for the 2008-09 school year (Parent Ex. I).

By due process complaint notice dated August 3, 2009, the parents, through their advocate, requested an impartial hearing (Parent Ex. A at p. 1). The parents alleged that the district failed to offer the student a free appropriate public education (FAPE)⁶ for the 2008-09 school year and that the recommended placement was not reasonably calculated to confer educational benefits on the student (id.).

The impartial hearing began on November 2, 2009, and concluded on March 8, 2010, after four days (Tr. pp. 1, 128, 206, 261, 320). On April 1, 2010, the impartial hearing officer rendered his decision (IHO Decision at p. 15). The impartial hearing officer found no procedural violations that rose to the level of denying the student a FAPE. Substantively, the impartial hearing officer determined that the general education with SETSS program recommended by the district had failed to offer the student a FAPE for the 2008-09 school year (id. at p. 11). He found that the district's recommended program was inadequate because the program was "extremely similar" to the program at the student's prior private school where the student had "failed to make meaningful progress" (id.). He also found that the district's recommended program failed to address the student's graphomotor deficits and need for OT (id.).

The impartial hearing officer went on to find that Mary McDowell was an appropriate placement for the student (IHO Decision at pp. 12-13). He determined that while he found the testimony of the witnesses from Mary McDowell to be "somewhat global and vague," there was "clear evidence" of the student's program and progress in the teacher reports dated January 2009 (id. at p. 12). The impartial hearing officer further found that the student received both speech-language and occupational therapies at Mary McDowell, and that the placement was the least restrictive environment (LRE) for the student (id. at p. 13).

⁶ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

In addressing equitable considerations, the impartial hearing officer concluded that equities favored the parents and he ordered the district to reimburse the parents for the tuition paid to Mary McDowell (IHO Decision at pp. 14-15).

The district appeals and asserts that the impartial hearing officer erred in determining that the district failed to offer the student a FAPE for the 2008-09 school year. The district asserts that the recommended general education program with SETSS and individual speech-language therapy was reasonably calculated to provide the student with meaningful educational benefits and the placement would have been able to implement that program. The district also asserts that the impartial hearing officer erred in determining that the IEP was inappropriate because it did not recommend OT because the parents did not raise any claims regarding related services in their due process complaint notice or in their closing arguments; therefore, the issue was not properly before the impartial hearing officer.

In addressing the parents' unilateral placement, the district asserts that Mary McDowell was inappropriate because it was too restrictive and it provided group, rather than individual, speech-language therapy. The district also asserts that the equities do not favor reimbursement.

In their answer, the parents assert that the impartial hearing officer correctly found that the district failed to offer the student a FAPE. The parents contend that the district failed to assess the student in all areas related to her disability, and specifically assert that the district's failure to conduct a formal OT evaluation resulted in a failure to assess the student's sensory and graphomotor needs. The parents also contend that the district failed to consider the private psychological evaluation, the learning specialist's report, the teacher reports, or information provided in the social history update. The parents assert that the district failed to consider information from the student's prior private school including the fact that the student used an FM unit, a vestibular cushion, and an Alpha Smart. The parents also contend that the CSE failed to recommend specialized support and services to address the student's reading and writing needs; failed to provide an IEP with writing goals; and failed to address the student's attentional needs, processing deficits, and emotional/counseling needs. In addressing the unilateral placement, the parents assert that the program at Mary McDowell was appropriate. The parents assert that Mary McDowell provided appropriate language-based remedial instruction in a small group along with the related services of speech-language therapy and OT. The parents also assert that the student met her goals at Mary McDowell and progressed in encoding and decoding levels, in writing, in lessening her anxiety, and in increasing her confidence. The parents further assert that there are no equitable considerations that would preclude tuition reimbursement.

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). An IEP must also include a statement of measurable annual goals, including academic and functional goals designed to meet the student's unique needs that result from the student's disability to Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

A student's recommended program must 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, 489 F.3d at 108; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). Determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546

F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

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

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

Upon review of the hearing record, I concur with the impartial hearing officer's conclusion that the district's program did not offer the student a FAPE for the 2008-09 school year. As described more specifically below, I find that the level of services recommended on the student's May 2008 IEP were insufficient to address her needs.

As an initial matter, I note that neither party has appealed the impartial hearing officer's determination that the parents' assertion that the district failed to include a complete statement of the student's present levels of achievement and performance was unsupported by the hearing record (at p. 10). Therefore, that aspect of the impartial hearing officer's decision is final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5]; see Application of a Student with a Disability, Appeal No. 09-095; Application of a Student with a Disability, Appeal No. 09-079; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-013; Application of a Student with a Disability, Appeal No. 08-073; Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

The hearing record reflects that the evaluative data available to the CSE at the May 2008 CSE meeting included a social history update of the student, a letter from the student's developmental behavioral pediatrician, a report of a classroom observation of the student, a report from the student's then current classroom teacher, a progress report from the student's private special education tutor, a speech-language report and a district psychoeducational report (Tr. pp.

47-51; Dist. Ex. 4 at p. 1). The hearing record further reflects that the parents also supplied the district with a private psychological evaluation dated June 2007 (see Tr. pp. 221-23, 294).

As previously noted, administration of the WJ-III ACH by the district yielded standard scores in the low average range on the academic skills and academic fluency cluster tests; however a closer review of the student's individual subtest standard scores reveals that the student achieved a score in the very low end of the low range in writing fluency (SS 72, grade equivalent 1.4) and the very low end of the low average range in spelling (SS 81, grade equivalent 2.0) (Dist. Ex. 7 at p. 4). In addition, the hearing record reveals that the student's level of classroom functioning was not consistent with the test scores obtained (compare Dist. Ex. 10, and Dist. Ex. 12 at p. 1, with Parent Ex. E at p. 3).

Although the student achieved some WJ-III ACH subtest scores in the average and low average range, reports prepared by the student's then-current third grade teacher at the prior private school and by her private special education tutor reflected that the student's overall functioning in math and reading was estimated to be at approximately the middle (2.5) and beginning (2.0) second grade levels, respectively (Dist. Exs. 10; 12 at p. 1). The student's third grade teacher further reported that the student exhibited academic difficulties in decoding, word retrieval, writing mechanics, and putting ideas together effectively, and that she had not yet mastered math facts (Dist. Ex. 10 at p. 1). According to the student's private special education tutor, she had not yet mastered long vowel patterns, had difficulty with r-controlled vowels and did not understand syllabication rules resulting in a diminished reading rate and overall fluency (Dist. Ex. 12 at p. 1). In addition to her deficits in decoding, the tutor indicated that the student also demonstrated significant language weaknesses that affected her ability to make meaning from text, specifically, difficulty with words with multiple meanings, interpreting figurative language, and inferring meaning from text (id.). The tutor also reported that the student's comprehension was compromised by her decoding and language weaknesses and that she had particular difficulty with nonfiction texts that required her to learn content specific vocabulary (id.). With regard to writing skills, the tutor reported that the student had difficulty explaining her thinking and expressing her ideas due to difficulty with word retrieval, difficulty organizing her ideas, and weak spelling skills as well as graphomotor deficits including handwriting legibility and reversals (id. at pp. 1-2). The private tutor's observations were supported by the student's classroom teacher at the prior private school, who reported that the student exhibited difficulty with writing mechanics and putting ideas together effectively (Dist. Ex. 10 at p. 1).

As noted above in more detail, an April 2008 speech-language report indicated that at the time of the May 2008 CSE meeting the student continued to demonstrate language and central auditory processing weaknesses that affected her performance in the classroom, including difficulty discriminating between acoustically similar sounds which impeded her decoding and encoding skills (Parent Ex. C at p. 1). The student's auditory processing difficulties also affected her ability to retell and recall auditory information and follow complex auditory directions (id.). I note that the student's speech-language pathologist utilized an FM amplification system with the student during therapy to enhance her auditory processing skills and further note that an auditory processing evaluation had been previously recommended in the June 2007 private psychological evaluation (Parent Exs. C at p. 1; Y at p. 30). Receptively, the student continued to demonstrate difficulty in the area of comprehension, specifically in her ability to respond appropriately to questions regarding main idea, recognizing details, sequencing, predicting outcomes, and making inferences (Parent Ex. C at p. 1). With regard to the effect of her expressive language deficits, the student continued to exhibit difficulty formulating narratives and used run on sentences; did not

include an appropriate sequence of beginning, middle, and end; and demonstrated persistent word finding difficulties which caused her to lose her train of thought mid-sentence (id. at pp. 1-2).

Furthermore, the private 2007 psychological evaluation report which the parent provided to the May 2008 CSE, indicates that the student demonstrated weaknesses in phonological/auditory processing and visual motor integration measures and that the evaluator surmised that these deficits appeared to "underlie/contribute to the [the student's] delays in reading, spelling and written expression and may in part account for the variability in the student's academic performance" (Parent Ex. Y at p. 28). The report also reflects that the student has diagnoses of a reading disorder, a disorder of written expression and an ADHD inattentive type with some hyperactive features (impulsive, fidgety, restless behaviors) (id. at pp. 24, 28).⁷

The hearing record also indicates that the student required a variety of classroom academic supports to address her needs.⁸ According to the student's third grade teacher at the prior private school, the student needed to preview texts before reading and completing assignments, she needed time and support to grasp new concepts, and her level of attention affected her receptive language skills (Dist. Ex. 10 at p. 1). Additionally, the student's speech-language pathologist reported that the student utilized a vestibular cushion during therapy, which was a "very positive support for [the student] because it [was] designed to give feedback to her body which in turn help[ed] her focus and attend to desk top work," and the pathologist recommended that the student use the vestibular cushion throughout the school day to assist her in attending to classroom work (Parent Ex. C at pp. 1-2). The hearing record also reflects that the student used an AlphaSmart keyboard as a support to assist her in writing tasks and required the use of a calculator as a testing accommodation to address her difficulty with calculations (Parent Ex. D at p. 2). I note that recommendations contained in the June 2007 private psychological evaluation included the use of a keyboard or word processor and extended time for all written assignments, and indicated the need for a complete OT evaluation to increase the automaticity, fluency, and intelligibility of her handwriting (Parent Ex. Y at pp. 19, 25, 29). I note also that the student's special education tutor reported that the student's handwriting was very difficult to read, she struggled to remember the direction of letters, and the student was both embarrassed and frustrated by her deficits in writing (Dist. Ex. 12 at p. 2). The private tutor further indicated her belief that the student required OT to address her graphomotor and organizational needs (id.).

Although I agree with the district's contention that the program offered to the student at the May 2008 CSE meeting would have provided her with more services than she had received at her prior private school; the hearing record does not support the conclusion that the level of services recommended by the district was sufficient to adequately address the student's identified needs. In addition, the district neglected to properly identify and address the student's expressive writing

⁷ Although the district's classroom observation reflected that the student's attention span was "very good throughout the lesson" and that she sat quietly, this is inconsistent with other documentary evidence contained in the hearing record (Dist. Ex. 6 at pp. 1, 2; see Dist. Ex. 12 at p. 1; Parent Exs. C at p. 1; D at p. 2).

⁸ The June 2007 private psychological evaluation report included extensive recommendations for classroom accommodations including, among other things, repetition of key concepts, complex directions, main ideas of presented material and directions to assignments; tasks broken down into highly structured, sequential steps; continued work with a learning specialist utilizing a highly repetitive, multisensory, sequential, cumulative approach to teaching reading and spelling such as the Orton-Gillingham program; use of a keyboard and dictation for writing activities; seating close to the teacher; shortened assignments and extended time limits on assignments and tests in a minimally distracting location; and classroom breaks (Parent Ex. Y at pp. 29-30).

needs or her graphomotor and visual motor integration needs; needs that are repeatedly discussed in the hearing record (see Parent Ex. E at pp. 6-8; see also Tr. pp. 220, 288-89; Dist. Exs. 7 at p. 4; 10; 12 at pp. 1-2; Parent Exs. C at p. 2; D at p. 2; L at p. 3; Y at pp. 25, 28-29). Although the district's SETSS teacher offered general testimony that she provides students with "follow-up on what was taught in [the classroom] mini-lesson" and provides "instruction in whatever they are working on" "reading, writing or whatever, math;" given the breadth of the student's academic needs and considering her attending and sensory weaknesses, the hearing record does not show that one period of SETSS daily was insufficient to address her deficit areas (Tr. pp. 76-77). The hearing record does not describe how the student's significant needs in written expression, and her difficulties with decoding, encoding, and mathematics would be addressed in each session. Moreover, as noted above, the May 2008 IEP failed to recommend any sensory accommodations or assistive technology that the student had successfully used in the past to address her attending and handwriting difficulties (see Dist. Ex. 4 at p. 2; Parent Ex. E at pp. 3-5, 11; see also Parent Exs. C at pp. 1-2; D at p. 2).

Additionally, I find that the district's assertion that the impartial hearing officer made an improper determination regarding OT to be unpersuasive. The impartial hearing officer found the May 2008 IEP to be inappropriate not only because it failed to provide OT as a related service, but also because it failed to address the student's graphomotor deficits when those deficits had been emphasized in a report available to the district's CSE (IHO Decision at p. 11). As discussed above, the student's graphomotor deficits also affected her written expression, and were a significant need that the district failed to address in the IEP (Parent Ex. Y at p. 28; see Parent Ex. E). As such, the district was remiss in not pursuing an OT evaluation as recommended in evaluations and reports available to the CSE and as evidenced by the student's continued difficulties with handwriting.

In conclusion, I find that the program recommended by the district was insufficient to meet the student's needs in the areas of math, reading, attention and/or focus, sensory processing, auditory processing, graphomotor skills, visual motor integration skills, and writing skills; thereby resulting in a failure to provide the student with a FAPE for the 2008-09 school year.

Having determined that the district did not offer a FAPE to the student for the 2008-09 school year, I will now consider whether the parents have met their burden of proving that placement of the student at Mary McDowell was appropriate.

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 at 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). In evaluating whether a parental placement is appropriate, parents are not held as strictly to the standard of placement in the LRE as school districts; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]). However, this must be balanced against the requirement that each child with a disability receive an appropriate education (Briggs v. Bd. of Educ., 882 F.2d 688, 692 [2d Cir. 1989]). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S., 231 F.3d at 105).

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).

According to the hearing record, Mary McDowell is a school for children from kindergarten through eighth grade who have average to above-average cognitive abilities and who have received a diagnosis or classification of a learning disability (Tr. pp. 136, 143, 144, 145, 148; Parent Ex. B at p. 2). The school does not use grades to assess students' progress; rather, teachers set goals for each student over the course of the year (Tr. p. 171). The school staff also provides speech-language therapy and OT by licensed and certified therapists (Tr. p. 143). Families are regularly advised of student progress and parent/teacher conferences occur twice per year (Tr. pp.

171-72, 198). The school follows the New York State curriculum and has developed rubrics that list skills and concepts for each academic area that serve as a guideline in measuring students' progress (Tr. pp. 199, 200). Mary McDowell staff also prepare comprehensive narrative reports on each student's progress twice per year (Tr. pp. 172, 199). Students are placed in classrooms based on academic and social needs, and are grouped by ability for small group instruction in math and reading (Tr. pp. 155, 187). To encourage small group instruction, the school schedules 1/2 of the students in a class for a nonacademic subject, such as music or art, while the other 1/2 of the students in the class work on an academic subject, such as social studies, writing workshop, or science (Tr. pp. 163, 189-90).

During the 2008-09 school year, the student attended a class comprised of 2 teachers and 12 students, ranging from 8 to 10 years of age (Tr. pp. 154-55, 179-80; Parent Ex. K at p. 1). The student received instruction in academic areas including reading, math, writing, social studies and science, as well as in non-academic areas including art, music, gym and theater arts (Parent Exs. K at pp. 11-17; N; O; P; Q). The student also received two 30-minute speech-language therapy sessions per week in a group of two and one 30-minute OT session per week in a group of two (Parent Exs. K at p. 1; L at p 3). The student's writing workshop and social studies classes were taught by two teachers and met three times per week, twice in half groups and once in a full group (Tr. p. 190). Science was taught by two teachers in a science lab twice per week for 45 minutes (Tr. pp. 187-89). According to the school's head teacher, small groups provided the teacher with the ability to regularly check in with the student when she "tuned out" to ensure that she understand what was being presented and remained on task (Tr. p. 168).

The student's reading group was comprised of five students, all of whom were at the same reading level as the student (Tr. pp. 185-86). The reading group met three times per week for one hour and once per week for 45 minutes (Tr. p. 184).⁹ The reading instructor utilized the Orton-Gillingham reading program, the Preventing Academic Failure (PAF) reading program, and a comprehension skills curriculum (Parent Ex. K at p. 3). The Orton-Gillingham reading program was described as a structured, multisensory approach to teaching decoding, encoding, and handwriting (*id.*). The curriculum included practicing spelling patterns, sound symbol relationships, and "red words" (words that cannot be sounded out and therefore must be memorized) (*id.*). During the 2008-09 school year, the student's reading group initially completed a review of the phoneme sounds, blends, previously learned "red words," and suffixes (*id.*). The remainder of the first semester primarily focused on solidifying short vowel sounds, various consonant blends, and open and closed syllables (*id.*). The student's reading group was quizzed once per week on new words, reviewed spelling patterns from previous weeks, and engaged in various spelling activities that reinforced the spelling lessons (*id.*). Alphabetizing and dictionary skills were reinforced using the group's weekly spelling word list (*id.*). Comprehension skills were addressed through a combination of instruction and group discussions, and focused on "think alouds," making predictions, sequencing, summarizing, character development, making inferences, and answering implicit and explicit questions (*id.* at pp. 3-4). The reading group also worked on decoding skills in independently as well as in the group (*id.* at p. 4).

⁹ The teacher from Mary McDowell who testified at the hearing was not the student's reading teacher during the 2008-09 school year (Tr. p. 164). Although she testified that the student received reading instruction three times per week for one hour and one time per week for 45 minutes, a January 2009 progress report from the student's reading instructor during the 2008-09 school year reported in that the student received reading instruction Monday through Thursday for one hour (Parent Ex. K at p. 3).

The student's Mary McDowell math group consisted of four students (Tr. p. 165; see Parent Ex. K at p. 6). The math group utilized a fourth grade curriculum that was modified to accommodate the student's deficits in attention and language processing (Tr. pp. 165, 166). The language was kept to a minimum, one or two examples were provided and reviewed, and only a few problems were placed on each page (Tr. p. 166). Additionally, the written instructions were provided in the same font that was used for the student's reading instruction (Tr. p. 166). Homework sheets duplicated the day's lesson so the students could be successful when they attempted to do the homework on their own (Tr. pp. 166-67). There were no time constraints on task completion and manipulatives and hands-on materials were used (Tr. pp. 167, 169-70). A routine math lesson began with a problem, was followed by a review and discussion of the homework, and then either a new concept was introduced or a previously taught concept was reviewed (Parent Ex. K at p. 6). The lesson ended with a game or with independent practice (id.).

For writing instruction, the student participated in daily journal writing and worked 1:1 with a teacher on sentence structure, handwriting, spelling and grammar (Parent Ex. K at p. 11). The class utilized the Basic Writing Skills curriculum (id. at p. 10). Lessons were individualized such that one student might be required to write a journal response, while another student completed the assignment using an AlphaSmart keyboard (Tr. pp. 161-62). Students also used an editing checklist to prompt them to use correct capitalization and punctuation (Parent Ex. K at p. 10). The students learned different parts of speech through hands-on activities such as cutting out pictures of nouns in magazines, playing charades to identify verbs, and using adjectives to describe a mystery object (id.). Students were also taught to distinguish between sentence fragments and complete sentences, expand sentences, identify sentence types (command, exclamations, statements, questions), and develop questions (id.).

The student was provided with modifications to facilitate her learning and to address her needs (Tr. pp. 158-59). To address the student's inability to sit still and attend to task, and her need to fidget, she was given either clay or a bendable rubber-covered wire to keep in her hands (Tr. p. 159). To address her auditory processing needs, the staff previewed material with the student prior to group discussions and repeated questions for her (Tr. pp. 159-60). The student was also provided with a visual representation of directions (Tr. p. 160). FM amplification units were located in each classroom and in the meeting room to amplify teacher voices and to minimize distracting noises (Tr. pp. 170, 195).¹⁰ The teachers also took dictation for the student at times (to assist her in getting her ideas down), used colored highlighting to differentiate parts of a problem, and reviewed previously introduced concepts (Tr. pp. 169, 170).

A progress report from January 2009 noted that the student participated in weekly spelling quizzes, learned spelling rules, and had improved her spelling skills (Parent Ex. K at p. 3). The report also noted that the student had strengthened her comprehension skills, had demonstrated an ability to answer both implicit and explicit questions, and had demonstrated a strong ability to recall events (id. at p. 4). Her ability to decode names and multisyllabic words had improved, her reading fluency had improved, and her encoding and decoding level increased from a beginning second grade level to a high second grade level (compare Dist. Ex. 10 at p. 1, and Dist. Ex. 12 at p. 1, with Parent Ex. K at p. 5). In comprehension, the student was at a beginning third grade level (Parent Ex. K at p. 5). In math, the student demonstrated an understanding of place value; was

¹⁰ An April 2008 speech-language progress report indicated that the student was utilizing an FM amplification system during her speech-language therapy sessions (Parent Ex. C at p. 1).

able to round, order and compare numbers with accuracy, demonstrated a firm grasp of addition facts and vocabulary; and solved two-step equations and basic subtraction problems with and without regrouping; and had formed a solid foundation of multiplication skills by using mnemonic devices to aid in her memorization (id. at p. 8). The report noted that the student rarely required reteaching of new material and with modifications and accommodations was working on fourth grade math concepts (Tr. pp. 165-66; Parent Ex. K at pp. 6, 9). In writing, the student demonstrated a strong understanding of skills, particularly when presented in isolation, and was using the skills and strategies learned in her reading group to aid her in writing (Parent Ex. K at pp. 10, 11). She also had improved in her ability to write complete sentences using descriptive vocabulary (id.). The student was also able to self-correct for spelling, capitalization and punctuation, and was reportedly "working hard" on improving her handwriting (id. at pp. 11-12). The student was also reported to have participated successfully in social studies and in science (id. at pp. 14, 15, 17). The progress report noted that the student had acclimated to the routines of Mary McDowell and formed friendships at the school (id. at p. 1). The student was described as being social both inside and outside of the classroom and played or talked with students from her own as well as other classrooms (id. at pp. 1, 2). The progress report also indicated the student had positive interactions and relationships with her teachers (id. at p. 1). She responded to directions, followed through with teacher requests, and consistently participated during academic periods (id.).

A mid-year OT progress report from the student's occupational therapist at Mary McDowell reported on the student's graphomotor, visual perception, gross motor, sensory processing skills, and activities of daily living skills (Parent Ex. L). The student's therapist noted that the student continued to have significant visual perception difficulties, which affected her handwriting and ability to copy information (id. at p. 3). The therapist reported that the student utilized an inefficient grasp, which led to decreased handwriting endurance and hand fatigue (id. at pp. 1, 3). The therapist also reported that the student continued to need support and practice with appropriate letter sizing and formation, appropriate spacing with and between words, letter placement in relation to lines and appropriate use of upper and lower case letters (id. at p. 1). The therapist noted that the student was working at a beginning level on her signature and on appropriate cursive letter sizing and formation, and that she was learning how to type (id. at pp. 1, 3). According to the progress report, the student exhibited severe difficulty with visual sequential memory, or the ability to remember for immediate recall a series of forms, and moderate difficulty with form perception, or the ability to recognize the unique shape, size and positional characteristics of objects (id. at p. 1). She had mild difficulty with visual discrimination (the ability to recognize, match and categorize the similarities and differences among forms), visual closure (the ability to determine the complete form from an incomplete form), and the ability to copy from near and far sources (id. at pp. 1-2). The occupational therapist indicated that the student exhibited decreased core stability, which the therapist opined could affect her ability to remain seated over long periods of time (id. at p. 3). The therapist worked with the student on sensory regulation so that her body was in an optimal state of arousal for learning (id.).

Based on the foregoing, I concur with the impartial hearing officer that the parent demonstrated that the program at Mary McDowell offered educational instruction specially designed to meet the unique needs of this student for the 2008-09 school year (IHO Decision at p. 13; see Gagliardo, 489 F.3d at 112, citing Frank G., 459 F.3d at 364-65).

The district also contends that the program at Mary McDowell was not appropriate for the student because it was too restrictive. I find that the impartial hearing officer's LRE determination was not inconsistent with LRE principles. Given my review of the hearing record, in particular

the information in the record concerning the level of the student's needs, the hearing record does not require modifying the impartial hearing officer's conclusion regarding LRE.

Moreover, I have given consideration to the sparsely developed evidence in the hearing record regarding equities, and find that there is no need to modify the impartial hearing officer's decision to award reimbursement to the parents.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
July 1, 2010**

**PAUL F. KELLY
STATE REVIEW OFFICER**