



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-073

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, attorneys for petitioner, Karyn R. Thompson, Esq., of counsel

The Law Offices of Regina Skyer and Associates, attorneys for respondent, Sonia Mendez-Castro, Esq.

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 respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Mary McDowell Center for Learning (MMCL) for the 2009-10 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending a 6th grade class at MMCL (Parent Ex. D). MMCL has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services is not in dispute in this appeal (Dist. Ex. 1 at p. 1; Parent Ex. A; see 34 C.F.R. § 300.8[c]; 8 NYCRR 200.1[zz]). However, as described later in this decision, there is a controversy over the student's special education classification of disability.

The student's educational history is discussed in Application of the Dep't of Educ., Appeal No. 09-078, and will not be repeated here in detail. The student attended public school through the third grade (2006-07 school year), during which time he was classified as a student with a disability and received special education and related services (Tr. p. 224; see Application of the Dep't of Educ., Appeal No. 09-078). The student thereafter attended MMCL during the 2007-08 and 2008-09 school years (see Application of the Dep't of Educ., Appeal No. 09-078).

According to the hearing record, a triennial reevaluation of the student was conducted during the 2008-09 school year in anticipation of the development of his individualized education program (IEP) for the 2009-10 school year (Tr. pp. 25, 28, 40; Dist. Ex. 5 at p. 1). On December 3, 2008, the district conducted a classroom observation of the student at MMCL (Dist. Ex. 4). The observation report indicated that during a social studies lesson involving vocabulary, the student participated in the activity with minimal help (id.). During a note taking activity, the student appeared to benefit from assistance from his teacher when writing his outline (id.). In addition, the observer noted that the student related well to teachers and classmates, was focused during the lesson, and did not appear to exhibit needs with regard to behavior (id.).

A January 2009 mid-year progress report from MMCL addressed the student's reading, math, writing, social studies, science, art, music, speech-language therapy, and occupational therapy (OT) (Dist. Ex. 3).¹ It was noted that at that time the student had been placed in a self-contained class with 12 students and two teachers (id. at p. 2). In addition to instruction in academic subjects, the student received two 30-minute language therapy sessions per week with one other student (id.). The progress report indicated the student was well liked by his peers and teachers, and that he formed new friendships with his classmates while maintaining relationships with students in other classes (id.). According to the progress report, the student frequently initiated interaction with peers (id.). The student consistently followed classroom routines for unpacking his backpack, turning in homework, copying homework, and beginning his journal assignment (id.). The progress report indicated that the student asked for teacher support as needed in his effort to complete his journal assignment (id.). During the school day, the student transitioned between all of his classes quickly and efficiently (id.). The student's teachers stated that he kept his learning materials organized and managed his individual schedule, remembering when it was time for language therapy (id.).

The student's teachers at MMCL reported that the student made steady academic progress throughout fall 2008 (Dist. Ex. 3 at p. 2). During direct instruction, the student benefited from multimodal instruction, which included visual aids and kinesthetic activities in developing conceptual understanding of topics presented, and in aiding in his retention of information (id.). According to the MMCL teachers, the student's academic performance was supported by ongoing language therapy that focused on strengthening the student's expressive language skills (id. at pp. 2-3). The MMCL progress report indicated that the student's writing improved through explicit modeling and repeated opportunities to practice the expression of ideas in complete thoughts (id. at p. 3). Individual assistance was frequently necessary to enable the student to recall content-specific vocabulary (id.). To assist the student with processing receptive language during group lessons, a teacher sat next to him, reiterated information, and posed guided questions directly to him (id.). During individual interactions with a teacher, the student reportedly asked questions and discussed whether he understood something (id.). The student's MMCL teachers observed that he was less willing to openly acknowledge his confusion in front of peers, especially during whole class instruction (id.). According to the teachers, the student benefited from working in smaller group settings in all areas of the curriculum because he could receive close attention and individual support from a teacher (id.). The progress report indicated that although the student

¹ I note that although District Exhibit 3 is described as a January mid-year report from MMCL, the exhibit, as offered into evidence during the impartial hearing, also contains duplicative pages that were admitted into evidence and identified as separate district exhibits (compare Dist. Ex. 3 at pp. 22-27, with Dist. Exs. 2; 4).

diligently completed his work and was willing to correct his work, his drive for academic success was coupled with fear of failing (id.). When presented with new and unfamiliar information, the student reportedly became easily frustrated and expressed that the work was too hard (id.).

The January 2009 MMCL progress report further indicated that the student was in a reading group with three other students that met four times per week for one hour (Dist. Ex. 3 at p. 4). Reading instruction was provided to the student using an Orton-Gillingham methodology (id.). At the time of the January 2009 progress report, the student was working at a low third grade reading level for comprehension and decoding (id. at p. 5). The progress report indicated that the student's reading group was introduced to scientific spelling, and that a different, unidentified Orton-Gillingham-based reading and writing program that placed greater emphasis on specific spelling rules and their memorization through repetition would be instituted as a replacement for the classroom's then-current Orton-Gillingham program (id.).

With regard to writing, the student participated in three 45-minute periods and one 30-minute period of direct writing instruction per week (Dist. Ex. 3 at p. 9). According to the January 2009 progress report, the student's writing was addressed in journal writing, direct writing instruction during language arts, as well as in other academic areas including reading group and social studies (id.). Instructional groups were described by the teachers as "flexible" based on a variety of factors that focused on each student's needs (id.). The MMCL progress report indicated that the student benefited from receiving instruction in groups of six students or less and that he had difficulty following along when a large amount of information was presented orally (id.). The teachers reported that, when confused in writing, the student was reluctant to ask for help and participate (id.). According to the progress report, the student benefited from weekly individual instruction with the teacher to finish work and reteach editing skills (id.). The January 2009 progress report indicated that the student also benefited from extended time and guided questioning from a teacher in order to generate his own ideas (id.).

The January 2009 progress report noted that during a poetry unit the student was more productive when provided with fill-in-the-blank outlines to help focus his thinking (Dist. Ex. 3 at pp. 9-10). The student reportedly benefited from use of a word list when using adjectives to describe topics in his writing due to his slow recall of specific vocabulary at times (id. at p. 10). The progress report indicated that during the sentence unit, the student benefited from first expressing his ideas orally to a teacher and then writing them with the help of the teacher repeating what he expressed (id.). Additionally, the student reportedly benefited from explicit instruction in sentence syntax (id.).

According to the January 2009 progress report, the student participated in a 4:1 math group that met four times per week for 45 minutes (Dist. Ex. 3 at p. 6). At the time of the progress report, the student reportedly worked at a high third grade level in math (id. at p. 8). The MMCL teacher followed guidelines for a third grade math curriculum and used a combination of texts and supplementary materials (id. at p. 6). Although the math teacher described the student as enthusiastic, open to guidance, and eager to learn new material, the January 2009 progress report also reflected that the student periodically experienced low self-esteem while engaged in whole class, small group, and independent activities (id. at p. 8). The student reportedly had difficulty remaining on task when he perceived he had made mistakes, and instead became silly and joked with classmates (id.). The student consistently completed homework assignments in a timely manner, but was reportedly resistant to making corrections to his work because he perceived

making corrections as a sign of failure (id.). According to the math teacher, the student responded well to multisensory presentation, use of concrete materials, and explicit step-by-step delineation of tasks, teacher modeling, consistent guided practice, highly structured lessons, clear expectations, and scaffolding (id.).

With regard to social studies, the January 2009 progress report indicated that the student performed well with multimodal instruction, listening, writing, and gluing pictures to support his learning (Dist. Ex. 3 at p. 13). According to the student's teachers, the student was strong in his ability to follow the teachers' lead in small chunks, but that he required further practice in completing multiple step assignments independently (id.). The MMCL progress report indicated that the student understood and retained information presented orally and copied notes from the board onto a structured outline or graphic organizer (id.). Although the teachers reported that the student knew what he wanted to say, he needed clues to help him remember content specific vocabulary (id. at pp. 13-14). The progress report noted that it took the student a long time to read nonfiction pieces that contained large amounts of unfamiliar vocabulary and that he was more adept at finding information when a teacher or classmate read aloud with him (id. at p. 14). The student reportedly benefited from previewing content-specific vocabulary and, for purposes of preparing outlines, he worked hard to highlight only key words in the passage rather than whole sentences (id.). The social studies teachers indicated that the student occasionally expressed that he enjoyed learning in groups of six rather than twelve, and affirmed that the student's participation and understanding was stronger in smaller groups (id.).

In science class, the January 2009 progress report indicated that the student was prepared to learn when he came to class, was confident when asking questions, and was willing to share personal experiences and insightful comments (Dist. Ex. 3 at p. 17). The student worked well individually as well as in a group, and he finished his assignments on time (id.). The student successfully demonstrated a variety of science process skills in a structured setting and he "independently mastered" several skills in his approach to learning (id.). With regard to art and music, the January 2009 progress report indicated that the student demonstrated a variety of skills appropriately, although he required support in music class for asking questions and in participating in group singing activities (id. at pp. 18-19).

The speech-language portion of the January 2009 progress report indicated that the student received language therapy twice weekly in a group of two students (Dist. Ex. 3 at p. 20). The speech-language progress report reflected that language therapy targeted the student's receptive and expressive language, pragmatic language, auditory processing needs, and critical thinking skills (id. at pp. 20-21). The student was provided with visual prompts and cues, multiple repetitions of target vocabulary, use of an FM amplification system, listening activities, and visualization techniques (id.).

With regard to OT, the January 2009 progress report indicated that the student participated in a six-week "Healthy Choice rotation class" in a group of six students with two occupational therapists for 55 minutes (Dist. Ex. 3 at p. 28).² According to the MMCL occupational therapists, the goal of the class was to improve cursive handwriting, typing skills, and visual perception skills,

² The January 2009 progress report did not indicate the frequency of the 55-minute OT sessions (see Dist. Ex. 3 at p. 28).

as well as to emphasize proper body mechanics, increase hand strength, and stretch the upper body after completing tasks (id.). The occupational therapists indicated that overall, the student transitioned easily to the class, followed directions, and required minimal assistance during the session (id.). The occupational therapists indicated that the student completed the class and recommended that he continue practicing writing and typing in the classroom (id.).

In April 2009, a social history update regarding the student was conducted by a district social worker through an interview with the student's mother (Dist. Ex. 5 at pp. 1-2). According to the parent, the student's attitude toward school had improved (id. at p. 1). In addition, the parent indicated that the student struggled with writing assignments, although he had been encouraged to take his time (id.). The student's mother described the student's communication as "crisper" than it had been in the past and that the student talked more openly (id. at p. 2). The social history update noted that the student was in good health and that his hearing and vision were within normal range (id.). The social history update also indicated that the social worker and the parent discussed due process rights and that the parent was given a copy of a procedural safeguards notice for parents of students with disabilities (id.).

In April 2009, a psychoeducational evaluation of the student was conducted by a district school psychologist (Dist. Ex. 2 at p. 1). The psychoeducational evaluation report indicated that an administration of the Stanford Binet Intelligence Scales–V (SB–V) yielded an abbreviated IQ score in the extremely low range and revealed that the student displayed a relative strength in verbal reasoning abilities (id. at pp. 2, 5). However, due to the student's significant language processing difficulties, the evaluator cautioned that the test results might not reflect the student's true cognitive potential (id.). Results of an administration of the Woodcock–Johnson III Tests of Achievement (WJ–III ACH) revealed that academically the student performed near the end of the second grade level in broad reading, at the beginning third grade level in broad math, and at the second grade level in spelling (id.). The Behavior Rating Inventory of Executive Functioning (BRIEF) Parent Form was completed by the parent to assess the student's executive function behaviors in the home and school environments (id. at p. 4). According to the parent's responses on the BRIEF, the parent did not believe that the student experienced significant problems overall with executive functions that affected his cognitive, behavioral and emotional functioning (id. at p. 5). However, the evaluator noted that the results of the BRIEF indicated significant difficulties for the student in the areas of working memory, "shift," and emotional control (id.).

On June 12, 2009, the Committee on Special Education (CSE) convened for the student's triennial review and to develop his IEP for the 2009-10 school year (Dist. Ex. 1 at pp. 1-2). Participants at the CSE meeting included the parent, a district representative who also participated as a special education teacher, the district school psychologist, a regular education teacher, the district social worker, the student's special education classroom teacher from MMCL, and an additional parent member (id. at p. 2). In the resultant IEP, the June 2009 CSE recommended that the student's classification of disability be changed from a student with a learning disability to a student with a speech or language impairment (id. at pp. 1-2). In addition, the June 2009 CSE recommended that the student be given additional adult support in the classroom setting as well as use of a multisensory approach across the curriculum; chunking and scaffolding of information; previewing of new material; use of graphic organizers, webs, and outlines during writing assignments; preferential seating near a teacher; additional time to process verbal/nonverbal information; repetition of directions; and use of an FM unit (id. at pp. 4-6). The June 2009 CSE recommended testing accommodations of extended time in a separate location with questions read

aloud, directions read and reread aloud, and auditory amplification through use of an FM unit (*id.* at p. 4). The June 2009 IEP included modification of the standard promotional criteria, in which the student would be expected to meet 65 percent of both the sixth grade English language arts standards and the sixth grade math standards, as evidenced by student work/portfolio, assessments/grades, teacher observation, and 90 percent attendance (*id.* at p. 14). The June 2009 CSE recommended that the student be placed in a 12:1+1 special class in a community school with related services of individual speech-language therapy one time per week for 30 minutes, and group (3:1) speech-language therapy two times per week for 30 minutes (*id.* at pp. 1, 14). During the course of the June 12, 2009 CSE meeting, the meeting participants discussed obtaining an updated speech-language evaluation of the student (Tr. pp. 71-72).

The district sent the parent a Final Notice of Recommendation (FNR) dated June 22, 2009 that set forth the placement recommendation of the June 2009 CSE and identified a specific school and classroom location for the student for the 2009-10 school year (Dist. Ex. 6).

In a letter dated July 1, 2009, the district informed the parent that her consent was required in order to conduct a speech-language evaluation of the student (Parent Ex. C). Among other things, the letter offered the parent an appointment time for the evaluation and indicated that, after completion of the evaluation, the parent would be invited to attend a conference to discuss the results of the evaluation and recommend educational services to meet the needs of the student "if appropriate" (*id.*).

The district conducted a speech-language evaluation of the student on August 4, 2009 to assess if speech-language delays were affecting the student's academic performance and if the student's speech-language services should continue at the then-present level (Dist. Ex. 7 at p. 1). The speech-language evaluation report indicated that the student was cooperative and attentive throughout the evaluation, and completed all of the tasks presented (*id.* at p. 1). Administration of the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4) yielded a core language score in the low range indicating the overall presence of delays in language skills (*id.* at pp. 2-3). The student achieved a receptive language score in the mildly deficient range, an expressive language score in the moderately delayed range, a language content score in the mildly delayed range, and a language memory index score in the severely delayed range (*id.* at p. 3). The evaluator indicated that the student's speech skills were at an appropriate level for effective communication (*id.* at p. 4). Although the student demonstrated both areas of weakness and average ability in his language skills, the evaluator noted that the student's significant delays in his ability to follow oral directions and to recall orally presented language indicated that language intervention services were required to support the student's classroom performance (*id.*).

In a letter dated August 24, 2009, the parent notified the district that the student would be placed in MMCL as of the first day of the 2009-10 school year and that she intended to seek funding for MMCL from the district (Parent Ex. A at p. 1). The parent stated that the June 2009 CSE met with regard to the student and that his classification of disability had been changed from a student with a learning disability to a student with a speech or language impairment "without current evaluations" (*id.*). In addition, the parent stated that the June 2009 IEP was "defective" insofar as it was developed by an improperly constituted review team, contained inadequate evaluations and goals, and followed a "faulty policy and practice" of lowering promotional criteria (*id.*). Among other things, the parent indicated that she could not agree or disagree with the

proposed 12:1+1 special class proposed in the FNR until she had an opportunity to visit it, meet with the staff, and assess whether it was appropriate for the student (id.).

In a due process complaint notice dated March 22, 2010, the parent requested an impartial hearing and contended that the June 2009 CSE was improperly constituted insofar as the CSE lacked a qualified regular education teacher of the student (Parent Ex. B at p. 3).³ According to the parent, the June 2009 CSE also lacked an appropriate evaluation of the student and the input of a speech therapist, when the CSE changed his classification and drafted the student's goals and objectives (id.). As a result, the parent alleged that she was denied a meaningful opportunity to participate in the development of the student's IEP (id. at p. 4). The parent also challenged the district's proposed classroom identified in the June 2009 FNR, stating that it did not provide suitable and appropriate peers for instructional and social/emotional purposes, it lacked appropriate teaching methodologies, and the school environment was too distracting (id. at pp. 2-3).

An impartial hearing convened on May 18, 2010 and concluded on June 14, 2010, after three days of proceedings (Tr. pp. 1-292). In a decision dated July 12, 2010, the impartial hearing officer determined that the district failed to offer the student a free appropriate public education (FAPE) because: (1) the regular education teacher at the June 2009 CSE was not teaching in a classroom at that time; (2) the June 2009 CSE improperly changed the student's classification of disability to a student with a speech or language impairment and drafted the student's goals and objectives without a proper evaluation of the student or input from a speech therapist; (3) the district failed to include a speech-language therapist at the June 2009 CSE meeting and, as a result, the parent lacked a meaningful opportunity to participate; (4) the district's classroom identified in the June 2009 FNR did not have a suitable and appropriate peer group for instructional and social/emotional purposes; (5) the teacher in the district's proposed classroom had no experience with a FM unit; and (6) the proposed school site was too big because the student needed "a small group setting with a lot of support" (IHO Decision at pp. 10-11). The impartial hearing officer concluded that MMCL was appropriate for the student because he made "steady progress academically, emotionally and socially" (id. at p. 11). The impartial hearing officer also determined that equitable considerations favored the parent (id.). For relief, the impartial hearing officer ordered the district to reimburse the parent for the cost of the student's tuition at MMCL, less a fixed sum previously awarded in a scholarship (id.; see Tr. p. 245).

The district appeals, contending that the impartial hearing officer erred in ruling that the June 2009 CSE was improperly composed. The district asserts that it was not required to include a regular education teacher at the CSE because neither the parent nor the district believed the student should be placed in a general education setting. Additionally, the district argues that the impartial hearing officer erred in determining that a speech-language therapist's participation was required at the June 2009 CSE and that the impartial hearing officer should not have addressed that issue in her decision. The district also alleges that it was not necessary to convene another CSE meeting after the speech-language evaluation was conducted in August 2009. According to the district, the annual goals and objectives in June 2009 IEP, particularly the speech-language

³ A due process complaint notice was filed on or about January 19, 2010; however, it was not included in the hearing record (IHO Decision at p. 2). The parent amended her due process complaint notice on March 12, 2010 (Parent Ex. B).

goals, were appropriate for the student. The district argues that the proposed 12:1+1 setting for the student in the district's school was appropriate and that the evidence in the hearing record showed that the teaching methodologies were appropriate for the student and aligned with his June 2009 IEP.⁴ The district also contends that the functional grouping of the student would have been appropriate.

With regard to MMCL, the district asserts that the parent failed to include a class profile to show that the student was placed with students having similar functioning levels. The district also argues that MMCL is overly restrictive for the student.

The district contends that equitable considerations favor the district because the parent did not seriously intend to enroll the student in a district placement and the parent's August 2009 letter to the district provided inadequate notice that the parent was rejecting the district's proposed placement for the student. For relief, the district requests that the impartial hearing officer's decision be vacated.

In the answer, the parent maintains that a regular education teacher who was currently teaching should have been included in the June 2009 CSE meeting. The parent claims that the impartial hearing officer properly determined that a speech-language therapist should have participated at the June 2009 CSE meeting and that the district failed to object to raising this as an issue.

The parent contends that the psychoeducational evaluation of the student did not provide sufficient information regarding the nature of the student's speech-language delays. The parent asserts that the student's delays support that he is learning disabled and objects to the change in the student's classification of disability, the student's goals and objectives in his June 2009 IEP, and the placement recommended by the district.

The parent also asserts that the teacher from MMCL participated at the CSE meeting by telephone for 15 minutes only and did not have access to the psychological evaluation. According to the parent, the paraprofessionals in the class that was identified in the June 2009 FNR were inappropriately involved in the instruction of children.⁵ The parents also assert that the district's teacher admitted that she had never worked with a student who used an FM transmitter and that this supports the conclusion that the recommended class was not appropriate. The parent admits

⁴ The impartial hearing officer did not address teaching methodology in her analysis and conclusion that the district failed to offer the student a FAPE (IHO Decision at pp. 10-11). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). I note that "[g]enerally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]; see Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]). In this case, the district is not aggrieved by the impartial hearing officer's decision not to address teaching methodology and, furthermore, the parent did not cross-appeal any aspect of the impartial hearing officer's decision. Therefore, this issue is not properly before me and I decline to address it.

⁵ Neither the issue of the MMCL teacher's access to the psychological evaluation during the CSE meeting nor the issue of the paraprofessionals' classroom activities were raised by the parent in her due process complaint notice, nor were these issues decided by the impartial hearing officer (see Parent Ex. B; IHO Decision). These issues have been identified for the first time on appeal and they are not properly before me. Accordingly, I will not address them.

that students may be permissibly grouped in accordance with functional levels, but argues that in this case, the student would not have been appropriately grouped for instructional purposes within the district's proposed class.

The parent argues that MMCL is appropriate for the student based on his progress and that his history of shyness and being bullied supports placing the student in a segregated setting. Additionally, the parent asserts, among other things, that the student has sufficient opportunities for mainstreaming during school outings/field trips.

According to the parent, equitable considerations favor the parent. The parent also asserts that she cooperated with district. Lastly, the parent asserts that the district should be precluded from alleging that she gave inadequate notice of the unilateral placement when the district did not raise this issue in its response to the parent's amended due process complaint notice. For relief, the parent requests that the impartial hearing officer's decision be upheld.

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

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

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist.,

873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148). The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]).

Turning first to the issue of the composition of the June 2009 CSE, a district's CSE must include not less than one regular education teacher of the student if the student is, or may be,

participating in the general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate," participate in the development of the IEP of the student, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel (20 U.S.C. § 1414[d][3][C]; see 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]). Here, a regular education teacher participated in the June 2009 CSE meeting, albeit, one who was not then teaching in a general education classroom (Tr. pp. 66-77; Dist. Ex. 1 at p. 2). However, neither party in this case argues that the district should have offered the student additional opportunities for mainstreaming or that he should have been placed in a general education setting for the 2009-10 school year (see, e.g., Dist. Ex. 1 at pp. 1, 12-13; Parent Ex. B at pp. 3-4). Therefore, I find that the lack of a current teaching assignment on the part of the participating regular education teacher at the June 2009 CSE meeting was not a defect that resulted in a denial of a FAPE for the student.

I will turn next to the impartial hearing officer's findings concerning the absence of a speech-language therapist from the June 2009 CSE and the recommended special education teacher's lack of experience with an FM unit. With regard to the parties' contentions over these two issues, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original complaint is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 09-140). The parent's March 2010 amended due process complaint notice did not identify any issues regarding the improper composition of the June 2009 CSE due to the absence of a speech-language therapist or the qualifications or experience of the staff in the school identified in the June 2009 FNR, including her concerns regarding the use of an FM unit (see Parent Ex. B).⁶ I also note that the hearing record does not contain any evidence showing any attempt by the parent to further amend her original complaint or seek permission from the impartial hearing officer to add these issues. I am not persuaded by the parent's argument that the scope of the impartial hearing was expanded merely by the district's failure to object to evidence that may have provided relevant background information with respect to the identified issues, particularly when the hearing record shows that the district objected to the impartial hearing officer raising matters outside the due process complaint notice (Tr. p. 257). Moreover, it is essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not identified as a matter of basic fairness and due process of law (Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; see Lago Vista Indep. Sch. Dist. v. S.F., 50 IDELR 104 [WD Tex. Oct. 24, 2007]; see also John M. v. Bd. of Educ., 502 F.3d 708, 713 [7th Cir. 2007]). In view of the foregoing, I find that the impartial hearing officer should not have reached the issues

⁶ Even if the issue of the speech-language therapist's presence had been raised, I note that there is no specific requirement that a speech-language therapist shall be included in a CSE meeting and that the inclusion of related service personnel is discretionary (see 34 C.F.R. § 300.321[a]; 8 NYCRR 200.3[a][1]). The need for the input of a speech-language therapist and the formulation of the student's goals and objectives is addressed below.

of whether the June 2009 CSE should have included a speech-language therapist or the recommended special education teacher's prior experience with FM units.

Turning next to the parties' contentions over whether the June 2009 CSE adequately evaluated the student prior to changing his classification or developing goals to address the student's speech-language needs,⁷ a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 C.F.R. § 300.303[b][1]; 8 NYCRR 200.4[b][4]). A reevaluation must be conducted at least once every three years unless the parent and the district agree that reevaluation is unnecessary (34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]).⁸ A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the

⁷ Once it is established that a student falls into one of the disability categories and is otherwise eligible for special education services as a student with a disability, a CSE is responsible to identify all of the student's areas of need without regard to the disability category in which the student was classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Although the impartial hearing officer determined that the student's classification should not have been changed because the CSE did not review the updated speech-language evaluation, the impartial hearing officer did not undertake an analysis of whether the remaining evidence in the hearing record supported the June 2009 CSE's determination that the student met the criteria for a student with a speech or language impairment. I also note that neither party disputes that the student is eligible for special education services as a student with a disability. Although both parties appear to agree that the student meets the learning disability criteria (see Tr. pp. 90; 219), the evidence also shows that the June 2009 CSE determined that the student was eligible for special education as a student with a speech or language impairment and the parent conceded at the impartial hearing that the student has a speech or language impairment as part of his disability (Tr. pp. 245-46; Dist. Ex. 1 at p. 1). However, regardless of the disability category stated on the student's IEP, the district was required to follow the procedures to identify the student's needs, including those related to his speech-language deficits, and recommend appropriate special education and related services (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Consequently, in the absence of an actual dispute over whether the student was eligible for special education services as a student with a disability, I find that there is no need to resolve a dispute, if any, over whether the student may be classified as a student with a speech or language impairment, a student with a learning disability, or both and, therefore, I need only address whether the district appropriately identified the student's needs.

⁸ The three-year reevaluation provision is often referred to as a "triennial" evaluation (see, e.g., Tr. p. 38; Application of a Child with a Disability, Appeal No. 95-78).

student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In this case, the district school psychologist who conducted the April 2009 psychoeducational evaluation of the student and attended the June 2009 CSE meeting testified that the CSE reviewed her psychoeducational evaluation report, the April 2009 social history update, the December 2008 classroom observation of the student at MMCL, and the January 2009 progress report from MMCL (Tr. pp. 43-46; Dist. Exs. 1 at p. 2; 2 at pp. 1, 5; 3-5). According to the school psychologist, the CSE determined that the student's language needs "greatly impacted" his academic performance in school (Tr. pp. 47-48). The April 2009 psychoeducational evaluation report considered by the June 2009 CSE reflected the student's significant processing difficulties, frequent requests for modifications and clarification of questions, and tendency to repeat questions to himself in order to process auditory information (Dist. Ex. 2 at p. 2; see Tr. pp. 48-49). The psychoeducational evaluation report also noted the student's expressive language delays, the difficulty in understanding him, and his preference to give one-word answers rather than expand upon his thoughts (Dist. Ex. 2 at p. 2; see Tr. p. 49). The school psychologist explained the significance of these deficits, noting that if the student required modification, clarification, and repetition of questions due to slow processing of information or a lack of understanding, he would experience difficulty within the classroom setting (Tr. p. 49). I also note that the student's teacher at MMCL reported to the June 2009 CSE that the student displayed auditory processing difficulties in the classroom that were characterized by his need for questions repeated and his difficulties with language-based work, such as math word problems (Tr. pp. 50, 52; Dist. Ex. 1 at p. 3).

Furthermore, part of the January 2009 progress report from MMCL before the June 2009 CSE included information from the student's speech-language pathologist at MMCL (Dist. Ex. 3 at pp. 20-21). The speech-language pathologist reported that the student demonstrated significant auditory processing weaknesses in the areas of auditory attention, auditory sentence memory, and auditory interpretation of directions and, therefore, MMCL provided an FM unit to support the student's ability to process verbal information in the presence of competing noise (Tr. pp. 58, 94-95; Dist. Ex. 3 at p. 20).

According to the district school psychologist, the suggestion to change the student's classification of disability to a student with a speech or language impairment was made by the student's special education teacher at MMCL (Tr. pp. 43, 50). The school psychologist testified that the June 2009 CSE did not meet for the purpose of changing the student's classification of disability and explained that typically a CSE does not know whether a classification is going to be changed until the CSE has had the opportunity to review the information through a teacher's participation in the process (Tr. pp. 86-87). She indicated that the purpose of changing the student's classification of disability at the June 2009 CSE meeting was to provide a better description of the student's disability, particularly in light of his receptive and expressive language and auditory processing difficulties (Tr. p. 91). The school psychologist explained that changing the student's classification to a student with a speech or language impairment helped to clarify the student's dominant difficulties within a classroom setting (Tr. pp. 47-48, 75, 87-89).

The impartial hearing officer concluded that the district did not conduct a formal speech-language assessment prior to changing the student's classification of disability from a student with a learning disability to a student with a speech or language impairment and failed to include a speech-language therapist at the June 2009 CSE meeting (IHO Decision at p. 11). However, as

noted previously, the CSE had before it current input from the student's speech-language pathologist at MMCL and updated information regarding the student's speech-language needs from the district's April 2009 psychoeducational assessment (Dist Exs. 2; 3 at pp. 20-21). A reevaluation includes the review of existing data from individuals including the student's teachers and related services providers (34 C.F.R. § 300.305[a][1]; 8 NYCRR 200.4[b][5][i]). There is no specific requirement that a CSE include the attendance of a speech-language therapist and the inclusion of related service personnel is discretionary (see 34 C.F.R. § 300.321[a]; 8 NYCRR 200.3[a][1]). Additionally, the regulations requiring evaluations prior to changes in eligibility only provide that such evaluations must be conducted prior to determining that a student is no longer eligible for special education services, a point that is not disputed by the parties in this case (see 34 C.F. R. § 300.305[e]; 8 NYCRR 200.4[c][3]). In this case, the hearing record supports the conclusion that the CSE considered input from a variety of sources, including formal assessments and the student's teachers and related service providers from MMCL, which was sufficiently comprehensive to identify all of the student's special education needs, including his speech-language needs (Tr. pp. 43-46, 50; Dist. Exs. 1 at p. 2; 2 at pp. 1, 5; 3-5; see Connor v. New York City Dept. of Educ., 2009 WL 3335760, at *5 [S.D.N.Y. 2009] [holding that an additional evaluation was not necessary to comply with the IDEA where adequate information was available from other sources during the process of developing an IEP such as an observation report and information obtained by the district's psychologist from the student's teacher and related service provider]). Upon conducting an independent review of the evidence in the hearing record, I find that the CSE had sufficient evaluative information at the time of the June 2009 CSE meeting to identify the student's needs and develop the student's IEP for the 2009-10 school year.

With regard to the parent's contention that the district failed to reconvene the CSE after the June 2009 meeting, I note that the school psychologist testified that the district conducted a speech-language evaluation after it had made recommendations and changed the student's classification of disability because the student had not had a speech-language evaluation "for a while," and based on the information received from his teacher, the CSE "felt it was good to get updates" (Tr. p. 72; see Dist. Ex. 7). The speech-language pathologist who conducted the August 2009 evaluation indicated that based on her report, the student needed to continue receiving the services that he was already receiving (Tr. pp. 23-24). She opined that the individual and group speech-language services identified on the June 2009 IEP were appropriate for the student (Tr. pp. 24-25). In view of this evidence, it does not appear that additional data was required in order to formulate the student's IEP for the 2009-10 school year. The essence of the parent's allegations in this case relate to the procedures employed by the district, and she does not allege that the speech-language services offered by the district in the June 2009 were substantively inappropriate for the student (see, e.g., Tr. pp. 235-36; Parent Ex. B; see also Omidian v. Board of Educ., 2009 WL 904077 at *26 [N.D.N.Y. Mar. 31, 2009] [holding that in the absence of allegations that a new evaluation would have led to a different substantive recommendation, there is no basis for concluding that the procedural defect impeded the parents' participation or denied a FAPE to the student]). Although I find that the district was remiss in failing to reconvene the CSE after the parent noted in her August 2009 letter that the speech-language evaluation had been completed and that the CSE should meet to consider the evaluation (Parent Ex. A), I also note that the parent had been given ample opportunity to participate in the June 2009 CSE meeting and that by the time she requested that the CSE reconvene to consider the additional updated information regarding the student's speech-language needs in August 2009, she had already decided to place the student at MMCL and seek tuition reimbursement. Furthermore, the evidence in the hearing record supports the

district's contention that the goals and objectives developed in the June 2009 IEP were consistent with goals and objectives proposed by the speech-language pathologist in the August 2009 evaluation (Tr. pp. 69, 75-77, 90-94; Dist. Ex. 7 at p. 6).⁹ Thus, the foregoing evidence does not support the conclusion that the parent was significantly impeded from participating in the development of the student's IEP or that the failure to reconvene the CSE resulted in a loss of educational opportunity for the student (see, e.g., L.R. v. Manheim Township Sch. Dist., 540 F. Supp. 2d 603, 617-18, 620 [E.D. PA 2008] [finding that even when an evaluation conducted after the creation of an IEP showed that a student's language impairment was more serious than what was previously known, it did not follow that the IEP was based on insufficient evaluations, nor did it render the language services offered by the district substantively inappropriate]). Accordingly, I find that although the district should have reconvened the CSE, the failure to do so did not rise to the level of a denial of a FAPE in this instance.

Turning next to the parties' arguments regarding the adequacy of the goals and objectives in the June 2009 IEP, the IEP identified the student's academic present performance strengths and needs (Dist. Exs. 1 at p. 3; 2 at pp. 2-5; 3-6). According to the IEP, reading and writing continued to be significant areas of weakness for the student and the IEP indicated that the student was independently decoding on a low third grade level (Dist. Ex. 1 at p. 3). The IEP indicated that the student had difficulty recalling phonics rules and deciphering between long and short vowels and that his reading comprehension was on a low third grade level (id.). The IEP indicated that the student benefited from being able to preview questions prior to the class assignment (id.). In addition, the IEP noted that the student's written expression was on an early second grade level and he was able to produce a quick outline independently, but that he had difficulty developing a topic and concluding sentence and had difficulty with the use of conjunctions and with syntax (id.). The IEP reflected that the student benefited from chunking of information, scaffolding, and teacher templates (id.). The IEP also noted that the student's spelling was on a second grade level and that the student's auditory and visual discrimination skills had improved, although difficulties in these areas continued to affect the student's performance (id.). The IEP indicated that when self-editing, the student was able to identify omissions of words and repetitions that he made, but he was unable to identify spelling and punctuation mistakes (id.).

In math, the IEP indicated that the student was working on a late third grade level for calculations and that he had more difficulty with word problems because of his language difficulties (Dist. Ex. 1 at p. 3). The IEP noted that some math problems were difficult for the student to solve because of problems with spatial organization (id.). The IEP reflected that the student's memory and recall with academic work were areas of difficulty (id.).

Socially, the IEP reflected that the student consistently followed classroom routines, transitioned between all his classes quickly and efficiently, and maintained organization of his learning materials (Dist. Ex. 1 at p. 5). According to IEP, the student was a leader in the classroom, read social cues, and did not exhibit pragmatic language difficulties when interacting with peers (id.). Additionally, when given structure, he was able to transition from one task to another without difficulty (id.). The IEP noted that the student had auditory processing delays for which he required assistive technology (id. at pp. 1, 6).

⁹ The issue of the recommended goals and objectives in the student's IEP is discussed in greater detail below.

The June 2009 IEP also identified the student's academic, social/emotional, and physical management needs, including a multisensory approach; chunking and scaffolding of information; previewing of new material; use of graphic organizers, webs, and outlines; preferential seating, additional time to process verbal/nonverbal information; repetition of directions; use of an FM unit; and additional adult support within the classroom setting (Dist. Ex. 1 at pp. 4-6).

The June 2009 IEP included multiple annual goals that were specific in terms of expected outcomes, measurable, and aligned with the student's needs as discussed above. The annual goals specifically addressed the student's need for multisensory reading instruction for decoding words containing short and long vowels and beginning and final consonant blends (Dist. Ex. 1 at p. 8). The IEP also included goals to improve his ability to answer literal comprehension questions about main idea and sequence of events in written form and to improve his listening comprehension skills by answering inferential questions such as drawing conclusions, predicting outcomes, and cause and effect relationships after listening to a passage read by his teacher (id. at p. 9). With regard to the student's math and reading needs, the student would work to multiply double digit numbers and (compute) long division with single-digit divisors independently with the use of teacher made templates as well as increase his ability to identify key words and essential details to solve one-step word problems involving all four basic operations (id. at pp. 9-10). The student's IEP also contained a goal to utilize pre-writing skills (brainstorming, graphic organizers, webs and outlines) and to express his thoughts and ideas on a given topic in a fully developed paragraph with at least three to five sentences utilizing correct spelling and punctuation (id. at pp. 10-11).

With regard to the speech-language goals included in the June 2009 IEP, I note that a review of the hearing record reflects that, although worded differently, the content of the student's speech-language present performance and speech-language goals attached to the August 4, 2009 speech-language evaluation was consistent with the June 2009 IEP (compare Dist. Ex. 1 at pp. 7-8, with Dist. Ex. 7 at pp. 5-6). The speech-language goals in the June 2009 IEP were specific, measurable, and aligned with the student's needs (Dist. Ex. 1 at pp. 7-8). The speech-language annual goals in the June 2009 IEP addressed the age-appropriate auditory processing skills by answering "wh" questions in response to weekly listening tasks (id. at p. 7). The goals also addressed grade-appropriate vocabulary skills through the correct selection of the definitions of novel vocabulary from a closed set (id.). Furthermore, the goals indicated that, given a variety of content materials presented orally/visually, the student would identify unknown vocabulary and apply predicting, retelling, summarizing, sequencing, and brainstorming strategies to comprehend grade level materials (id. at p. 8). I also note that the school psychologist and the speech-language evaluator who conducted the August 4, 2009 speech-language evaluation testified that the speech-language goals developed in the June 2009 IEP were appropriate to meet the student's delays in speech-language (Tr. pp. 16, 26, 64-65, 96; Dist. Ex. 7 at pp. 1, 4), and the parent did not successfully rebut this evidence by identifying any inconsistencies between the annual goals included in the June 2009 IEP and those attached to the August 2009 speech-language evaluation (see Dist. Exs. 1 at pp. 7-8; 7 at p. 6). I find that the annual goals included in the June 2009 IEP were aligned with the student's needs and were appropriate. Consequently, I find that the district did not fail to offer the student a FAPE due to inadequate goals and objectives in the June 2009 IEP.

Turning next to the issue of grouping of the student in the placement offered by the district, as discussed below, the hearing record reflects that the proposed 12:1+1 special class placement was consistent with the student's needs and that the student was appropriately grouped. The special

education teacher from the proposed school testified that the class consisted of ten students that were ages 11 and 12, who had classifications of learning disability, speech or language impairment, or multiple disabilities (Tr. pp. 103-05, 109). One paraprofessional was assigned to the class as a whole, and two additional paraprofessionals assigned to specific students (Tr. pp. 104-05). The special education teacher also indicated that eight out of ten of the students assigned to her 12:1+1 class participated in State assessments (Tr. pp. 133, 156). The proposed 12:1+1 special class was located in a school building that included approximately 600 students overall (Tr. p. 147).

The special education teacher testified that she differentiated instruction for her students to make sure they received what they needed in accordance with their IEPs (Tr. p. 111). Examples of the differentiated instruction that she used included modeling,¹⁰ chunking of information, scaffolding, use of "visuals" such as graphic organizers, and highlighting, reading repetition and verbal repetition, and use of manipulatives in math (Tr. pp. 112, 114-15, 119-122, 125, 131, 137, 140, 154). Depending on the level of the student, the teacher provided independent or easier work, work that included larger print and shorter passages, or the support of an adult working with them (Tr. p. 127). The special education teacher indicated that she assessed and observed students, and kept data on her students to assist her in differentiating instruction and determining which students needed help with various skills (Tr. pp. 128-30).

With regard to grouping, the special education teacher testified that math and English were taught in blocks consisting of two periods per lesson and that she grouped students based on their abilities (Tr. pp. 107, 152). She noted that the functional levels in the 12:1+1 class for reading and math were between first and fifth grade, and she noted that although a student might have "good" skills in computation, the same student might have a problem in solving word problems (Tr. pp. 108, 138-39). The special education teacher indicated that for reading, her class was divided into four groups (Tr. p. 141). According to the special education teacher, reading comprehension was a significant concern for all of the students, and they were taught skills involving main ideas, to compare and contrast, to find details, as well as other reading skills (Tr. p. 143). With regard to math, she divided the students into three groups with as few as two students per group in some instances (Tr. pp. 148-49). Similar to reading and math, the functional level for the students' writing in the proposed class was between first and fifth grade (Tr. p. 154).

The evidence in the hearing record described above supports the conclusion that the proposed 12:1+1 placement for the student was appropriate and the student would have been grouped appropriately. Overall, the evidence shows that the special education services recommended by the June 2009 CSE were reasonably calculated to enable the student to receive educational benefits such that the student was offered a FAPE (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Having found that the district offered the student a FAPE, I need not reach the issue of whether the private educational services obtained by the parents were appropriate for the student and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000];

¹⁰ The special education teacher from the proposed school provided an explanation of how she used modeling in her writing instruction (see Tr. pp. 120-21).

Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated July 12, 2010 that determined that the district failed to offer the student a FAPE and directed the district to reimburse the parents for a portion of the student's tuition at MMCL are hereby annulled.

**Dated: Albany, New York
October 13, 2010**

**ROBERT G. BENTLEY
STATE REVIEW OFFICER**