



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-076

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

**Appearances:**

Law Offices of Neal Howard Rosenberg, attorneys for petitioners, Alexandra Hindes, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Karyn R. Thompson, Esq., of counsel

### DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Mary McDowell Center for Learning (Mary McDowell) for the 2009-10 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending the fifth grade in a special class at Mary McDowell with 11 other students (Tr. pp. 141-42, 158, 227-28; Dist. Ex. 7 at p. 1). Mary McDowell has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7). The hearing record reflects that the student exhibited needs with regard to auditory function in the areas of processing, attention, and memory (Tr. p. 157). The student also exhibited needs in receptive and expressive language (with regard to organization); social pragmatics (with regard to language, tone regulation, and code switching); executive functions; and working memory (Tr. pp. 157-58). In addition, the student exhibited a hypersensitivity to noise and a desire for sensory stimulation (Tr. p. 158). The student's classification and eligibility for special education programs and services as a student with a learning disability (LD) are not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record indicates that the student initially entered Mary McDowell when he was in the second grade (2006-07 school year), and that he continued to attend Mary McDowell through the fifth grade (2009-10 school year) (Tr. p. 227; see Dist. Exs. 3 at p. 1; 6 at p. 2). The hearing record describes Mary McDowell as a full-time special education program that

predominantly serves students with language-based learning disabilities and also serves students with attention deficit hyperactivity disorders (ADHD) and non-verbal learning disabilities (Tr. p. 139).

A November 14, 2008 observation report was prepared as part of the student's annual review/triennial evaluation, when the student attended the fourth grade at Mary McDowell (Dist. Ex. 1). At the time of the observation, the student was in a class of twelve students with two teachers during a social studies lesson (id.). The observation report reflected that during group instruction, the student required minimal assistance with spelling and assurance that he had completed a map activity correctly (id.). When paired with a peer, the student worked well with his partner and was able to complete his work with minimal teacher assistance (id.). The observer noted that the teacher provided a visual cue<sup>1</sup> to assist students with maintaining an appropriate voice level and that the classroom was equipped with an amplification system (id.). The observer further noted that the student related well to his classmates and teachers, that he actively participated in the lesson, and that no behavioral concerns were noted during the lesson (id.).

In a mid-year speech-language progress report dated January 2009, the student's Mary McDowell speech-language pathologist indicated that the student was receiving speech- language therapy twice a week in a group of two (Dist. Ex. 5 at p. 1). The report indicated that therapy focused on improving the student's receptive, auditory, pragmatic, and expressive language skills (id. at pp. 1-2). The student was reported to have made progress in his ability to retain information presented in previous lessons and to generalize word relationships to other areas of instruction, and had increased his working memory skills through multisensory techniques including verbal, auditory, and tactile supports (id. at p. 1). The report indicated that the student had deficits in the areas of auditory attention and processing speed, auditory word and sentence memory, and auditory interpretation of multi-step directions (id.). To address the student's weaknesses, the student required removal of extraneous distractions, directions broken down, and additional response time (id.). The report further reflected that an FM amplification system was utilized in the classroom and therapy room to stimulate the student's auditory system (id.). With regard to expressive language, the report indicated that the student had deficits in the areas of sentence formulation, word finding, and verbal organization skills (id. at p. 2). However, the student's word finding skills had improved as a result of phonemic and semantic cueing and by using a visualization strategy (id.). Verbal prompts and modeling were used to assist the student in formulating cohesive sentences and the auditory cue "stop, think, plan, speak" was utilized to remind the student to think about what he was going to say before expressing himself (id.). The report noted that the student's speech-language therapy sessions continuously emphasized the importance of appropriate verbal and nonverbal communication in interactions with peers and that the student was more aware of using words to communicate with peers during disagreements (id.). The report indicated that the student was making steady progress, but that he needed to focus on increasing his receptive, auditory, pragmatic, and expressive language skills (id.).

In a mid-year occupational therapy (OT) progress report dated January 2009, the student's Mary McDowell occupational therapist reported that the student was receiving one 30-minute OT session per week in a group of two (Dist. Ex. 4 at p. 3). The report indicated that the focus of

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<sup>1</sup> The classroom contained a picture of a traffic light called "[y]acker [t]racker" to help the students regulate their voices appropriately with the use of green, yellow, and red lights (Dist. Ex. 1).

therapy was on overall body strength, coordination, balance, sensory integration, fine motor skills, visual perception skills, and handwriting (*id.*). The student was reported to demonstrate good endurance in gross motor exercises, but decreased endurance for tabletop work (*id.*). The report indicated that the student sought out sensory input to help organize his body, regulate his arousal levels, and increase his attention (*id.*). In addition, the report indicated that the student was currently working on self correcting his handwriting, independently completing visual perception worksheets, and typing using home row keys (*id.*). The occupational therapist indicated that the student was a friendly, hardworking student who benefited from receiving OT (*id.*).

The student's academic progress from September 2008 to January 2009 was reflected in a mid-year progress report completed by the student's Mary McDowell teachers (Dist. Ex. 6 at pp. 1-21). The progress report indicated that the student was in a self-contained class of twelve students and two teachers, and received OT and speech-language therapy (*id.* at p. 2). Academically, the progress report reflected that the student continued to make progress, contributed to class discussions, and worked well with his peers (*id.*). However, the progress report reflected that at times the student had conflicts with peers due to a difference in opinion or misunderstanding and that he socialized with peers when he was supposed to be working, both of which required teacher intervention or redirection (*id.*). The student was reported to ask for repetition of directions or rephrasing of directions during large group instruction and would again ask for teacher assistance if needed (*id.*). The progress report reflected that while the student knew the classroom routines, he typically took a while to get started in the morning, forgot at times to turn in his reading log, and often talked to friends, which prevented him from finishing his work, unless redirected by a teacher (*id.*). With regard to homework, the report reflected that the student was inconsistent, but took responsibility for missing homework by completing it during "yard time" (*id.*). Socially, the student generally had positive relationships with his teachers and was well liked by his peers (*id.* at p. 3). However, "yard time" was reported to be challenging for the student due to conflicts with peers over disagreements during play or personality conflicts which required teacher intervention (*id.*). The report reflected that the student's goals for the following semester included among other things, to explore new activities and build new friendships during choice time, to enter the classroom quickly in the morning, to work well with peers, to solve problems without teacher support, to complete homework consistently, and to limit side conversations and stay on task for longer periods of time during group lessons (*id.* at pp. 2, 5). The report reflected that the student was utilizing a combination of the Orton-Gillingham and Preventing Academic Failure (PAF) reading programs as well as a comprehension skills curriculum and that he was functioning at a high second grade level in encoding and decoding and at a beginning third grade level in comprehension (*id.* at pp. 4, 6). In math, the student followed the Houghton Mifflin third grade curriculum and the report reflected that he showed a good understanding of the concepts covered during the semester (*id.* at pp. 7, 9). With regard to writing skills, the report indicated that during daily journal response, the student's writing was neat, clear, and incorporated complete sentences expressing his thoughts, feelings and knowledge, but that he needed reminders regarding punctuation and capitalization (*id.* at p. 10). The report reflected that the student developed an understanding of the grammatical skills taught in class and was generalizing the skills learned in writing to other areas of study (*id.* at p. 11). The report further reflected that the student had successfully participated in the science curriculum and that social studies was an area of strength for him (*id.* at p. 14).

On February 5, 2009, the parents executed an enrollment contract for the student to attend Mary McDowell for the 2009-10 school year (Parent Ex. E). According to the contract, the parents chose not to participate in the tuition refund plan (id. at p. 2).<sup>2</sup>

On March 19, 2009, respondent's (the district's) social worker completed a social history update as part of the student's triennial review (Dist. Ex. 2 at p. 1). The student's mother served as the informant during the parent interview (id.). The report reflected the parent's concerns regarding the student's school performance, including the student's "over-heightened" senses, sensitivity to noise, and distractibility (id. at p. 1). In addition, the report reflected concerns regarding the student's eye condition, congenital motor nystagmus,<sup>3</sup> for which he had undergone two surgeries (id. at pp. 1-2). Although the student's mother indicated that the student's eyesight was currently good and that he no longer had to wear glasses to read, she also indicated that one eye was stronger than the other, that he did not see the left side of the page when reading, that he focused on the right side first, and that his pupils differed regarding dilation (id.). The report further indicated concerns regarding the student's difficulty with stairs, reading, and copying of information (id. at p. 1). Regarding the student's then-current special education program, the student's mother indicated that the student was doing well and liked school since attending Mary McDowell (id.). However, she reported that the student did not like to read and at times exhibited stress and frustration with his work (id.). The parent indicated that prior to attending Mary McDowell, the student did not like school and she opined that he had needed more individual attention and that his class had not provided enough structure (id.). Regarding the student's behavior at home, the parent indicated that he was a "sassy 10 year old" and had many leisure time interests including cooking, playing the guitar, writing music, and helping with the care of the family dog (id. at pp. 1-2). She reported that he required reminders to take care of his responsibilities at home and tended to be slow to get up and ready for school (id. at pp 1-2). Regarding the student's behavior in the community, the parent indicated that he tended to be a follower and at times a loner (id. at p 2). She further indicated that the student was able to maintain friendships, but at times, his social interactions could be difficult (id.). The student was also reported to play sports with other children including hockey, baseball, and tennis (id.). The parent also reported that the student had a history of fine motor delays (id.).

Also on March 19, 2009, a district school psychologist completed a psychoeducational evaluation of the student as part of the student's triennial review (Dist. Ex. 3 at pp. 1, 5). Administration of the Stanford Binet Intelligence Scales-Fifth Edition Abbreviated Battery (SB-5) yielded an abbreviated battery IQ score of 70,<sup>4</sup> which falls at the bottom of the borderline range (id. at p. 2). Administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) yielded broad reading and broad math standard scores primarily within the low average range of functioning (id. at p. 3). The Behavior Rating Inventory of Executive Functioning (BRIEF) Parent

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<sup>2</sup> The hearing record reflects that the parents paid the student's tuition with nine installment payments between April 28, 2009 and March 1, 2010 (Parent Ex. H).

<sup>3</sup> The student's March 19, 2009 psychoeducational report indicates that nystagmus refers to "involuntary repetitive, rhythmic oscillations" of the eyes (Dist. Ex. 3 at p. 1).

<sup>4</sup> The March 2009 psychoeducational evaluation report reflected that a previous measure of the student's intellectual functioning using the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) in February 2006 yielded a full scale IQ score of 89, which falls at the upper limit of the low average range (Dist. Ex. 3 at pp. 1, 2).

Form was completed by the student's mother to assess the student's executive function behaviors in the home and school environments (id.). The report reflected that the parent's responses produced a global executive composite (GEC) score within the clinically significant range, which indicated that the student experienced significant problems with executive functions that affected his cognitive, behavioral, and emotional functioning (id. at pp. 4, 5).

On May 15, 2009, the Committee on Special Education (CSE) convened for the student's triennial review and to develop his individualized education program (IEP) for the 2009-10 school year (Dist. Ex. 7 at pp. 1-2). The meeting attendees included the parent, the district representative who also participated as the special education teacher, the school psychologist, a school social worker, a regular education teacher, an additional parent member, and the student's special education classroom teacher from Mary McDowell via telephone (id. at p. 2). The IEP conference summary dated May 15, 2009 indicated that the CSE considered the student's psychoeducational evaluation, social history, observation and a teacher report at the May 15, 2009 CSE meeting and that the CSE also requested a medical report (Dist. Ex. 8 at p. 1).

The CSE continued the student's eligibility for special education programs and services as a student with a learning disability and recommended a 12:1+1 special class in a community school with related services of speech-language therapy, OT, and counseling (Dist. Ex. 7 at pp. 1, 15). The CSE further recommended the use of a multisensory approach across the curriculum, repetition of directions, preferential seating in all classes, and pre-teaching of concepts to be presented in class to address the student's academic management needs (id. at pp. 3-4). To address the student's social/emotional management needs, the CSE recommended counseling and additional support in the classroom (id. at p. 5). The CSE further recommended OT and that the student "be careful walking down stairs due to congenital nystagmus" to address the student's health/physical management needs (id. at p. 6). The IEP included annual goals in the areas of math, reading (decoding and comprehension), writing, speech-language skills (auditory processing and verbal reasoning skills), OT (fine motor and sensory processing skills), and counseling (id. at pp. 7-12). The CSE recommended testing accommodations of extended time (double), examinations administered in a separate location, questions read aloud, and directions read and reread aloud (id. at p. 15). The CSE also recommended modification of the standard promotional criteria (id.). The CSE considered and rejected an integrated co-teaching class because it would not provide the small group instruction that the student required for academic progress (id. at p. 14). The CSE also considered and rejected a 12:1 special class in a community school because it would not offer the support of an additional adult within the classroom that the student required (id.).

By letter dated August 13, 2009, the district notified the parents of the specific location of the student's proposed program and summarized the recommendations made by the May 15, 2009 CSE (Parent Ex. A). By letter dated August 27, 2009, the student's mother responded to the district's August 13, 2009 letter, advising the district that she had concerns about the appropriateness of a special class in a community school, including the large size and the "functional profile" of the school (Parent Ex. C). She requested that the district send her a class profile and the opportunity to visit the proposed program at the start of the school year (id.). She further advised that the student would begin the school year at Mary McDowell and "reserve[d] the right to seek tuition reimbursement" (id.).

The parent received a class profile of the recommended class in early September 2010 (Tr. p. 235). The class profile reflected that there were 11 students attending the program at that time, ranging in age from 8 to 11 years (Parent Ex. B at pp. 1-2). The classifications of the students attending the recommended class included emotional disturbance, speech and language impairment, learning disability, multiple disabilities, and mental retardation (id.). The profile indicated that the functional levels of the students attending the class ranged from PK.9 to grade 2.4 in reading and in math (id.).

The hearing record reflects that the student's mother visited the recommended program in early September for approximately 20 minutes (Tr. p. 237). She observed the "morning meeting" circle, group math instruction, and independent math seatwork, which was supervised by the assistant teacher (Tr. pp. 237-38).

By letter dated September 16, 2009, the student's mother advised the district that she was rejecting the district's placement, continuing the student's placement at Mary McDowell for the 2009-10 school year, and would be seeking tuition reimbursement from the district (Parent Ex. D). Citing the district's class profile, the student's mother contended that the composition of the students in the proposed classroom was inappropriate because the students had varying academic levels and social needs (id.). She further found the class composition inappropriate because the class profile reflected that the students ranged in age from seven to thirteen years (id.). Based on her observation of the recommended placement, the student's mother found the classroom inappropriate because it was a "distracting environment that was not adequately controlled by the teachers" and the mother was concerned that the student would not receive the individualized attention that he required (id.). She further expressed concern that the recommended placement would be unable to provide the student with his mandated counseling and speech-language therapy (id.).

By due process complaint notice dated October 5, 2009, the parents requested an impartial hearing (Parent Ex. G). They alleged that the district had failed to offer the student a free appropriate public education (FAPE) on procedural and substantive grounds (id.). According to the parents, the May 2009 CSE was improperly composed, the CSE failed to follow proper procedures and to review appropriate documentation, and the resultant IEP contained "insufficient goals and objectives" (id.). The parents further contended that based on the class profile and the mother's observation of the proposed classroom, the student would not be appropriately grouped with other students in the proposed program because the students varied in functional levels, some of the students had behavioral difficulties, and there was a six year age span (id.). The parents also alleged that the proposed school was too large for the student and that there was no confirmation that the school could provide the related services the student required (id.). As a proposed resolution, the parents sought tuition reimbursement for the student's attendance at Mary McDowell as well as the provision of transportation and related services (id.).

The impartial hearing began on April 19, 2010 and concluded on June 15, 2010, after three days of proceedings (Tr. pp. 1, 130, 264). By decision dated July 15, 2010, the impartial hearing officer concluded that the district offered the student a FAPE for the 2009-10 school year (IHO Decision at pp. 7-9). First, the impartial hearing officer determined that the gravamen of the parents' due process complaint notice was that the district's proposed placement was inappropriate due to the class composition and the size of the school, and that the other allegations raised in the complaint lacked detail and specificity (id. at pp. 2-3). The impartial hearing officer termed the

parents' procedural arguments relating to CSE composition and the CSE's failure to consider documents as "general" allegations that "demonstrated no real impact on the substance of the IEP" (id. at p. 8). Regarding the district's substantive program, the impartial hearing officer determined that the district's placement was designed to confer educational benefits to the student (id. at p. 7). Specifically, the impartial hearing officer noted that the public school had the same class ratio as the private school, that there were "master teachers or coaches" in math and reading to assist the teachers and students, and that the student would receive counseling at the district school (id. at pp. 7-8). He further determined that the student's needs regarding sensitivity to noise and difficulty focusing due to an eye condition could be met by the classroom teacher and by the accommodations and supports in the IEP, including reading questions to the student, rephrasing directions, and asking the student to repeat (id. at p. 8). The impartial hearing officer noted that a single FM unit could be provided in the classroom and that the student "appear[ed] in some ways robust in the context of noise and other children in that he participate[d] in sports and teams" (id.).

Regarding the composition of the students in the proposed class, the impartial hearing officer noted that the special education teacher testified that the age span of the students in the class in September 2009 was 8 to 11 years old (IHO Decision at p. 5). While the class profile listed some students who were older, the class profile also indicated that these older students were not enrolled in the class as of September 2009 (id.). The impartial hearing officer further found that the functional levels of the students in the proposed classroom were similar to the functional levels of the students at Mary McDowell, and "except in one or two instances are within the accepted range" (id. at p. 7). The impartial hearing officer noted that the special education teacher testified about the methods employed to deal with behavior, various methodologies used to address the students' needs, and that she received assistance from other personnel (id. at pp. 7-8). According to the impartial hearing officer, in the context of the overall program/placement, "the impact of some deviation in the norms of similar grouping appears minimal if any" (id. at p. 8). Based on the foregoing, he determined that the district offered the student a FAPE and denied the parents' request for tuition reimbursement (id.).

The parents appeal, contending that the impartial hearing officer erred in finding that the district offered the student a FAPE for the 2009-10 school year. According to the parents, the asserted procedural errors rise to the level of a denial of a FAPE. Specifically, the parents allege in their petition (1) that the May 2009 CSE was invalidly composed because it lacked "qualified" regular and special education teachers; (2) that the IEP lacked goals relating to the student's needs in executive functioning, spelling, and reading comprehension; (3) that the CSE failed to take into account how the student's nystagmus might impact his educational needs; and (4) that the CSE failed to offer the student an FM unit. The parents further argue that the student would have been inappropriately grouped for academic and social purposes in the proposed class. In addition, the parents assert that they met their burden to show that Mary McDowell was an appropriate placement for the student and that equitable considerations favor an award of tuition reimbursement. As relief, the parents request that a State Review Officer overturn the impartial hearing officer's decision and award the parents reimbursement for the student's tuition at Mary McDowell for the 2009-10 school year.

The district answered the parents' petition, requesting that the impartial hearing officer's decision be upheld in its entirety. The district asserts that it offered the student a FAPE. Responding to the parents' assertion about the CSE composition, the district argues that the parents failed to show how the alleged procedural error impeded the student's right to a FAPE, significantly

impeded the parents' opportunity to participate in the decision making process, or caused a deprivation of educational benefits. According to the district, the goals set forth in the student's IEP were appropriate, and any deficiencies would have been addressed by the special education classroom teacher. The district further asserts that the student's diagnosis of a motor nystagmus was discussed by the CSE and included in the IEP under the health and physical development section, and that the special education classroom teacher testified that had the student entered the public school, she would have learned more about the diagnosis and its effects in the classroom. The district argues that the parents' claim that the CSE failed to recommend an FM unit for the student is outside the scope of review because it was not raised in the parents' due process complaint notice. With respect to the grouping of the student in the proposed classroom, the district argues that the proposed classroom was appropriate because the student's needs were similar to the other students in the classroom and the student's special education classroom teacher would have differentiated the student's academic instruction and been able to address the student's social/emotional needs. Lastly, the district submits that Mary McDowell is an overly restrictive placement for the student and that the parents never intended to place the student in public school.

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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; 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]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148). The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

Upon review and due consideration of the entire hearing record in this matter, I find for the reasons set forth below that the impartial hearing officer correctly determined that the alleged procedural errors did not rise to the level of a substantive denial of a FAPE and that the district's

recommended program and services were designed to confer the student with educational benefits during the 2009-10 school year.

I will first address the parents' allegation set forth in their petition that the May 2009 CSE was improperly composed because the district's special and regular education teachers who participated at the CSE meeting were not teaching in the classroom. The impartial hearing officer noted that the parents raised "CSE composition in a general way" and determined that it "demonstrated no real impact on the substance of the IEP" (IHO Decision at p. 8). The IDEA requires a CSE to include, among others, not less than one regular education teacher if the student is or may be attending a general education environment and one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 C.F.R. § 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]). The special education teacher or provider should be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).

Here, a regular education teacher participated in the May 2009 CSE meeting, albeit, one who was not then teaching in a general education classroom (Tr. p. 104; Dist. Ex. 7 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. Therefore, I find that the lack of a current teaching assignment on the part of the participating regular education teacher at the May 2009 CSE meeting was not a defect that resulted in a denial of a FAPE for the student (see Application of the Dep't of Educ., Appeal No. 10-073). The hearing record further reveals that a special education teacher from the district and the student's classroom teacher from Mary McDowell attended the May 2009 CSE meeting (Tr. pp. 83, 102-03; Dist. Ex. 7 at p. 2). The district's special education teacher, who previously taught special education classes, was not teaching within a classroom at the time of the May 2009 (Tr. pp. 102-03). Although I find that the May 2009 CSE lacked a special education teacher who could have personally implemented the student's IEP had the student attended the district's proposed program, I decline to find that this procedural violation resulted in a substantive denial of a FAPE. Initially, I note that the parents only generally alleged invalid CSE composition in their due process complaint notice (see IHO Decision at pp. 2, 8; Parent Ex. G), and did not develop this claim with any further specificity during the impartial hearing. I am also not persuaded by the parents' allegation that was raised for the first time in their petition that the absence of a special education teacher at the May 2009 CSE meeting impeded the development of adequate goals in the student's IEP. First, for the reasons discussed later in this decision, I disagree with the parents' allegation that the district denied the student a FAPE because the IEP contained inadequate goals. Second, the hearing record demonstrates the active participation of the student's then-current Mary McDowell classroom teacher at the May 2009 CSE meeting; specifically, that the Mary McDowell teacher discussed with the CSE the student's academic and social progress, areas of weaknesses and strengths, her estimates of the student's current instructional levels, the student's academic management needs as well as his social/emotional management needs, the areas where the student required goals, and the special education program and related services that the student required (Tr. pp. 83-99). The hearing record further reveals that the CSE considered

progress reports from the student's special education providers at Mary McDowell (Tr. p. 105). Thus, the hearing record does not support the conclusion that the absence of a special education teacher at the May 2009 CSE who could implement the district's proposed program impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]), particularly here where the student's classroom teacher at Mary McDowell actively participated at the May 2009 CSE meeting (see Application of the Dep't of Educ., Appeal No. 08-105). Accordingly, I find that this procedural violation did not result in a substantive denial of a FAPE to the student.

Next, I turn to the parents' contention raised in their petition that the goals contained in the IEP are insufficient because there are no goals to address the student's executive functioning, spelling, and reading comprehension needs. An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). I have carefully reviewed the annual goals contained in the May 2009 IEP, as well as the documents considered by the CSE when developing the IEP, and conclude that the goals, as written, adequately target the student's identified needs. Contrary to the parents' claim, the May 2009 IEP contains a writing goal that addresses the student's executive functioning (Dist. Ex. 7 at p. 10). The focus of the writing goal is to increase the student's ability "to organize his thoughts in order to write 5 complete sentences on a given topic using correct spelling, grammar" (id.). This goal indicates that the student will use "pre-writing strategies" (such as outlines, graphic organizers, webs, brainstorming) all which would address the student's deficits in executive functioning (id.). The May 2009 IEP further addresses the student's deficits in executive functioning through the recommendations pertaining to the student's academic management needs, including a multisensory approach to learning, repetition of directions, preferential seating in all classes, and pre-teaching of concepts to be presented in class (Tr. pp. 199, 215-16; Dist. Ex. 7 at pp. 3-4). With regard to spelling, although the IEP does not include a spelling goal per se, the student's writing goal reflects that the student's spelling would be addressed therein (Dist. Ex. 7 at p. 10). In addition, the IEP includes goals that require the student to demonstrate comprehension skills when presented with information both auditorily and from text (id. at pp. 8, 10; see Tr. p. 113). The hearing record indicates that the student's mother had the opportunity to participate in the May 2009 CSE meeting and did not raise any challenges to the goals until her October 2009 due process complaint notice when she alleged that the goals were "insufficient" (Parent Ex. G). Thus, given the circumstances of this case, I decline to find a denial of a FAPE based on any inadequacies in the goals.

I also find that the parents' allegation that the district failed to consider the student's diagnosis of a motor nystagmus is belied by the hearing record. The student's mother testified that the May 2009 CSE discussed the student's diagnosis of motor nystagmus and that she explained how the medical condition affects the student academically and socially (Tr. p. 229). Further, the IEP references the student's diagnosis of motor nystagmus (Dist. Ex. 7 at pp. 1, 6). As the impartial hearing officer determined, the IEP includes accommodations and supports to address the student's needs relating to his eye condition (IHO Decision at p. 8, Dist. Ex. 7 at pp. 1, 7).

Regarding the parents' allegation that the CSE failed to offer the student an FM unit, State regulations provide that 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 due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3]; 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). Here, I find that the hearing record demonstrates that the parents failed to assert in their due process complaint notice any claim relating to the student's need for an FM unit (see Parent Ex. G), and there is no indication in the hearing record that the district agreed to expand the scope of the impartial hearing to include this issue or that the parents amended their complaint. Accordingly, the issue of whether the student requires an FM unit that was raised for the first time in the parent's petition must be dismissed.

The parents further argue that there is an unacceptably broad range of students in the recommended classroom. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][i], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a] – [d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). The similarity of abilities and needs may be demonstrated through the use of a proposed class profile or by the testimony of a witness who is familiar with the children in the proposed class (Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, the regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. Of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073). Finally, State regulations provide that the age range

of students in a special education class who are less than sixteen years old shall not exceed thirty-six months (8 NYCRR 200.6[h][f]).

The parents contend that the class profile of the recommended classroom indicated that the class was comprised of students across a six year age span who demonstrated a wide range of needs, including behavioral concerns.<sup>5</sup> The class profile reflected that the ages of the students designated as "attending" the recommended class ranged from eight to eleven years and the academic functioning ranged from PK.9 to grade 2.4 in math and reading (Parent Ex. B at pp. 1, 2). However, the teacher of the recommended class testified that her students' reading and writing levels ranged from upper kindergarten to "approaching 5th grade level" (Tr. p. 36). The teacher also testified that the math levels of the students in the recommended class were between first grade and lower third grade and that additionally, two of her students attended a general education fifth grade class for math instruction (Tr. pp. 17, 40). The hearing record reflects that the functional levels of the student in the instant case were at a high second grade level in independent reading, a mid third grade level in reading comprehension, a mid to high third grade level in computation, a mid third grade level in applied problems, a high second to low third grade level in writing, and at a second grade level for encoding (Dist. 7 at p. 3).

I find that the chronological ages of the students attending the proposed class did not exceed the permissible thirty-six month age range set forth in State regulations, and that the student would have been suitably grouped in terms of his age with the other students. I further find that the student's academic functional levels were sufficiently similar with the students in the proposed class as reflected on the class profile and by the teacher's testimony. Moreover, the hearing record demonstrates that the teacher of the district's recommended class differentiated instruction for the varying needs of the students across the levels of functioning in the recommended classroom (Tr. pp. 24-25; 34-41).

The hearing record further reflects that the student would also have been appropriately grouped relative to social/emotional functioning in the recommended classroom. Testimony by the teacher of the recommended class indicated that, based on her review of the student's present level of social/emotional performance on the May 2009 IEP, his needs were similar to the students in her classroom (Tr. pp. 42-43). The IEP reflected that the student, at times, had conflicts with other students because of difference of opinions and misunderstanding of directions or ideas and that the student became social with his peers during work times (Tr. p. 43; Dist. Ex. 7 at p. 5). The teacher of the recommended class testified that she typically addressed student misunderstandings or conflicts by having students stop, take a deep breath, have one person talk at a time so the students can try to explain the conflict or depending on the situation, she may simply give the directions again and make sure that both students involved refocus on their task and continue to work (Tr. p. 43). The teacher also indicated that she employed a classroom behavior management system where at the end of every period, each student's behavior was assessed (Tr. p. 32). Students who demonstrated appropriate behavior, participated, and remained on task, moved their clothespin up a step on the chart (id.). Students whose clothespins reached a designated spot were

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<sup>5</sup> I note that the class profile included not only students who were then attending the recommended class, but also students who were "awaiting authorization" and were not actually in the recommended class (Parent Ex. B at pp. 1-2). As such, including those students who were "awaiting authorization" would increase the range of ages and functional levels as reflected by the class profile (id.).

rewarded with incentives such as participating in a "class game" at the end of the day and a certificate to take home at the end of the week (*id.*). The teacher testified that she could address the student's socialization with peers during work times through her classroom "warning system," whereby she recorded students' inappropriate behavior such as being off task, by writing their name on the board under the heading "warnings" (Tr. pp. 43-44). If students received three warnings, they would not "move up" on the behavior chart (Tr. p. 44).

Based on the foregoing, I find that the student's academic and social/emotional functioning levels as well as age are similar to those students in the proposed class, and that the student would have been suitably grouped for instructional purposes.

In summary, any procedural errors asserted were either not supported by the hearing record or did not rise to the level of a denial of a FAPE. I also conclude that as a whole, the program recommended by the May 2009 IEP was designed to confer educational benefits upon the student. The May 2009 IEP identified the student's academic, social, physical, and management needs; the CSE developed goals to address the student's identified needs; and further, the CSE recommended a 12:1+1 special class with related services of speech-language therapy, OT, and counseling and recommended a placement where the student would have been suitably grouped for instructional purposes. Thus, the district offered the student a FAPE in the LRE for the 2009-10 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having determined that the district offered the student a FAPE, I need not reach the issue of whether Mary McDowell was appropriate for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
October 29, 2010**

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**ROBERT G. BENTLEY  
STATE REVIEW OFFICER**