



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-087

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

Appearances:

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

Law Offices of Neal Howard Rosenberg, attorney for respondent, Karen Newman, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Aaron Academy for the 2008-09 school year. The parent cross-appeals from the impartial hearing officer's determination which reduced the award of tuition reimbursement to the parent by one fourth. The appeal must be dismissed. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was 13 years old and attending the Aaron Academy, where she was unilaterally placed by her parent during the 2008-09 school year (Tr. pp. 126, 135, 241, 540-41; Parent Exs. A at p. 1; D).¹ The hearing record describes Aaron Academy as a school where the curriculum is based on a combination of New York State standards and college readiness standards and is set in a "21st Century Learning" framework that utilizes "Universal Design" principals (Tr. pp. 423-24). The Commissioner of Education has not approved

¹ During the course of the impartial hearing, the district moved to dismiss the parent's claim for tuition reimbursement and the parent filed a memorandum of law in opposition to the district's motion (IHO Exs. I-II). Before the impartial hearing was concluded, the impartial hearing officer dismissed the parent's tuition reimbursement claim on the basis that tuition reimbursement was "limited to non-profit institutions under the applicable statutes" and closed the case (see Application of a Student with a Disability, Appeal No. 09-085). The parent appealed and a State Review Officer reversed and remanded the matter for completion of the evidentiary hearing (id.).

Aaron Academy as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

The student has received diagnoses of a partial callosal agenesis, a post traumatic stress disorder, chronic (PTSD), and a central auditory processing disorder (Dist. Exs. 4 at p. 2; 5 at p. 11). She demonstrates difficulties with academics, social-emotional functioning, attention, concentration, retention of information, complex verbal information processing and following directions, as well as delays in language processing (Tr. pp. 267-78; Parent Exs. H at p. 1; R at p. 1; Dist. Exs. 2; 4; 5). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R § 300.8 [c][10]; 8 NYCRR 200.1 [zz][6]).

The parties' familiarity with the student's early history is presumed, therefore, it is unnecessary to repeat it in detail. Briefly, when the student began attending school she exhibited difficulties in the areas of attention, impulsivity, memory, higher order reasoning, and graphomotor skills, as well as rigidity in mental operations (Dist. Ex. 4 at p. 2). At approximately the age of eight she was also found to have a partial agenesis of the corpus callosum, a neurological condition that negatively effects the integration between the visual and language sides of the brain (Tr. p. 255, Dist. Ex. 4 at p. 2).²

Over two dates in April 2004, an audiologist conducted an auditory processing evaluation of the student (Parent Ex. F). Audiological testing revealed normal hearing sensitivity, uncomfortable loudness levels, and middle ear pressure bilaterally (id. at p. 1). The audiologist reported that the student's word recognition scores were "excellent" (id.). An administration of the "SCAN," described as "a screening test for auditory processing disorders with several subtests," yielded filtered words, competing words and competing sentences subtest scores within the "normal" range (id. at p. 2). The student's performance on the auditory figure ground subtest, which measured her ability to understand speech in the presence of competing noise, was in the borderline range (id.). Results of an administration of the Phonemic Synthesis Test to the student were "within normal limits" (id. at p. 3). The evaluation report indicated that Staggered Spondaic Word Test (SSW) results provide "information about auditory memory, decoding, and attention, organization and auditory integration," and that the student's performance on the SSW revealed difficulty with decoding and auditory memory (id. at pp. 2-3). The audiologist's report included information about potential difficulties the student may face in relation to her evaluation results (id. at p. 3). The audiologist also noted that the results of the student's testing should be interpreted with extreme caution because of the student's medical and educational history (id. at p. 1). The audiologist recommended the student receive an updated speech-language evaluation, a "psycho-educational and/or neuro-psychological" evaluation, and a "sensory integration" OT evaluation (id. at pp. 3-4). Additional recommendations included the use of an FM listening system in the student's classroom, speech-language therapy, auditory integration training, a quiet classroom, classroom seating within close proximity to the teacher, pre-teaching, breaks, repetition,

² The hearing record describes partial callosal agenesis as "[s]he has no corpus [callosum] from the rostrum to – and the posterior portion of the corpus [callosum] is absent. The genue (phonetic) and the anterior portion of the body of the corpus [callosum] are present. So she has no corpus [callosum] towards the rear of her brain, up to about ... the top of [her] head" (Tr. pp. 242, 255).

rephrasing, and providing important information or homework assignments to the student in writing (id.).

The student was placed in a district first grade integrated co-teaching (ICT) class in April 2004 and reportedly continued to attend district ICT classes through the sixth grade (Tr. pp. 630, 635-36; Dist. Ex. 4 at p. 2).

Over three dates in May and June 2007,³ a private psychologist (private psychologist 1) completed a neuropsychological evaluation of the student (Dist. Ex. 5).⁴ According to the resultant evaluation report, private psychologist 1 conducted an "extensive history," reviewed "records and questionnaires," and administered a "neuropsychological battery" (id. at p. 1). Private psychologist 1 reported on the student's "biopsychosocial history" and her academic history, noting that the student continued to exhibit difficulties in the areas of problem solving, frustration tolerance, language processing, math, spelling, attention, distractibility, memory, hyperactivity, and impulsivity and that the student had previously received a diagnosis of an attention deficit hyperactivity disorder (ADHD) for which she took medication (id. at p. 2). Additionally, according to private psychologist 1's report, the student had difficulty developing friendships "due to lack of social discretion, poor sequential story telling, and poor judgment of other people's feelings," however, she did not display any "behavioral problems" (id. at pp. 2-3).

Private psychologist 1 further reported that the student demonstrated deficits in initiation of tasks, working memory, and organization and that according to her teachers she frequently required prompts to perceive visual similarities and differences and lacked comprehension of abstract concepts (Dist. Ex. 5 at p. 3). The student's academic progress was reportedly below expectation when compared to same age peers and although she demonstrated average intellectual potential, she had difficulty with concentration, retention of information, and following directions (id. at pp. 3-4).

Private psychologist 1 recommended a small, structured, and "nurturing" classroom environment for the student, which had a social skills orientation and was located in a small school (Dist. Ex. 4 at p. 4). She indicated that the student required full-time specialized multisensory instruction in all subjects within a 12:1 special class where the student was taught at her level utilizing an integrated curriculum (id.). Private psychologist 1 also recommended that the student's reading assignments be monitored to prevent reviving previously reported traumatic events and that her "classroom and transport be in a secure emotional environment that does not revive past traumas" (id.). Additionally, private psychologist 1 recommended the following: social skills counseling; speech-language therapy to address receptive speech integration; and OT to address finger differentiation, interhemispheric integration, and organizational techniques (id.). Lastly, private psychologist 1 recommended that the student be provided with a copy of class notes, outlines, and study guides (id.). Private psychologist 1 offered the student the following diagnoses: partial callosal agenesis, a communication disorder, NOS (receptive language), a mathematics

³ The May/June 2007 neuropsychological evaluation consisted of four pages and had a signature date of May 5, 2008 (Dist. Ex. 4).

⁴ When submitted to the Office of State Review, the pages of District Exhibits 4 and 5 were intermingled. The pages were reordered as identified in the district's exhibit list.

disorder, a reading disorder, a disorder of written expression, and a learning disorder, NOS (memory/hemispheric integration) (id.).

On May 2, 2008 private psychologist 1 conducted a second neuropsychological evaluation and administered a battery of standardized tests to the student including the Wide Range Achievement Test-III (WRAT-III), the Gray Oral Reading Test-Fourth Edition (GORT-4), the Ohio Test of Literacy (OTOL) and selected subtests of the Developmental Neuropsychological Assessment (NEPSY) (Dist. Ex. 5 at p. 1).⁵ She reported that the student demonstrated average cognitive functioning as indicated on a 2007 administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) with a full scale IQ of 92, a verbal comprehension index of 93, a perceptual reasoning index of 96, a working memory index of 94, and a processing speed index of 97 (id. at p. 2). Private psychologist 1 indicated that at the time of the 2007 testing the student's "[r]esponse control was mildly impaired for simple tasks, and tended to break down further with increasing task complexity" (id.). Private psychologist 1 also indicated that the 2007 testing reflected that the student's executive functions "were intact for simple tasks, but became increasingly impaired as task complexity increased" and that her "[r]ecent and delayed visual and verbal memory (new learning) was mildly and severely impaired, in a manner that suggested poor access to encoded information" (id.). She noted that the student's performance on the 2007 WISC-IV administration demonstrated significant improvement compared to previous testing completed in November 2004 which indicated a full scale IQ of 68 (id. at pp. 5-6).

Private psychologist 1 reported that results from her administration of the WRAT-III to the student indicated that the student's decoding skills were above average, her phonological processing skills were adequate, and that she had a deficit in the area of spelling (Dist. Ex. 5 at p. 3). Results for the GORT-4 included grade equivalent scores as follows: reading speed (6.2), reading comprehension (6.1), reading accuracy (4.7), and reading fluency (5.4) (id.). The student's total reading skills, which fell at the 12th percentile, indicated that she had significant deficiencies in her ability to learn from reading (id.). In the area of math, the WRAT-III indicated the student had computational ability at the 2nd grade level (id.). The student's visual and auditory sustained attentions were adequate (id. at p. 6). Her response control had improved compared to previous testing but remained mildly impaired (id.). The student's executive functions were adequate for simple tasks but mildly to moderately impaired for more complex tasks (id.). According to private psychologist 1, the student demonstrated mild to moderate deficits in visual scanning and visuospatial integration as well as impaired receptive language processing skills; with adequate abilities in the areas of mental processing speed, sensorimotor integration, and proprioception (id. at pp. 7-8). The student reportedly demonstrated superior fine motor response speed and reaction time (id. at p. 8).

Private psychologist 1 concluded her May 2008 neuropsychological evaluation report by offering the medical recommendation that the student's current medication for ADHD be discontinued (Dist. Ex. 5 at p. 10). She also made academic recommendations that included: (1) a small, social skills oriented, ungraded or multigrade classroom environment; (2) provision of class work and homework assignments at the student's level of progress; (3) presentation of instructional materials "given in one sensory mode at a time, first verbal, then visuospatial, so that each

⁵ The May 2008 neuropsychological evaluation consists of 12 pages and has a signature date of June 12, 2007 (Dist. Ex. 5).

hemisphere can learn the material separately;" (4) weekly social skills group counseling; (5) speech-language therapy and OT; (6) preferential seating, provision of copies of class notes, extended time for tests, and frequent rewards; (7) use of a calculator for math calculations which involve verbal/computation and visuospatial skills; and (8) that the student's classroom and transportation must be "a secure emotional environment which does not revive past traumas" (id. at pp. 10-11).

On May 8, 2008, a second private psychologist (private psychologist 2) completed an assessment of the student which included a review of previous neuropsychological testing, parent and student interviews, an observation, and a review of records (Dist. Ex. 6).⁶ Private psychologist 2 concluded that the student's then current ICT placement did not meet the student's needs (id. at p. 1). Additionally, private psychologist 2 indicated that the student's "current learning environment and her interaction with her teachers and fellow students [we]re unintentionally triggering her PTSD and interfering with her ability to learn in the classroom" (id.). Private psychologist 2 reported that the large class size overwhelmed the student and consequently she was "unable to manage the academic and psychosocial stimuli" (id. at p. 3).

Private psychologist 2's recommendations included the following: (1) small class size and small nurturing environment; (2) instruction at the student's specific level; (3) a social skills curriculum built into the academic program; (4) a classroom "free of social and emotional distractions" and "free of high-stakes testing preparation;" (5) a classroom "free of project performance, and comparison by peers" and a classroom "sensitive to students with psychological trauma issues;" (6) multi-modality learning resources; and (7) instruction that focused on the student's strengths (Dist. Ex. 6 at p. 4).

On May 9, 2008, the Committee on Special Education (CSE) convened to develop a program for the student for the 2008-09 school year (Tr. p. 647). Meeting attendees reportedly included private psychologist 2, who had been invited by the parent to discuss the student's needs and classroom behaviors as related to her PTSD (Tr. pp. 647-52). The hearing record further reflects that the student's mother believed the student's then-current ICT placement was not meeting her daughter's educational needs and that the student required a more restrictive placement (Tr. pp. 647, 651). At the May 2008 CSE meeting, district participants reportedly advised the parent that they could not change the student's proposed placement from an ICT placement to a more restrictive setting without an "administrator" or someone in an "official DOE role" to "sign that on an IEP," and therefore the CSE would need to reconvene (Tr. pp. 653, 656-57, 661).

On June 13, 2008, the CSE reconvened to continue developing the student's individualized education program (IEP) for the 2008-09 school year (Dist. Ex. 2). Attendees at the June 13, 2008 CSE meeting included the parent, a district school psychologist who also acted as the district representative, a district special education teacher, a district "ESL" teacher, a district regular education teacher, and a district school "counselor" (id. at p. 2). The June 2008 CSE determined that the student was eligible for special education programs and services as a student with a learning disability and (Dist. Ex. 2 at p. 1).

⁶ Page two of private psychologist 2's four-page report was not included in the hearing record (Dist. Ex. 6).

The CSE developed present levels of performance in the areas of academic performance, social/emotional performance, and health and physical development (id. at pp. 3). The June 2008 IEP contained eight annual goals and 22 corresponding short-term objectives to address the student's needs in the areas of reading, writing, math, and social/emotional functioning as well as her receptive, expressive and pragmatic language (Dist. Ex. 2 at pp. 6-10). The June 2008 IEP also included testing accommodations of extended time (2.0), a separate location, and questions and directions read and reread aloud (id. at p. 13). The CSE recommended that for the 2008-09 school year the student be placed in a 12:1 special class with related services of speech-language therapy two times per week in a group of three for 30 minutes and two times per week individually for 30 minutes, as well counseling one time per week in a group of three for 30 minutes (Dist. Ex. 2 at pp. 1, 13).

In a notice dated August 12, 2008, the district informed the parent that for the 2008-09 school year the student was recommended to attend a 12:1 special class with related services of speech-language therapy and counseling (Dist. Ex. 3). The district also identified the proposed community school for the student to attend (Dist. Ex. 3).

In a letter to the district dated August 18, 2008, the parent informed the district that she could not make a decision regarding the June 2008 CSE proposed education placement until she visited the proposed school site which was currently not in session (Parent Ex. A). The parent indicated that she would be placing her daughter at the Aaron Academy until she had the opportunity to visit the recommended school in September 2008 (id. at p. 1).

In a subsequent letter to the district dated October 3, 2008, the student's mother informed the district that she had visited the 12:1 special class at the CSE's recommended school for approximately four hours on September 1, 2008 (Parent Ex. B at p. 1). The parent observed that the student would have been in a class of eight students for five classes per day and would have attended lunch and "specials" with additional regular education students (id.). She reported that five of the eight students displayed behavior problems such as shouting, kicking, and "threatening behavior" which disrupted instruction on a consistent basis throughout the school day (id.). According to the parent, due to the behavior of the students in the class, the teacher was not able to engage in individual or small group instruction (id. at p. 2). The parent noted that there were no additional adults in the classroom to allow the teacher to continue instruction when students exhibited maladaptive behaviors and that the instruction provided to the class was above the comprehension level of her daughter (id.). The parent also noted that lunch supervision was minimal and that there was no supervision provided at the bathroom (id. at p. 3).

In her October 3, 2008 letter the parent contended that the student required a small, structured and nurturing classroom environment in a small school with, among other things, multisensory instruction and a social skill curriculum (Parent Ex. B at p. 3). The parent informed the district that she was unable to accept the proposed placement, that the student would continue to attend the Aaron Academy and that she would be seeking tuition reimbursement (id. at pp. 3-4).

An Aaron Academy report card dated November 11, 2008 provided information on the student's attendance, grades, and goals (Parent Ex. I). According to the report card, the student

earned an "overall portfolio grade"⁷ of B+ with individual grades ranging from C+ to A+ in the areas of integrated global studies, integrated civics, art, physical education, integrated core skills, music, computer and integrated health (id. at p. 1). The report card reflected that the student's identified learning goals for herself included improvement in the areas of math and attention (id. at p. 2). Teacher comments reflected that the student needed to develop comprehension and visualization skills and that she needed to monitor her tone of voice with peers and use her strong leadership skills in a positive manner (id.). The November 2008 Aaron Academy report card also included the parent's comment that she would like the student to improve her math calculation skills and develop number sense (id.).

In a due process complaint notice dated November 12, 2008 the parent claimed that the district did not offer the student a free appropriate public education (FAPE) (Dist Ex. 1). Among other things, the parent claimed that the CSE's composition was invalid and that goals and objectives on the IEP were too broad and were inappropriate (id.). The parent also claimed that the proposed placement contained students with severe behavioral problems and that the student would be inappropriately mainstreamed in a large setting for portions of the day (id.). Lastly, the parent claimed that the student required a small nurturing school with children without behavioral problems because she suffered from PTSD and needed a calm setting as well as an academically challenging class (id.).

On January 29, 2009, the district conducted a classroom observation of the student during the student's math and integrated studies classes at the Aaron Academy (Tr. p. 712; Parent Ex. G). The observation report indicated that the classroom was comprised of a head teacher, two assistant teachers, and nine students (id.). According to the observation report, the student participated in a math activity with another student who was reportedly "a little more advanced who could model for her"; actively participated in the class, "laughing off" an incorrect answer she provided; and read with clarity and good expression (id.). The observer noted that the student's teacher reported that she "definitely needed" small group attention and was "in summary a very active student who constantly tried to be involved in the class" (id.).

On May 23, 2009, the student underwent a reevaluation of her visual and perceptual development (Parent Ex. O). The resultant report indicates that the student was initially referred and evaluated due to poor tracking skills, difficulty with spatial awareness, and poor fine motor skills and received diagnoses of accommodative infacility and visual perceptual dysfunction (id. at p. 1). The evaluator reported that the student's skills had improved after completion of 42 sessions of weekly vision therapy but that deficits still remained (id.). The student's eye teaming and eye focusing were greatly improved and the student reported that she no longer experienced discomfort while reading (id.). The student continued to exhibit deficits in the areas of visualization, visual processing speed, visual sequential memory, and auditory sequencing (id.). The evaluator recommended the student wear glasses for all distance activities, sit facing the front of her classroom with the teacher and board within her direct line of sight, and receive reminders to take her time in order to reduce impulsivity when problem solving (id. at p. 2). It was also recommended that the student receive information in auditory and visual forms simultaneously so that she may utilize both learning styles in all academic subjects with the use kinesthetic

⁷ A portfolio was defined in the hearing record as work samples collected over the school year which provide for an assessment of the student's work (Tr. p. 511).

reinforcement when possible to "promote better motor learning and allow [the student] to learn and retain information in the most efficient way possible" (id.).

An Aaron Academy progress report dated 2009 described the student's then-current functioning levels (Parent Ex. H). The progress report included assessment results in the areas of reading, math, and language skills as well as in the student's social/emotional functioning (id. at pp. 2-4). The student demonstrated strong listening comprehension skills, weaker skills in the understanding of noncontextual language, and strength in geometry but difficulty with multiplication and division calculations (id. at p. 2). The student's difficulties with vocabulary and auditory memory negatively affected her language processing and the evaluator reported that "[w]hile her overall scores were excellent, these two areas can impact her ability to read social cues or understand how her social cues maybe interpreted" (id. at p. 3). The evaluator recommended interventions including experiential learning at the core of her instruction, "manipulative math," direct instruction and the use of visual supports (id.). The evaluator reported that activities should begin in the classroom and then be "scaffolded" to authentic situations (id.). It was recommended that the student have access to multiple methods of presentation, participation and expression so as to ensure engagement in the curriculum (id. at p. 4). The evaluator reported that the student's "agenesis and the resulting learning style require a multi-layered approach to instruction" (id.).

An Aaron Academy transition report was completed in June 2009 by the student's classroom teachers (Parent Ex. R). The transition report indicated that the student was sociable and interested in peers but had difficulty interpreting social cues, recognizing social boundaries, and monitoring her tone of voice (id.). The transition report also indicated that the student was interested in the class assignments, hard working and that she actively participated in class (id.). The transition report went on to indicate that student had difficulty with abstract concepts, sequencing, memory, organization of writing, inferential thinking, identifying main idea, reading directions, recalling facts and information, using contextual cues, understanding the concept of time, and pacing herself (id.). The transition report reflected that the student's "universal design learning access points"⁸ included the following: (1) use of routines and explicit strategy teaching for understanding of abstract concepts; (2) organizational/study skills, social skills instruction, and use of manipulatives in conjunction with visual and auditory presentation of information; (3) self-assessment rubric, tutoring younger students, and preview/review readings; and (4) use of multiple means of presentation, highlighting, color coding, and underlining (Tr. p. 50; Parent Ex. R). The transition report indicated that the strategies proven to be effective with the student included trigger free content, empathy, a supportive atmosphere, a multi-sensory approach to instruction, chunking information/assignments, and multiple means of presenting information (Parent Ex. R). According to the transition report, presentation of information in a strictly auditory or strictly visual format was an ineffective way to instruct the student (id.). The report indicated that the student experienced childhood trauma and had a diagnosis of agenesia of the corpus callosum (id.).

An Aaron Academy report card of the student was completed on May 29, 2009 by the student's core teachers (Parent Ex. Q). The student's "performance" grades were in the B through

⁸ The hearing record reveals that universal design principals were based on evidence-based practices and allow access to the curriculum for "everyone" (Tr. p. 424).

A+ range and her "process" grades were in the A through A+ range (id.). The Aaron Academy report card provided input from the student regarding her progress and learning goals and the student stated that she improved in the areas of math and reading (id. at p. 2). Additionally, the student stated that she "feels good" regarding her peer relationships and would like to continue to improve in the areas of math and social skills (id.). The student's teachers reported that the student made marked improvements in the areas of writing structure and organization and the teachers reported that the student "made steady progress in her academic and social development" (id. at p. 3).

The impartial hearing convened on May 28, 2009 and concluded on June 23, 2009 after two days of testimony (Tr. pp. 1, 119), during which the district called one witness (Tr. p. 15). When the impartial hearing reconvened, the district called a second witness and entered 11 documents into evidence (Tr. p. 156; District Exs. 1-11). The parent called five witnesses, including herself and entered 15 documents into evidence (Tr. pp. 243, 342, 420, 539, 617; Parent Exs. A; B; E-O; Q; R). The impartial hearing officer entered three documents into evidence (IHO Exs. I-III).

In a written decision dated August 6, 2010, the impartial hearing officer found in favor of the parent and ordered the district to reimburse the parent for tuition at the Aaron Academy during the 2008-09 school year (IHO Decision at pp. 22-23).

The impartial hearing officer determined that the failure to include a parent member at the IEP meeting was a procedural flaw, but did not, "in and of itself" result in a denial of a FAPE (IHO Decision at p. 17). The impartial hearing officer further found that the district failed to offer the student a FAPE because the student "presented with a unique profile that was not accurately portrayed in the IEP" (id. at p. 18). The impartial hearing officer based this finding on, among other things, the fact that the IEP failed to describe or address the student's partial collosal agenesis and PTSD (id.). The impartial hearing officer also found that the district's proposed placement was inappropriate because the recommended class was a sixth grade class, that the student had completed the sixth grade, and that the hearing record did not show that the student needed to repeat the same grade (id. at p. 19).

With regard to the parent's unilateral placement, the impartial hearing officer found that the Aaron Academy was an appropriate placement for the student because, among other reasons, the Aaron Academy met the student's need for a small class size, individual attention and a safe environment and because the student demonstrated academic and social progress in the program (IHO Decision at pp. 19-21).

Upon considering equitable considerations and whether to award the tuition reimbursement relief requested by the parents, the impartial hearing officer determined that the parent's failure to object to any part of the IEP at the CSE meeting and her decision to secure a placement at the Aaron Academy prior to the CSE meeting were not unreasonable actions such that tuition reimbursement needed to be "reduced or denied" pursuant to the IDEA (IHO Decision at p. 21). Lastly, the impartial hearing officer found that "despite the equities favoring the parent" the tuition reimbursement award should be reduced by one-fourth due to the parent's failure to provide timely ten-day notice of her intent to remove the student from the public placement and seek a private placement at public expense (id. at pp. 21-23).

The district appeals, and reasserts the argument it raised in Application of a Student with a Disability, Appeal No. 09-085 that the parents' 2008-09 tuition reimbursement claim should be denied because the Aaron Academy is a for-profit business.⁹ With regard to the merits, the district contends that the impartial hearing officer erred in finding that the recommended program for the student was inappropriate for the following reasons: (1) the impartial hearing officer incorrectly found that the teacher of the recommended program did not testify; (2) the impartial hearing officer relied upon the fact that the district did not conduct its own evaluations, an argument not raised by the parent; (3) contrary to the impartial hearing officer's finding, all members of the CSE meaningfully participated at the CSE meeting; (4) although the IEP did not list the student's diagnoses of agenesis and PTSD, there is no legal requirement that an IEP include a medical diagnosis and the IEP was nonetheless appropriate because it included interventions and services that would have met the student's social and emotional needs in school; and (5) the impartial hearing officer erred in finding that placing the student into a sixth grade class was inappropriate because there is no legal requirement that the student must be placed in a particular grade, only that students need to be grouped with other students who are of a similar age and functioning level. Although not addressed by the impartial hearing officer, the district contends that the opportunity to interact with general education students during lunch would be appropriate and beneficial to the student.

The district also contends that the parent failed to show that the unilateral placement at the Aaron Academy was appropriate. Specifically, the district argues that the hearing record shows that the Aaron Academy uses a "universal design for learning", but does not sufficiently show what the contents of the curriculum for each of the subjects taught at the Aaron Academy. The district further argues that the impartial hearing officer erred in finding that the student made progress at the Aaron Academy because there is not enough specific evidence found in the hearing record to base the finding on. Lastly, the district argues that the Aaron Academy was too restrictive because it did not provide any mainstreaming opportunities that would have been beneficial to the student.

The district next contends that the impartial hearing officer erred in determining that equitable considerations favored the parents. Specifically the district argues that tuition reimbursement may be reduced or denied if parents do not raise their concerns about the recommended program and their intent to enroll the student in a private school at an IEP meeting or provide such notice in writing at least ten days prior to removing the student from the public school. The district contends that the August 18, 2008 letter from the parent to the district did not provide sufficient notice and the October 3, 2008 letter from the parent to the district provided the notice long after the parent removed the student from the public school (Parent Exs. A; B). The district further contends that the impartial hearing officer erred in directing the district to pay a reduced tuition reimbursement award and should have denied reimbursement entirely because the parent never intended to consider a public school for the 2008-09 school year.

In her answer and cross-appeal the parent responds to the district's petition and argues that the impartial hearing officer properly found that the district failed to offer the student a FAPE

⁹ To the extent that the petition for review in this case may be interpreted as a request to reopen the decision in Application of a Student with a Disability, Appeal No. 09-085, I note that an application to reopen or reargue a prior decision of a State Review Officer is expressly prohibited by State regulations (8 NYCRR 276.8[d]; see Application of the Dep't of Educ., Appeal No. 10-058; Application of the Bd. of Educ., Appeal No. 07-074).

because, among other things, the student's IEP does not accurately describe her needs and because the district's recommended placement in a 12:1 classroom in which other students had behavior problems was inappropriate given the student's agensis and PTSD. The parent contends that IEP failed to discuss agensis and PTSD and instead focused on addressing needs related to ADHD despite the fact that an evaluation provided to the CSE concluded that the student did not have ADHD. The parent also contends that the lack of a parent member at the CSE meeting resulted in a loss of educational opportunity and infringed upon the parent's participation in the formation of the IEP. The parent argues that the recommended placement was also inappropriate because it consisted of a placement in a sixth grade class, despite the fact that the student had passed the sixth grade, and would have negatively impacted the student's self esteem. The parent also argues that the instruction model used in the recommended class requires the student to work independently, which the student is unable to do and would have required peer review, which is inappropriate for the student. The parent next argues that the proposed class had only one other female student in it and that, along with some of the course material, would have been likely to trigger the student's PTSD, given her history. The parent asserts that at the June 2008 CSE meeting, the parent and the school psychologist were both concerned that a 12:1 setting would be inappropriate due to behavior problems in the class, but according to the parent, she relented because the team persuaded her that the 12:1 placement was the best one available given the limited options available.

The parent next contends that the impartial hearing officer properly found that the Aaron Academy was appropriate. The parent contends that the Aaron Academy appropriately responds to the student's agensis and PTSD in that it was a small nurturing environment and the school combined auditory, visual and kinesthetic modes of instruction for the student. The parent further argues that the unilateral placement was appropriate because the student made academic, social and behavioral progress at the Aaron Academy.

The parent also contends that the impartial hearing officer properly determined that the equities favored the parent because the parent cooperated with the CSE, visited the proposed placement and because the parent notified the CSE that she had reserved a seat (by making a \$7000 deposit) at the Aaron Academy for the student and intended to seek reimbursement. The parent further contends that had the CSE meeting been fully conducted on May 9, 2008, as originally scheduled, she could have received and accepted a public school placement prior to making a second payment to the Aaron Academy (due June 2, 2008) and would only have risked losing the initial deposit.

Additionally, the parent cross-appeals the portion of the impartial hearing officer's order that reduced the tuition reimbursement award by one-fourth and argues that the impartial hearing officer incorrectly found that the parent had not satisfied the 10-day notice requirement to the district. The parent contends that the notice requirement was satisfied at the June 13, 2008 CSE meeting wherein the parent informed the district that she was not satisfied with the proposed placement and intended to enroll the student at the Aaron Academy and seek tuition reimbursement. The parent further contends that even if the district was not properly notified, the lack of timely notice in this case should not result in a reduced reimbursement award.

In an answer to the parent's cross-appeal, the district argues that the parent failed to give the district proper notice of her enrollment of the student at the Aaron Academy because the parent's claimed instances of notice to the district in writing and at the CSE meeting failed to

properly raise and identify the parent's concerns with the recommended program, as required by law.

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

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

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

City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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]).

Turning to the district's appeal, I agree with the impartial hearing officer's determination that the district failed to sustain its burden to establish that it offered the student a FAPE during the 2008-09 school year, but I do not agree with all of the impartial hearing officer's reasons in reaching this conclusion. As noted above, an appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][1], [a][2], [a][4]; 8 NYCRR 200.4[d][2][i], [2][iii], [2][v]; Tarlowe, 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]). Upon an independent review of the hearing record, I find that the district failed to sustain its burden to establish that the CSE developed an appropriate program for the student because, as described more fully below, the student's 2008-09 IEP does not sufficiently identify the student's needs, especially in light of the information contained in the

private neuropsychological evaluations conducted by private psychologist 1 and the assessment conducted by private psychologist 2, which were available to the CSE at the time of the May and June 2008 CSE meetings for its review and consideration when developing the student's 2008-09 IEP (Tr. pp. 161, 286, 322, 359, 648, 667, 678; compare Dist. Exs. 4-6 with Dist. Ex. 2).¹⁰

The district contends that the impartial hearing officer erred in relying on the lack of diagnoses of partial collosal agenesis and PTSD in the student's June 2008 IEP because there is no requirement to identify specific medical diagnoses in an IEP and because the IEP included interventions that should be used to address the effects that such diagnoses had upon the student's social/emotional needs in school.¹¹ Assuming, for the sake of argument, that the student's diagnoses of colossal agenesis and PTSD were not required to be listed on her IEP (see 8 NYCRR 200.4[d][2][i]), I find this argument unconvincing because the IEP nevertheless needed to identify any health, vitality, and physical skills or limitations that pertain to the student's learning process (8 NYCRR 200.1[ww][3][i][c]).

The hearing record reflects that the June 2008 CSE reviewed information including the May/June 2007 and May 2008 private neurological reports, the May 2008 psychotherapy report, an April 2004 auditory processing report, and a March 2007 radiology report (Tr. pp. 174-75, 177-78; Parent Exs. F; N; Dist. Exs. 4-6). The neuropsychological evaluations, psychotherapy assessment, and the auditory processing and radiology reports provided information regarding the student's diagnoses of partial collosal agenesis and PTSD as well as the related academic and social-emotional needs (id.).

The student's present levels of academic performance in the June 2008 IEP indicated that the student made steady academic and social progress during sixth grade, that she continued to have difficulty with social interactions, and "c[ould] become easily frustrated in math" (Dist. Ex. 2 at p. 3). The student's IEP further indicated that she "benefit[ed] from manipulatives and hands on activities" and that with "support and scaffolding" she had the ability to produce "good writing pieces" but continued to have difficulty with spelling and organization (id.). The June 2008 IEP contained academic management needs that included introducing projects to the student in chunks; using concrete manipulatives, graphic organizers, visual aids, and a calculator; providing a seat

¹⁰ At the June 2008 CSE meeting the parent discussed and identified each of the evaluations with the district's school psychologist in order to ensure that the CSE had an opportunity to fully consider the evaluations in creating the student's IEP (Tr. pp. 665-69).

¹¹ The district also argues that the impartial hearing officer erred in ruling that the district failed to offer the student a FAPE because it did not conduct its own evaluations (Pet. ¶ 42; IHO Decision at p. 18). The parents did not raise this issue in their due process complaint notice. Both the IDEA and 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). The adequacy of the district's evaluation of the student was not raised the parent's due process complaint notice and, therefore, it is not appropriate to consider this basis in determining whether the district offered the student a FAPE (see Dist. Ex. 1). However, it does not affect my determination regarding whether the student's needs were appropriately identified in the student's IEP.

facing the teacher and writing board; worksheets adapted to have more white space; and assignments with less information on one page (id.).

With regard to the student's present levels of social/emotional performance, the June 2008 IEP indicated that she "ha[d] struggled greatly this year to meet the academic and social demands of middle school" (Dist. Ex. 2 at p. 4). The IEP also indicated that the student needed a more structured environment that was small, nurturing, and offered academic tasks at her level (id.). The June 2008 IEP reflected that "[d]ue to extremely difficult past experiences, [the student] also need[ed] an environment without peer review which c[ould] negatively impact her self-esteem" and that the student lacked social skills and required more intensive social skills training (id.). The June 2008 IEP also indicated that the student's behavior seriously interfered with instruction such that she required additional adult support and that the provision of counseling addressed the student's behavioral needs (id.). Lastly, the student's IEP did not indicate that the student had any social/emotional management needs (id.).

Regarding the student's present levels of health and physical development, the June 2008 IEP indicated that the student had diagnoses of a central auditory processing disorder and ADHD and that she required an FM unit to address her health and physical development management needs (Dist. Ex. 2 at p. 5).

At the impartial hearing, the district school psychologist who participated in the development of the student's IEP stated that he was not familiar with agenesia (Tr. pp. 159, 188-89). Private psychologist 1 testified that the June 2008 CSE considered only approximately 20 percent of her neuropsychological report (Tr. pp. 276, 286-87). Private psychologist 1 testified that the student's IEP did not accurately reflect the results of her testing, because she reported phonological processing and decoding skills were intact and that the student's decoding skills were age advanced (Tr. p. 288). Private psychologist 1 stated that the June 2008 IEP indicated that the student's decoding skills needed to improve, but the psychologist explained that the student's decoding skills were above age level (Tr. pp. 289-90). According to private psychologist 1, the June 2008 IEP indicated that the student had a deficit related to reading speed, but that her reading speed was adequate, whereas she needed improvement in the areas of reading accuracy and fluency (Tr. p. 289). According to the neuropsychological evaluation, the student was "a moderate to severely emotionally disturbed but ambitious child, with feelings of insecurity, low self-assurance, and hyperactive, aggressive, acting out tendencies. Difficulty with reality testing, and withdrawal into fantasy gratification was a prominent defense" (Dist. Ex. 5 at p. 9). According to the psychologist, the student experienced "[a]nger towards boys (and fear/anger re: peers, in general) is prominent" (Dist. Ex. 5 at p. 9).

Private psychologist 1 noted that the student's academic deficits were greatest in areas where interhemispheric integration was necessary, such as mathematical word problems, writing, reading comprehension, complex verbal information processing, and the spontaneous generation of organizing principles (Dist. Ex. 5 at p. 10). With regard to the student's receptive language skills, private psychologist 1 described the student as lacking a visual component when receiving information which resulted in diminished retention of information (Tr. p. 271). Regarding the student's expressive language skills, private psychologist 1 also testified that the student had difficulty communicating her experiences, unless she phrased it in "motoric terms" (Tr. p. 272).

According to testimony by private psychologist 1, the student's executive functions such as goal setting, developing steps and planning were affected due to the lack of integration of information which resulted in difficulties with written expression (Tr. pp. 273-7). Private psychologist 1 indicated that the student's writing skills were impaired because she does not organize information well (Tr. pp. 273-74). According to private psychologist 1, the student's strategies could be employed over time to train the frontal lobes in the student's brain to accommodate for deficits in the mid and rear portions of the brain (Tr. p. 274). However, private psychologist 1 testified that scaffolding was insufficient to address the student's difficulties with writing (Tr. p. 274). Private psychologist 1 indicated that the missing connection between the student's left and right regions of the brain negatively affected her academic performance but that the student's "motor strip" located in the frontal region of the brain was functional and, although "[i]t will take a while," if she was provided with opportunities to interact with the environment she would be better capable of learning (Tr. pp. 261-63).

According to private psychologist 1, the student also required cueing regarding social skills throughout the day (Tr. p. 292). Private psychologist 1 testified that the student's curriculum needed a social component (*id.*). Noting that the student "misses a large percentage: of social cues," private psychologist 2 testified that she strongly recommended a consistent social skills curriculum built into the academic program (Tr. pp. 362-63). Private psychologist 1 stated that during engagement in social interactions the student needed to be provided information using two modalities (Tr. pp. 283-84).

The June 2008 IEP indicated that the student had a diagnosis of ADHD (Dist. Ex. 2 at p. 5); however, private psychologist 1 testified that the student was not offered a diagnosis of ADHD (Tr. p. 276).¹² Private psychologist 1 further testified that the student's impulsivity and distractibility was related to her diagnosis of PTSD rather than to an ADHD (Tr. p. 277). According to private psychologist 2, the student's IEP did not accurately reflect the input she had provided to the CSE regarding the student and how PTSD affected her learning (Tr. p. 359, 385).

Private psychologist 2 stated that the student had PTSD and as a result exhibited symptoms similar to ADHD symptoms (Tr. p. 364). According to private psychologist 1, as part of the PTSD, the student would become easily threatened and overwhelmed by fear" or terror in situations in her environment that would typically be considered neutral (Tr. p. 277). As a result of the student's fears, she "lose[s] her ability to focus and learn" (*id.*). Private psychologist 1 explained that in order that to appropriately address the student's attention, impulsivity and distractibility, her need for interventions that facilitate feelings of safety in her environment and avoid environmental factors leading to hyper vigilance should have been clearly identified rather than interventions used to address an ADHD (Tr. pp. 276-78, 282). Private psychologist 2 stated that when the student did not feel the environment was safe she would become hyper vigilant regarding "whether people are going to hurt her, whether it be emotionally or physically" (Tr. p. 348).

¹² The May/June 2007 neuropsychological report indicated in the biopsychosocial history that the student currently received medication for ADHD (Dist. Ex. 4 at p. 2). However, in the May 2008 neuropsychological evaluation medical recommendations included discontinuation of the stimulant medication (Dist. Ex. 5 at p. 10). The student's condition was not diagnosed as ADHD in either of the neuropsychological reports before the CSE (Dist. Exs. 4 at p. 4; 5 at p. 11).

Additionally, in a May 2008 psychotherapy report, private psychologist 2 indicated that the student's behaviors such as lack of listening, poor eye contact, daydreaming, impulsivity, and fidgety behavior were "the direct result of the exacerbation of her trauma as a result of being unable to manage the classroom environment" (Dist. Ex. 6 at p. 3). Private psychologist 1 explained that a characteristic of PTSD was the student might experience neutral stimuli as negative and threatening and that these perceived threats overwhelmed her cognitive and memory systems which resulted in difficulties with attention (Tr. p. 268). Private psychologist 1 stated that the student needed a safe and nurturing school experience and that without such an environment the student would "go into terror," which would negatively affect the student with respect to her agensis (see Tr. p. 278).

The present levels of performance in the student's June 2008 IEP do not provide sufficient information about her special education needs and current abilities. Specifically, the IEP does not reflect the evaluative data or information about the severity of the student's difficulties as it relates to her learning environment other than stating that the student has "extremely difficult past experiences," and needs an environment without peer-review (Dist. Ex. 2 at p. 4). In view of the forgoing evidence in the hearing record, I am not persuaded that the district established by a preponderance of the evidence that the student's needs, especially with respect to how her PTSD affected her learning in a classroom environment, were accurately or sufficiently identified in the student's June 2008 IEP.

Turning next to the student's annual goals in the June 2008 IEP, private psychologist 2 testified that the goals related to social-emotional functioning were not adequate to address the student's needs regarding safety, general flashbacks and intrusive memories (Tr. pp. 371-73). Private psychologist 1 further testified that the student's short-term objectives related to attention were inappropriate for a student diagnosed with PTSD because the need to adjust the student's environment should have been identified (Tr. p. 282). Private psychologist 1 also testified that the student's annuals goals related to counseling were "kind of superficial" because the student's social difficulties were not addressed (Tr. p. 283). According to Private psychologist 1, although the student needed to improve her spelling skills, the student's IEP did not contain annual goals to address the student's spelling deficits (Tr. pp. 289-90). Additionally, private psychologist 1 indicated that the student's June 2008 IEP did not accurately reflect the student's functioning level in mathematics in that the annual goals targeted higher level skills even though the student did not yet possess the related foundational skills (Tr. pp. 263, 266).

Private psychologist 1 also indicated that the testing accommodations on the June 2008 IEP were not appropriate for student (Tr. pp. 321-22). Noting that the IEP recommended the use of concrete manipulatives, visual aids, a seat facing the teacher, adapted worksheets and graphic organizers, private psychologist 1 stated that those would be "good" for the student but were "not sufficient" (Tr. pp. 301-03, 317).

The district also contends that the impartial hearing officer erred in finding that it was inappropriate to recommend that the student be placed into a sixth grade class after she has passed the sixth grade because the 12:1 class at the recommended district school with speech therapy and counseling related services would have met the student's educational and social/emotional needs. Specifically, the district contends that the student would be grouped with students who were of a similar age and functioning level; that the classroom teacher would differentiate the curriculum and methodologies based on student need; that the classroom teacher would employ kinesthetic,

visual and auditory strategies and use small group instruction with read aloud, reading strategies, visualization, predictions, inferencing, discussion, questions and prompts. The district contends that the classroom teacher would deal with behavior problems through proximity control and progressing to telling the whole class to stop a particular behavior, but would not single out any student or try to embarrass them. The district argues that such techniques comply with the recommendations of the private psychologists.

However, even in light of these additional arguments, based on a preponderance of the evidence, I find they are unconvincing in light of the compelling evidence in the hearing record that the June 2008 IEP was not appropriate. The parent informed the district that the student required a small, structured and nurturing classroom environment in a small school and this information is in part reflected in the student's June 2008 IEP (Parent Ex. B at p. 3; Dist. Ex. 2 at p. 4). Private psychologist 1 also reported that the student's classroom must be "a secure emotional environment which does not revive past traumas" (Dist. Ex. 5 at pp. 10-11).

Based on my review of the hearing record, for all of the reasons stated above, I concur with the impartial hearing officer's conclusion that the district did not meet its burden to prove that it offered the student a FAPE for the 2008-09 school year. Having found that the district failed to offer a FAPE, I must now determine if the parent has sustained her burden to establish the appropriateness of the Aaron Academy for 2008-09 school year.

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

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

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

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

In this case, the district argues that the hearing record shows that the Aaron Academy uses a "universal design for learning", but does not sufficiently show what the curriculum for each of the subjects taught at the Aaron Academy consists of. The district further argues that the impartial hearing officer erred in finding that the student made progress at the Aaron Academy because there is not enough specific evidence found in the hearing record upon which to base the finding. Lastly, the district argues that the Aaron Academy was too restrictive because it did not provide any mainstreaming opportunities that would have been beneficial to the student. For the reasons discussed below, I find the district's arguments unconvincing.

In regard to the district's first argument, I concur with the impartial hearing officer's determination that the program and related services at the Aaron Academy were appropriate to address the student's special education needs (IHO Decision at p. 20-21). Contrary to the district's assertion, the hearing record contains evidence regarding the content of the curriculum at the Aaron Academy sufficient to provide a basis for the impartial hearing officer's finding that the unilateral placement was appropriate (Tr. pp. 519-20, 549-551, 580-83). The student attended the Aaron Academy for the 2008-09 school year (Tr. pp. 540-41). The Aaron Academy implemented "a curriculum based on the framework for 21st Century learning integrating critical core subjects of language arts, math, economics, arts, technology, science, social studies with 21st Century themes of global awareness, financial, economic, business and civic literacy" (Tr. pp. 423-24; Parent Ex. H at p. 1). The school's curriculum model included New York State learning standards and college readiness standards (Tr. pp. 423-24). The school also implemented evidence-based universal design principals that "make [the] curriculum accessible to everyone" (id.). The application of universal design learning principals allowed the student "to access and output information that reflects her individual learning strengths and challenges" (Parent Ex. H at p. 1).

The director of the Aaron Academy stated that she had past experience working with students with agenesis of the corpus callosum in both clinical and educational settings (Tr. pp. 425-27). The student's head teacher at the Aaron Academy also described the nature of the

student's condition and how it affected her ability to learn facts, vocabulary words, and her ability to recall dates or names (Tr. p. 545). The director stated that instruction was provided to the student by "multiple means of access" indicating that information was represented using multiple methods and that the student had multiple ways to express what she had learned (Tr. p. 429). According to the director, the student was instructed using not only visual and auditory methods but also a "tactile—a muscle memory piece" so that information was presented to her in multiple ways (Tr. p. 470). The head teacher at Aaron described strategies in which she implemented multi-modal instruction to accommodate for the student's learning style (Tr. p. 546).

The director testified that the student's class was comprised of ten sixth and seventh grade students who were instructed according to their ability levels (Tr. p. 437). The student's core teaching team consisted of a head teacher, an assistant teacher, a speech-language pathologist and a school psychologist and at least three of the instructors were present in the classroom at any given time (Tr. p. 440). According to the director, the student was instructed using an integrated services model so as to allow her to learn within a context (Tr. pp. 443-44).

The student's teacher at the Aaron Academy testified that she provided the student with strategies to assist her with organization and writing (Tr. pp. 541-42). For example, the student typed her writing assignments to allow for it to become a motor integrated skill (Tr. p. 430). The student had access to "SMART" technology and a "Mac book" for daily content instruction which provided her with needed support "while teaching her how to access more advanced information using technology" (Parent Ex. H at p. 1). The student's writing program provided for the use of laptops, graphs, charts, outlines, starting phrases, and checklists which allowed the student to better sequence her writing and to use complete sentences and punctuation (*id.* at p. 2). The student's language and vocabulary needs were addressed through the use of "meaningful, content derived vocabulary words that [we]re presented in a variety of formats and contexts" (*id.*). The student wrote in a journal to address her significant difficulty with word recall (*id.*). The student was also the classroom "language reporter, responsible for catching content related to idioms and/or figures of speech and recording them into the 'journal'" to address her difficulties with receptive language, expressive language and writing (*id.*).

Overall organization was an area of need for the student which was addressed at the Aaron Academy through a structured classroom environment, clear directions, and provision of a list of content requirements (Parent Ex. H at p. 1). The student's daily tasks were outlined on a board and she met with a teaching assistant each morning and throughout the day as needed to provide organizational support (*id.*). Her academic instruction was provided in manageable, clearly illustrated chunks, and outlined using visual and kinesthetic supports (*id.*). The student participated in the development of some of her own academic goals to improve her engagement in the learning process (*id.*).

The student attended weekly small group speech-language therapy sessions to address her needs in social skills, pragmatics, reasoning, and problem solving (Parent Ex. H at p. 2). Additionally, she attended a health class led by an occupational therapist and a psychologist to address health, hygiene, personal safety, money management, nutrition, and access to community resources (*id.*). The student's math instruction included discrete trial training and application to real life settings (*id.*).

The student's related services at the Aaron Academy provided her "with an integrated, content based, meaningful program that allows for transfer of skill" (Parent Ex. H at p. 2). A speech-language pathologist taught reading fluency and content vocabulary and a school psychologist taught social skills (Tr. p. 438). The student engaged in forum¹³ and core skills sessions which were facilitated by a school psychologist and a speech-language pathologist and included topics such as self-esteem, individual changes, personal space, flexibility, nonverbal cues, pragmatics, developing friendships, and respecting authority (*id.* at p. 1). The student was also instructed in the areas of self-advocacy, decision making, critical thinking and problem solving (*id.* at p. 2). Additionally, a school psychologist in conjunction with a speech-language pathologist taught social thinking and related social skills (Tr. p. 448). Regarding the student's PTSD, the director of the Aaron Academy stated that having the school psychologist in the student's classroom was a necessary component of the student's program (Tr. p. 449). The head teacher at Aaron testified that the instructional reading material was tailored to the student to avoid triggering her PTSD (Tr. p. 561). The head teacher at Aaron further testified that the student was taught to ask an adult for guidance when she needed additional assistance regarding social interactions (Tr. p. 562). According to the head teacher at Aaron, the classroom was a nurturing environment that was physically and emotionally safe for the student, and bullying and rumor issues were "not really an issue" (Tr. pp. 569-70).

I also find that there was sufficient evidence in the hearing record to support the impartial hearing officer's finding that the student made progress while attending the Aaron Academy (see IHO Decision at p. 20). The director of the Aaron Academy testified that rubrics, pre-testing and post-testing were used to measure the student's progress (Tr. p. 465). According to the director, the student made social and emotional progress during the 2008-09 school year (Tr. p. 476). With regard to social/emotional functioning, the student improved her self-advocacy skills, made new friends, sought out interactions with peers, and demonstrated leadership skills within the classroom (Tr. p. 452; Parent Ex. H at p. 1). Additionally, the student's head teacher at Aaron stated that the student made academic progress in the 2008-09 school year (Tr. p. 556). This evidence of progress is corroborated by the student's report cards and "portfolio rubric assessment" (Parent Exs. I; J; Q).

Additionally, the district contends that the Aaron Academy was "too restrictive" in that there were no mainstreaming opportunities for the student at the unilateral placement. While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 2010 WL 1253698, at *19 [S.D.N.Y. Mar. 21, 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]; Application of the Dep't of Educ., Appeal No. 10-042; Application of a Child with a Disability, Appeal No. 99-083). The head teacher at the Aaron Academy testified that she provided the student with stories and content that would not trigger the student's past traumatic experiences (Tr. pp. 560-61). The teacher also testified that the core social skills curriculum taught respect and understanding which resulted in a "very safe" environment for the student (Tr. pp. 569-70). I find that in light of the student's sensory and behavioral needs, and the required

¹³ The school psychologist taught the student during "forum," a small group setting wherein the students engaged in peer-mediated and topic-based discussions (Tr. p. 448).

level of supports needed by the student, LRE considerations in this instance do not preclude a finding that the parent's unilateral placement was appropriate.

Accordingly, I find that the hearing record shows that the student's program at the Aaron Academy for the 2008-09 school year was appropriate in that, as discussed above, the Aaron Academy provided the student with educational instruction specially designed to meet her unique needs, while supported by such services as are necessary to permit the student to benefit from instruction (see Gagliardo, 489 F.3d at 112, citing Frank G., 459 F.3d at 364-65).

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

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty, 315 F.3d at 27); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist., 2007 WL 3085854, at *13 [E.D. Pa. Oct. 22, 2007]).

At the May 2008 CSE meeting the parent urged the CSE to change the student's placement from the proposed ICT class to a more restrictive environment because she believed that the ICT placement the student had been in for the sixth grade in the previous school year was no longer

appropriate (Tr. p. 651). At the May 2008 meeting the parent also disclosed to the CSE that she was investigating private placements (Tr. p. 652). The parent told the CSE that she believed in public schools and was open to a public placement but had secured a spot at the Aaron Academy in the event that no appropriate public placement became available (Tr. pp. 653-56). She informed the CSE that she did not earn enough to easily afford the tuition at the Aaron Academy and that if she placed the student there, she would need to seek tuition reimbursement (*id.*). At the time of the May 2008 CSE meeting the parent had signed a contract and paid a deposit to the Aaron Academy to secure a place for the student (Tr. p. 731).

At the June 2008 CSE meeting the parent discussed the fact that the student needed specific types of interventions, more adults supervising the classroom, and small group instruction (Tr. pp. 669-70). The parent disclosed that she had put a deposit down at the Aaron Academy; however, she also testified that she was still hoping that "there would be a good 12-to-1 fit" available in a public placement (Tr. pp. 669-71). The parent also discussed that she would seek tuition reimbursement for the Aaron Academy in the event the student attended the school (Tr. p. 670).

The district sent the notice to the parent identifying the specific school the student had been recommended to attend dated August 12, 2008 (Dist. Ex. 3). The parent sent a letter to the district dated August 18, 2008 stating that she "c[ould] not make a decision until school is open in September," that the student required a small nurturing school due to her PTSD, and that in the interim she would be placing the student at the Aaron Academy (Parent Ex. A). The parent testified that she made multiple attempts to visit the recommended school, and she wrote a second letter to the district, dated October 3, 2008, after visiting the school that detailed her concerns with the school and rejected the district's proposed placement (Tr. p. 679; Parent Ex. B).

In light of the above, and based on the specific facts in this matter, I find that the parent provided evaluations to the district and was cooperative with the CSE in developing the student's June 2008 IEP. Although the hearing record shows that parent disclosed to the CSE that she might place the student at the Aaron Academy, the evidence in the hearing record shows she did not convey dissatisfaction with the CSE process or the student's IEP to the district prior to placing the student at the Aaron Academy. Additionally, her August 2008 letter to the district did not express her dissatisfaction with the CSE and the June 2008 IEP that were set forth in her due process complaint notice (*see* Dist. Ex. 1; Parent Ex. A). I also find that the parent did not give sufficient prior notice to the district of her concerns with the proposed placement prior to the student's removal (*see* 20 U.S.C. § 1412[a][10][C][iii][I]; 34 C.F.R. § 300.148[d][1]; Wood v. Kingston City School Dist., 2010 WL 3907829, at *9 [N.D.N.Y. Sept. 29, 2010]). Upon weighing the equitable factors in this case, and in the exercise of my discretion, I decline to modify the impartial hearing officer's one fourth reduction in tuition reimbursement. Accordingly, I will dismiss the parent's cross-appeal.

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 DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
 December 10, 2010

JUSTYN P. BATES
STATE REVIEW OFFICER