



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-099

### **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, Jessica C. Darpino, Esq., of counsel

Skyer, Castro, Cutler and Gersten, attorneys for petitioners, Jesse Cutler, Esq., of counsel

#### **DECISION**

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

At the time of the impartial hearing, the student was attending Mary McDowell (Tr. p. 248).<sup>1</sup> 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 (Tr. p. 24; see 8 NYCRR 200.1[d], 200.7). The hearing record reflects that the student exhibited needs in receptive and expressive language, auditory processing, gross and fine motor coordination and motor planning including dysgraphia, and in decoding, visual spatial skills, and executive functions (Tr. pp. 216-18). In addition, the hearing record reflects that the student exhibited anxiety (Tr. p. 219). The student's classification and eligibility for special education programs and services as a student with an other health impairment (OHI) is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

With respect to the student's educational history, the hearing record reflects that the district initially evaluated the student in fall 2005 due to the student's difficulties functioning in his private

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<sup>1</sup> The hearing record reflects that the student attended an "ungraded" class in the lower division of Mary McDowell and that Mary McDowell is "ungraded" until middle school (Tr. pp. 154, 258). The student's May 8, 2009 IEP indicated that the student would have been in the second grade during the 2009-10 school year (Dist. Ex. 2 at p. 1).

preschool general education classroom (Tr. pp. 212-13, 247). In February 2006 the student began receiving preschool services of speech-language therapy, occupational therapy (OT), physical therapy (PT), and special education itinerant teacher (SEIT) services (Tr. pp. 213-14).

A June 7, 2007 psychoeducational evaluation update was conducted by a district school psychologist to determine how the student was functioning academically (Dist. Ex. 7 at pp. 1-2).<sup>2</sup>

<sup>3</sup> The June 2007 psychoeducational update indicated, as part of the student's history, that he was eligible for special education services as a preschool student with a disability and received related services (*id.* at p. 1). According to the evaluator, the student presented with difficulties visually focusing and speaking, as his speech was "not always comprehensible and in a low tone" (*id.*). The evaluator described the student as "shy" and indicated in the report that the student "could have performed better but because he was shy he did not respond as well" (*id.*). The evaluator further described the student as focused, not motivated, in need of prompting to respond, and low in confidence which hindered his performance (*id.*). The evaluator indicated that the student understood directions well but that directions had to be repeated because the student "refus[ed]" to respond (*id.*). The evaluator opined that once the student was in a comfortable setting with services he would be able to perform well and with confidence (*id.*). The evaluator administered the word reading subtest of the Wechsler Individual Achievement Test – Second Edition (WIAT–II) to determine the student's academic functioning level, and the results yielded a score in the high average range when compared to his chronological peers (*id.* at p. 2). Test results of the word reading subtest of the WIAT–II indicated that the student was able to identify most letters of the alphabet, rhyme words, and identify beginning and ending sounds to words, but that he was unable to read words from a list (*id.*). The evaluator also administered the math reasoning subtest of the WIAT–II and the results yielded a score in the high end of the average range (*id.*). Test results of the math reasoning subtest of the WIAT–II indicated that the student was able to use whole numbers to describe quantities; geometric and spatial reasoning to solve problems; patterns to solve problems; and grids and graphs to make comparisons, draw conclusions, or answer questions. Test results of the math reasoning subtest of the WIAT–II also indicated that the student was unable to solve problems with money or "tell time" (*id.*). Recommendations at that time were for the student's educational planning team to determine the student's school age classification and program and to continue all related services as recommended by the provider. No modifications were recommended for the student (*id.*).

According to the student's mother, the student was provided with preschool services at the student's private school when he became eligible to attend kindergarten in the 2007-08 school year (Tr. pp. 214-15).<sup>4</sup>

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<sup>2</sup> I note that the hearing record contains duplicative exhibits. For purposes of this decision, only district exhibits are cited in instances where both the district's and parent's exhibits are identical. I remind the impartial hearing officer that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

<sup>3</sup> The district referred to the evaluation as "Turning Five" evaluation (Dist. Ex. 7).

<sup>4</sup> According to the student's mother, during the 2007-08 school year (kindergarten) an integrated co-teaching (ICT) class was recommended for the student, but instead the district funded an additional year of preschool services for the student (Tr. p. 215).

The student attended Mary McDowell for the 2008-09 school year when he would have been in first grade (Tr. p. 248).

A lower elementary division mid-year progress report from Mary McDowell dated January 2009 for the period between September 2008 and January 2009 indicated that the student attended a self-contained class of nine students and two teachers (Dist. Ex. 8 at pp. 1-2). According to the mid-year progress report the student received instruction in reading, writing, mathematics, and social studies from his homeroom teachers, and attended "special classes" in science, library, block building, physical education, music, art, and theatre arts (id. at pp. 2-27).<sup>5</sup> The student received speech-language therapy two times per week with one other student and OT one time per week with one other student (id. at p. 2). The student also participated in a weekly "all class" language and OT class (id.). The student's homeroom teachers indicated that the student made a "smooth transition" to his self-contained classroom and Mary McDowell (id.). The student's teachers noted that at the beginning of the school year the student entered the classroom with "some trepidation," but after learning classroom rules, schedules, and expectations the student appeared more comfortable, less anxious, and less impulsive (id.). The mid-year progress report indicated that the student benefited from explicit teacher strategies such as asking a teacher for information and assistance to help him cope with changes in routines (id. at pp. 2-3). The student's teachers indicated that as the semester progressed the student began to feel more comfortable socially and participated in various classroom activities with classmates (id. at p. 3). At times during the day the student could appear "overly silly" and have difficulty regulating his body and laughter (id.). At these times his teachers found it helpful to ask the student to get a drink of water or take a break (id.). At the time of the mid-year progress report the student began to self monitor his silly behavior and might ask a teacher for a break when he felt he could not "get the sillies to stop" (id.). Academically, the student's teachers indicated that the student made steady progress and was more comfortable and confident during predictable language activities that were part of the classroom routine and schedule (id.). The mid-year progress report indicated that the student benefited from having visuals posted during class discussions to remind him to stop, raise his hand, and wait to be called on by a teacher (id.). The teachers described the student's tendency to seek out teacher praise and indicated that he appeared "proud" when he was able to participate appropriately (id.).

Socially, the student's teachers indicated that at the beginning of the school year the student tended to seek out teachers to share personal information (Dist. Ex. 8 at p. 4). By the time of the mid-year progress report the student had become more comfortable with peers and was more successful initiating and being part of a conversation with them, using "conversational turn taking" (id.). In addition, the student participated in a variety of classroom and free play activities with peers during structured and unstructured times (id.). The mid-year progress report indicated that the student attempted to solve peer conflicts on his own and asked a teacher for help when needed (id.).

The student's January 2009 mid-year progress report further indicated that the student participated in an Orton-Gillingham (O-G) Preventing Academic failure (PAF)<sup>6</sup> reading group with four other children, four times per week for 45 minutes to practice phonemic awareness, letter-sound correspondence, encoding, decoding, and handwriting (Dist. Ex. 8 at p. 5). Among

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<sup>5</sup> The January 2009 Mary McDowell mid-year report included curriculum overviews for art, music, and theatre arts and need not be described in detail herein (Dist. Ex. 8 at pp. 24-26).

<sup>6</sup> O-G is described as a highly structured, multisensory instructional approach that uses routine oral, written, and kinesthetic review of letters, sounds, and motor patterns to provide a foundation for reading (Dist. Ex. 8 at p. 5).

other things, the mid-year progress report indicated that the student worked at a beginning first grade level with teacher support (id. at p. 7). In addition, the student's mid-year progress report indicated that the student benefited from the small structured reading group to help him attend, build letter-sound correspondence, decode, and work on letter formation (id.). The student's teachers indicated that the student's decoding, handwriting, and self-confidence in his reading skills progressed during the first semester of the 2008-09 school year (id.). For writing, the student's teachers noted that the repeated practice and structure of the O-G PAF handwriting program helped the student form letters (id. at p. 8). At the time of the mid-year progress report, the student was working on generating original sentences in his journal, using words from reading group or recalling facts related to curriculum ideas in science, writing, and social studies (id.). With teacher reminders, the student was able to write complete sentences using words and phrases from reading group (id.). The mid-year progress report indicated that the student consistently used capitalization and punctuation, but needed reminders about spacing between words and the correct sizing and placement of letters (id. at pp. 8-9). The teachers indicated that when engaged in activities that focused on oral language activities as part of a writing skills program used in class, due to the student's anxiety and impulsivity, he often rushed when generating descriptive words and appeared not to understand what was asked by the teacher (id. at pp. 9-10). When provided with teacher support and reminders to slow down the student was able to generate more appropriate descriptive words and expand his thoughts and ideas (id. at p. 10).

The student's January 2009 mid-year progress report further indicated that the student participated in a mathematics group with four other students and one teacher, three times per week for 45 minutes (see Dist. Ex. 8 at p. 12). The mathematics group used a program that "spirals," which means that each day a new concept was introduced that built on previously learned skills (id.). The mid-year progress report indicated that during mathematics group, the student had difficulty attending and listening to the teacher; he continuously commented during group and used "self talk" as a strategy to help him process what was going on in class, requiring redirection by the teacher (id. at p. 13). The mid-year progress report noted that the student was able to transfer his learning from the group lesson into independent activities that followed the lesson (id.). The student showed an understanding of most concepts taught throughout the semester and seemed to enjoy working with familiar manipulatives such as pattern blocks (id.). When new material was introduced the student's reported tendency was to blurt out excessive questions before the teacher had the opportunity to explain (id.). The student's mathematics teacher indicated in the mid-year progress report that the small group allowed the student to receive consistent teacher support in order to help reduce his anxiety around learning; and that the student had to wait less time, allowing him to participate more frequently (id. at p. 14).

The student's January 2009 mid-year progress report indicated that for social studies and science the student became familiar with the structure and routine of the class and was able to participate appropriately (Dist. Ex. 8 at pp. 16, 18). Specifically, the mid-year progress report indicated that the student enthusiastically participated in social studies during the study of the Mary McDowell community. The mid-year progress report indicated that the student "quickly became familiar with the names and roles of the staff and he was successful in sharing information during class discussions" (id. at p. 16). In addition, "[w]hen moving throughout the building," the student would tell his teacher the name and role of people that he passed and, with prompting, said hello to many teachers and faculty (id.). In addition, the student "share[d] with a big smile and enthusiastically jump[ed] out of his seat when sharing" (id.). Regarding science, the student's mid-year progress report indicated that the student often made interesting comments and understood the concepts taught throughout the semester.

The student's January 2009 mid-year progress report indicated that for language therapy, the student participated in two weekly 30-minute sessions in a group of two students, as well as one 40-minute classroom language/OT lesson per week conducted by the speech-language pathologist and the occupational therapist (Dist. Ex. 8 at pp. 19-20). The speech-language pathologist indicated that the student willingly came to therapy and was an active participant in therapy sessions (id. at p. 19). The student was described as having difficulty staying on topic during therapy activities but was easily redirected (id.). Receptively, the student had difficulty understanding utterances of increasing length and complexity and it was sometimes challenging for the student to respond to questions appropriately (id.). The student's auditory processing deficits were evident in the areas of auditory memory, sequential memory, and processing speed, as it was difficult for him to retain and recall specific information when there was an increase in length and complexity of incoming information (id.). Strategies to support the student's auditory processing skills included providing visual cues along with auditory information, breaking down directions into simple steps, and repetition (id.). Expressively, the student demonstrated good expressive vocabulary and used morphological markers, but needed to be prompted at times to provide more details and more specific language (id.). Limited jaw movement during speech production and some sound substitutions in single words and connected speech at times resulted in decreased speech intelligibility (id. at p. 20). The speech-language pathologist described the student as a social and friendly youngster who was eager to interact with peers and adults (id.). Pragmatically, the student often initiated with others, particularly adults by asking questions to which he knew the answers (id.). The student responded well to limits placed on how many questions he could ask, as well as with the provision of moderate to maximum cues, to initiate with adults in other ways (id.).

The student's January 2009 mid-year progress report indicated that for OT, the student participated in one 30-minute group per week in a group of two, as well as in the aforementioned language/OT classroom group (Dist. Ex. 8 at p. 23). The occupational therapist indicated that the student was challenged with activities that involved core and upper extremity strength, endurance, bilateral coordination, and motor planning (id.). At the time of the mid-year progress report the student presented with a decreased sense of body awareness and often used his vision to assist with how to position his body or perform more challenging movements (id.). The student also presented with sensory processing difficulties, especially a mixture of sensory seeking and sensory under-responsive behaviors that affected him during his school day (id.). When in a "higher state of arousal," the student was described as fidgety, talkative, and presented with difficulty following directions (id.). When in a "lower state of arousal," the student demonstrated difficulty "maintaining positions against gravity" and presented as tired or sluggish (id.). In both states the student displayed awkwardness in movement and decreased body control (id.). The occupational therapist indicated that the student responded positively to whole class sensory breaks that involved movement and joint input; he benefited from use of a pencil grip to ensure an efficient grasp pattern on a writing implement; and he presented with improved positioning at the table when using a special chair and an inflated wedge (id.). The occupational therapist indicated that OT also focused on handwriting specific to formation, spacing, working memory, alphabet recall, upper and lower case use, near/far-point copy, and fine motor control (id.). In addition, OT addressed self-care skills such as managing socks and shoes, as well as skills employed when using scissors (id.). The occupational therapist indicated that the student would benefit from continued OT services as well as from extracurricular activities that would address gross motor skills and sensory integration, such as swimming or tumbling (id.).

The student's January 2009 mid-year progress report also indicated that the student was consistently excited to participate in his physical education class (Dist. Ex. 8 at p. 27). The student was described as a high energy student who gave his best at all times (id.). Occasionally he struggled with maintaining focus during transitions from one activity to another, but the student improved during the semester (id.). The student's mid year progress report indicated that areas of strength for the student included a positive attitude, participation to best of his ability, participation with confidence, understanding of game concepts, and attempting all skills (id.). In addition, the student was noted to have improved in the following areas: positive social interactions, positive sportsmanship, fair play, leadership ability, as well as balance, coordination and movement (id.).

On January 21, 2009 the parents executed an enrollment contract for the student to attend Mary McDowell for the 2009-10 school year (Parent Ex. K). The parents paid a deposit of \$6,500 on January 31, 2009 (Parent Ex. I at p. 1). Pursuant to the terms of the contract, the parents agreed to pay \$20,760 of the full tuition by July 1, 2009 and the remaining balance by December 1, 2009 (\$13,840) (Parent Ex. K at p. 1). The hearing record reflects that the parents made the additional tuition payments to Mary McDowell on June 10, 2009, and November 15, 2009 (Parent Ex. I at pp. 2-3).

On March 10, 2009 the district social worker conducted a 55-minute classroom observation of the student at Mary McDowell, in preparation for the Committee on Special Education (CSE) annual review (Dist. Ex. 5). The classroom observation report indicated that the student was observed in reading class with five other children present in the group (id.). The observer described the student as easily engaged and cooperative with the teacher and the other children in the class; positively responsive to teacher direction, praise, and rewards; and able to wait for his turn (id.). The observer characterized the student's attention span as "average," and indicated that the student asked and answered questions and successfully transitioned between various activities during the lesson (id.). In addition, the observer noted that the student "displayed what appeared at times to be a degree of difficulty tolerating frustration or . . . an indication of anxiety" (id.). The student was also noted to "easily fatigue" (id.). The classroom observation report indicated that the student had difficulty with a "skywriting"<sup>7</sup> exercise (id.).

The CSE convened on May 8, 2009 for the student's annual review (Dist. Ex. 2 at pp. 1-2). Participants at the CSE meeting included the student's mother, the district representative who also participated as the school psychologist, a regular education teacher assigned to the CSE, a school social worker, and by telephone, the student's special education classroom teacher from Mary McDowell and an additional parent member (id. at p. 2).<sup>8</sup> As noted in the resultant individualized education program (IEP), the May 2009 CSE continued the student's eligibility for special education services as a student with an OHI (Tr. p. 283; Dist. Ex. 2 at p. 1). The May 2009 CSE

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<sup>7</sup> Skywriting is defined in the hearing record as a kinesthetic technique used as part of the student's O-G PAF reading program, whereby he "writes" in the air with a straight arm to form letters using specific language (Dist. Ex. 8 at p. 5).

<sup>8</sup> The hearing record reflects that at the time of the impartial hearing, the parents were not contesting the composition of the May 8, 2009 CSE (Tr. p. 310).

also recommended that the student be placed in an ICT<sup>9</sup> class with related services of individual speech-language therapy two times per week for 30 minutes, and individual OT two times per week for 30 minutes (Dist. Exs. 2 at pp. 1, 14). The CSE terminated the student's physical therapy (PT) services because it had been previously determined by the student's physical therapist that his gross motor development reached an age appropriate level and he no longer required PT (Tr. p. 223; Dist. Ex. 2 at pp. 2, 5, 14). In addition, the CSE recommended that the student be provided with preferential seating, a multisensory approach to learning, teacher prompting and redirection as needed, repetition of concrete directions/previously presented materials, and "programmatic supports" (Dist. Ex. 2 at pp. 3-4). The CSE recommended that the student participate in all State and local assessments without accommodations and that he be considered for promotion based on standard criteria for advancement to the next grade in school (*id.* at p. 14). The May 2009 IEP reflected that in addition to an ICT class, the CSE considered providing the student with general education with special education teacher support services (SETSS) but rejected that option as insufficient to appropriately meet the student's needs (*id.* at p. 13). The May 2009 CSE also considered providing the student with a 12:1 special class, but rejected that option as too restrictive for the student (*id.*). The May 2009 IEP reflected that the projected initiation date of the recommended services was September 8, 2009, and that the IEP would next be annually reviewed on or about June 30, 2010 (*id.* at p. 2).

Handwritten notes from the May 2009 CSE meeting<sup>10</sup> recorded on a form signed by the student's mother indicated that the January 2009 Mary McDowell mid-year progress report and the March 2009 classroom observation were reviewed by the CSE and that the student's medical report was in his file (Dist. Ex. 6). In the section on the form delineated "parent concerns," the notes from the CSE meeting indicated that the student's special education teacher from Mary McDowell provided the May 2009 CSE with an overall academic summary regarding the student and that the student displayed "low frustration – anxiety" (*id.*). The notes from the CSE meeting indicated that the student's mother was asked if the student was in private therapy or counseling for his anxiety, or if he had ever been in counseling and that the mother answered "no" (*see* Dist. Ex. 6; *see also* Tr. p. 25). The notes further reflected that the committee discussed that the student's overall health was good; that the student wore bifocal eyeglasses; that the student's motor coordination was a concern; that the student exhibited hypotonia, depth perception and graphomotor difficulties; that the student demonstrated expressive language and auditory processing difficulties; and that the student loved sports and was competitive (Dist. Ex. 6). The May 2009 CSE notes also indicated next to a notation regarding the ICT class, that the student's mother and teacher from Mary McDowell believed that the student needed a small class environment (*id.*). The notes of the May 2009 CSE meeting indicated that the parent was provided

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<sup>9</sup> Integrated co-teaching services is defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (*see* <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>). I note that the parties have also used the term "collaborative team teaching" (CTT) to describe the student's recommended program for the 2009-10 school year. For consistency within this decision, I will use the term "ICT" when referring to the district's recommended program.

<sup>10</sup> The notes from the May 2009 CSE meeting contain information in the recorder's handwriting which was partially illegible and difficult to read (*see* Dist. Ex. 6).

with a copy of her due process rights and that the recommended placement was explained to the parent (id.).

The district sent a Final Notice of Recommendation (FNR) dated June 30, 2009 to the student's parents which set forth the recommendations of the May 2009 IEP and identified a specific school location for the student for the 2009-10 school year (Dist. Ex. 3).<sup>11</sup>

In a letter dated July 15, 2009, from the student's father to the district, the father wrote that he was unable to agree or disagree with the recommended program within ten days of receipt of the FNR because he was unable to view the recommended placement as it was closed (Parent Ex. E). The father also indicated that he attempted to call the telephone number provided in the June 2009 FNR but that he was not able to speak to anyone about the program (id.). The student's father requested "any information" about the program and advised that he would visit the program when school opened (id.).

In a letter dated August 24, 2009 from the parents' attorney to the district, the parents advised of their placement of the student at Mary McDowell as of the first day of the school year for 2009-10 and of their intent to seek funding for the placement from the district as well as bussing (Parent Ex. B). The parents further advised that the final notice of placement was not sent by the district until June 30, 2009, although the CSE review was held on May 8, 2009, and that the parents were unable to visit the placement and make an assessment as to the appropriateness of the placement (id.). In addition, the parents further advised that once they had an opportunity to visit the program, they would either "place the child accordingly" or file a "detailed hearing request" (id.). The parents asserted that "[i]n order to assure that [the student] ha[d] a school program to attend that [wa]s reasonably calculated to confer benefit to him they ha[d] placed him at [Mary McDowell]" (Parent Ex. B).

In a due process complaint notice dated September 21, 2009, the parents asserted that the district failed to offer the student a free appropriate education (FAPE) on procedural and substantive grounds (Parents Ex. A at p. 1). Specifically, the parents asserted that the May 8, 2009 CSE did not rely on necessary evaluations to properly measure the student's skill levels; that teacher estimates were not an acceptable method of evaluation for determining current levels; and that the IEP did not reference any testing or evaluations (id. at p. 2). The parents further asserted that the May 2009 IEP was incomplete because the CSE failed to adequately address the student's social/emotional needs as well as health and physical development needs (id.). In addition, the parents asserted that the CSE recommended a large ICT program for the student without properly evaluating the student's ability to be placed in such an environment, and that such an environment could not provide for the needed level of individualized support, including teacher prompting, redirection and programmatic support, and that the failure to place the student in a smaller, more supportive setting constituted a denial of FAPE (id.). The parents further asserted that the ICT class was "wholly inappropriate" for the student because the class contained up to 25 students, which was too large for the student; that he would be overwhelmed by the number of students in his class and by the 700 students that attended the recommended school; and that the students were expected to go to recess and the cafeteria independently, which would be "impossible" for the student (id. at p. 3). The parents also asserted that the proposed ICT placement did not offer the

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<sup>11</sup> The June 30, 2009 FNR incorrectly indicated the student's special education eligibility classification was "Learning Disability" (Dist. Ex. 3). The May 2009 CSE continued the student's eligibility for special education services as a student with OHI and the resultant IEP accurately reflects the student's classification status (Dist. Ex. 2 at p. 1).



student a suitable and functional peer group for instructional and social/emotional purposes (id.). In addition, the parents asserted that the student's placement at Mary McDowell was appropriate for the 2009-10 school year and that there were no equitable considerations that would bar reimbursement. As relief, the parents sought tuition reimbursement at Mary McDowell for the 2009-10 school year (id. at pp. 3-4).

In a decision dated September 3, 2010, the impartial hearing officer found that the CSE did not rely on sufficient evaluations to properly measure the student's current skill levels (IHO Decision at p. 24). The impartial hearing officer noted that teacher estimates were the only assessment techniques noted on the student's IEP to establish the student's current levels and did not qualify as an acceptable method of evaluation in determination of the student's levels (id. at p. 25). In addition, the impartial hearing officer found that the lack of reference to any testing or evaluations in the student's IEP was "clearly inappropriate" to measure the student's current skill level (id.). The impartial hearing officer further found that the CSE could not have recommended a placement that was "appropriately tailored to meet the child's specific needs" without such essential information; that the CSE did not indicate to what extent the student's behavior interfered with his instructional process and learning skills, although it acknowledged the student's emotional and social needs; and that the CSE failed to set forth specific "health/physical management needs" aside from a "boiler plate" recommendation for OT and speech-language therapy (id.). Also, the impartial hearing officer found that the district's witnesses failed to present sufficient evidence that a change of the student's prior placement to placement in an ICT was warranted. The impartial hearing officer concluded that the IEP was inadequate and that the recommendation to place the student in an ICT setting without appropriate evaluations for the student was "fatal" (id.). Due to the lack of testing and assessment, the impartial hearing officer indicated that district witnesses' testimony regarding the possibility of the student making meaningful educational progress in an ICT class was not convincing and the district failed to present credible evidence that the recommended program was reasonably calculated to confer educational benefit (id.). The impartial hearing officer also found that the proposed ICT placement did not offer the student a suitable and functional peer group for instructional and social/emotional purposes (id. at pp. 25-26). In addition, the impartial hearing officer found that Mary McDowell was an appropriate placement, based on the testimony of the parents' witnesses that described the student's deficits, needs, the individualized interventions for the student employed at Mary McDowell and the student's progress (id. at p. 26-27). The impartial hearing officer also concluded that equitable considerations favored the parents (id. at pp. 27-28).

In a petition, the district asserts that it offered the student a FAPE. The district specifically asserts that, while the impartial hearing officer expressed his concern for the lack of testing and evaluations used to create the student's IEP, testimonial and documentary evidence indicates that testing and evaluations were not necessary because the CSE had sufficient information to make a program recommendation. The district further asserts that, contrary to the impartial hearing officer's determination, the IEP adequately addressed the student's social/emotional and health/physical management needs. The district asserts that the CSE acknowledged the student's issues with anxiety and frustration and recommended teacher redirection and "pragmatic"<sup>12</sup> supports to accommodate the student. Moreover, the district asserts that the student's physical needs were appropriately addressed with the recommendation by the CSE for OT. In addition, the district asserts that the impartial hearing officer improperly found that the district failed to present

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<sup>12</sup> I note that the district refers to the "programmatically supports" recommended in the student's May 2009 IEP as "pragmatic" supports (Answer ¶ 41; see Dist. Ex. 2 at p. 4).

sufficient evidence that a change in program to an ICT program was warranted. The district asserts that the hearing record does not reflect a change to the student's recommended placement other than to terminate PT; that none of the district witnesses testified that the 2009-10 IEP recommended a change in placement; that the district recommended an ICT placement in 2007-08 for the student's kindergarten year; and that there was no IEP meeting or recommendation for the 2008-09 school year. In addition, the district asserts that the ICT placement was appropriate for the student and provided the student with a suitable and functional peer group for instructional, social, and emotional purposes. The district further asserts that the recommended placement would have allowed the student to mainstream with other children and would have provided individual speech-language therapy and OT.

In addition, the district asserts that Mary McDowell was not appropriate for the student. The district specifically asserts that Mary McDowell does not meet the student's academic needs because the student only receives instruction in mathematics and reading four days a week, and the student does not receive individual sessions of OT or speech-language therapy. In addition, the district asserts that Mary McDowell is not appropriate for the student because a special class environment with no regular education students is too restrictive for the student. The district further asserts that the equitable considerations do not favor the parents. The district specifically asserts that the hearing record shows that the student's parents did not "seriously" intend to enroll the student in public school because they did not advise the CSE that they had signed a contract to enroll the student at Mary McDowell for the 2009-10 school year more than three months before the May 2009 CSE meeting; the parents had already paid a \$6,500 deposit to Mary McDowell as of the date of the May 2009 CSE meeting; the parents rejected the option of tuition refund insurance; the parents paid an additional \$20,760 to Mary McDowell on June 20, 2009; and the student had never attended public school. In addition, the district asserts that the parents did not give timely notice of their intent to enroll the student at Mary McDowell. The district asserts that it was not until August 24, 2009, seven months after signing the enrollment contract and after the parents had paid \$27,260 to Mary McDowell that the parents told the CSE that the recommended school was inappropriate and that they would be enrolling the student at Mary McDowell. Moreover, the district asserts that the notice was improper because it did not explicitly reject the recommended placement and did not indicate any problems with the student's IEP.

In an answer, the parents deny many of the district's allegations and assert, among other things, that the decision of the impartial hearing officer was properly rendered in their favor. The parents specifically assert, among other things, that the district failed to consider the student's individual needs, review the student's evaluations prior to the CSE meeting to determine whether additional evaluation was required, develop an IEP that appropriately identified the student's individualized needs and that would allow for meaningful progress toward a series of academic goals and objectives, develop appropriate annual goals and short-term objectives, provide sufficient and appropriate support to address the student's needs, and that the district recommended a significant change in placement as the district failed to recommend any placement for the student the prior year and the student attended a small special education class in a special education school setting. The parents further assert that they were denied meaningful participation resulting in an IEP that failed to address a number of the student's needs, including his distractibility, difficulty with following directions, impulsivity and inability to self-monitor. In addition, the parents assert that the proposed class failed to offer the student a suitable and functional grouping for educational and social/emotional needs. In addition, the parents assert that the CSE failed to address the student's severe performance anxiety and low tolerance for frustration, both of which rendered the student unable to pursue academic tasks without a small specialized class setting with a high

teacher to student ratio, and that the recommendation of teacher redirection as needed and programmatic supports to address the student's social/emotional needs were not appropriate. The parents further assert that the CSE's rejection of a special class in a 12:1 ratio was based on the belief that the district only offered such classes to students performing several years below grade level and that the refusal to consider placement at Mary McDowell was inappropriate. The parents further assert that when the CSE reviewed evaluative material of the student the following year in May 2010, the CSE concluded that an ICT class was too large and that the student needed additional adult support throughout the day and recommended placement in a 12:1+1 class.

In addition, the parents assert that the impartial hearing officer properly determined that the student's placement at Mary McDowell offered educational benefits to the student and was not overly restrictive. Addressing the equities, the parents assert that the student was placed at Mary McDowell to ensure that the student would have a place to attend school during the 2009-10 school year; and that the parents had requested a placement letter before the end of June 2010, that would have allowed them to evaluate the proposed program and withdraw the student from Mary McDowell in a timely manner if the district had offered the student a FAPE. The parents attach to their answer four exhibits, denoted as the student's May 20, 2010 IEP for the 2010-11 school year, FNRs dated June 30, 2009 and July 7, 2009 for the 2009-10 school year with postmarked envelopes; a letter dated June 4, 2009 from the student's mother to the CSE chairperson regarding travel plans with certified mail receipt; and a letter from the student's father to the Brooklyn Integrated Service Center dated July 10, 2009 regarding his inability to visit the proposed placement with certified mail receipt (see Answer Exs. A, B, C, D).

The district submitted a reply responding to the inclusion of documents attached to the parents' answer and requesting that this office decline to accept such "additional documentary evidence." Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 10-062; Application of the Dep't of Educ., Appeal No. 10-047; Application of a Student with a Disability, Appeal No. 10-002; Application of a Student with a Disability, Appeal No. 09-085; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, I will not accept the additional documentary evidence, as I find that the exhibits offered by the parents were available at the time of the impartial hearing and are not necessary for my review in order to render a decision.

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the

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

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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).

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

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).

Returning to the merits of the instant case, I will first consider whether the hearing record supports the impartial hearing officer's finding that the CSE did not rely on sufficient evaluations to properly measure the student's current skill levels (see IHO Decision at p. 24). The hearing record reflects that the student's May 2009 IEP was developed pursuant to an annual review (Dist. Ex. 2 at p. 2). With certain exceptions, a student's IEP is required to be reviewed periodically, but not less frequently than annually, and revised as appropriate (20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). The CSE is required to develop an IEP that accurately reflects the student's special education needs (34 C.F.R. § 300.306[c][2]; 8 NYCRR 200.4[d][2]). Incumbent with that duty is the mandate that the IEP "shall report the present levels of academic achievement and the functional performance and indicate the individual needs of the student." (8 NYCRR 200.4[d][2]; see 34 C.F.R. § 300.320 [a][1]). Moreover, a CSE is required to "consider" information about the student provided to, or by, the parents (8 NYCRR 200.4[f][2][ii]; Application of a Student with a Disability, Appeal No. 08-077; Application of a Child with a Disability, Appeal No. 07-139).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 C.F.R. § 300.303[b][1]; 8 NYCRR 200.4[b][4]). A reevaluation must be conducted at least once every three years unless the parent and the district agree that reevaluation is unnecessary (34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or

assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).<sup>13</sup>

Upon review of the hearing record, I find that the student's May 2009 IEP properly reported the student's present levels of academic achievement and functional performance (see 8 NYCRR 200.4[d][2]; 34 C.F.R. § 300.320 [a][1]). Moreover, I note that the parents do not assert that the estimates provided by the student's teacher of the student's skill levels to the May 2009 CSE were inaccurate in their due process complaint notice (see Dist. Ex. 1) or on appeal (see Answer). A review of the January 2009 mid-year progress report from Mary McDowell, in conjunction with the information provided by the student's teacher from Mary McDowell (who participated in the CSE meeting), and the March 2009 classroom observation, reveals that the May 2009 CSE had sufficient information relative to the student's present levels of academic performance at the time of the CSE meeting in order to develop an IEP that accurately reflects the student's special education needs (see 34 C.F.R. § 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Dist. Exs. 5; 8 at pp. 1-27).<sup>14</sup>

Turning to the May 2009 IEP for the 2009-10 school year, the CSE used updated teacher estimates provided by the student's special education teacher from Mary McDowell to determine the student's current level of performance in reading and mathematics (Tr. pp. 25, 28, 40; see Dist. Ex. 2 at pp. 2-3). The May 2009 IEP indicated that, for the student's academic performance and learning characteristics, according to the student's then-current classroom teacher, the student began the 2008-09 school year with some basic decoding/sight words (Dist. Ex. 2 at p. 3). In addition, the May 2009 IEP noted that the student learned class routines and enjoyed learning in school; that the student was reading pre-primer books; that writing was very difficult for the student; and that the student benefited from markers/highlighting (id.). The IEP indicated for mathematics, that the student was working on pre-addition skills and concrete word problems and that the student seemed to feel more confident in mathematics due to structured conceptualization (id.). In addition, the student's teacher described him "as almost over focused" in class, a description of the student that was characterized in the IEP as consisting of self-doubting and self-referencing, tendencies which internally distracted the student (id.). The teacher estimates provided by the student's special education teacher from Mary McDowell and included in the IEP indicated that the student's instructional levels for reading decoding and reading comprehension

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<sup>13</sup> Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 10-073; Application of Student with a Disability, Appeal No. 10-069; Application of the Dep't of Educ., Appeal No. 07-018).

<sup>14</sup> The hearing record included an undated neuropsychological evaluation update report that indicated the student was evaluated over four sessions between March and April 2010 (Parent Ex. L at pp. 1-29). However, this evaluation was conducted after the May 2009 CSE meeting.

were at the 1.5 grade level; his instructional level for writing was at the 1.0 grade level; and his instructional level for spelling was at the 1.5 grade level (id.). The IEP noted that the teacher's estimate of the student's instructional level in mathematics for problem solving was at the K.9 grade level and his instructional level for computation was at the K.5 grade level (id.).

Accordingly, although the hearing record supports the impartial hearing officer's finding that teacher estimates were the only method of appraisal noted on the student's IEP to establish the student's then-current levels of academic achievement and functional performance, I find that the impartial hearing officer erred in his determination that teacher estimates are not an acceptable method of evaluation in determination of a student's skill levels (A.J. v. Bd. of Educ., 679 F. Supp. 2d 299, 302 [E.D.N.Y. 2010][noting teacher reports of progress]; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 801 F. Supp. 1392, 1396 n.4 [D.N.J. 1992], aff'd, 995 F.2d 1204 [3d Cir. 1993][noting use of teacher estimates]; see IHO Decision at p. 25). I further find that, in the instant case, teacher estimates constituted an acceptable method of evaluation in determination of the student's functional academic skills.

In addition, upon review, I find that the hearing record does not reflect that the educational or related service needs of the student required a reevaluation at the time of the May 2009 CSE. In making this determination, I note that the CSE considered a detailed progress report from Mary McDowell, which included pertinent information regarding the student's social/emotional needs, and covered all academic subjects, special subjects, as well as the student's participation and progress in OT and speech-language therapy (see Dist. Ex. 8). Moreover, I note that the hearing record does not reflect that the student's parents or teacher requested a reevaluation (see 34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]). Although a reevaluation must be conducted at least once every three years (unless the parent and the district agree that reevaluation is unnecessary), I note that the hearing record reflects that three years had not passed since the student's most recent reevaluation conducted in June 2007 (the "Turning Five" psychoeducational update referenced herein) (see 34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]). Additionally, the hearing record shows that the district social worker who participated in the May 2009 CSE also conducted an observation of the student at Mary McDowell in preparation for the student's annual review (8 NYCRR 200.4[b][1][iv]; see Dist. Exs. 2 at p. 2; 5). Accordingly, the hearing record does not support the impartial hearing officer's finding that the CSE did not rely on sufficient evaluations to properly measure the student's current skill levels.

I will next consider whether the student's May 2009 IEP adequately addressed the student's health/physical management needs. Regarding the student's health and physical development, the IEP indicated that the student was in good overall health (Dist. Ex. 2 at p. 5). The IEP indicated that the student wore bifocal glasses and that "depth perception [was] an issue" for him; that the student exhibited hypotonia and graphomotor deficits, but made progress in his gross motor performance and no longer required PT (id.). In addition, the hearing record reflects that the student, when writing, used a "thumb wrap" grasp described as "inefficient" and displayed occasional hand fatigue (id. at p. 21). Regarding the student's visual perception abilities, the hearing record reflects that the student displayed "moderate difficulty" with figure ground and "severe difficulty" with form perception, spatial relationships, visual discrimination, visual memory, visual sequential memory, and visual closure (id.). Regarding the student's ability to copy, the hearing record reflects that the student had "moderate difficulty" with near-point copy and far-point copy (id. at p. 22). In the gross motor domain, the student displayed "severe difficulty" with upper extremity strength and endurance, core/trunk strength and endurance, bilateral coordination, and motor planning (id.). The OT report noted that the student experienced

"moderate difficulty" with eye-hand coordination and balance (id.). As to the student's sensory processing skills, the OT progress report described the student as exhibiting "severe difficulty" with sensory discrimination; "mild difficulty" with sensory modulation involving sensory over-responsive reactions, and "moderate difficulty" with sensory modulation involving sensory under-responsive reactions and sensory seeking/craving (id.). As to activities of daily living, the student demonstrated "severe difficulty" with all skills related to shoe tying (id. at p. 23).

Upon review of the hearing record, I find that the student's health/physical management needs were discussed at the CSE meeting and appropriately addressed in the student's IEP (Tr. pp. 36, 256, Dist. Ex. 2 at pp. 5, 6). While the student exhibits motor coordination needs, handwriting needs, and hypotonia, I find that OT was recommended to address these concerns (Tr. pp. 36-37, 53-54; Dist. Ex. 2 at pp. 5, 10). In addition, I note that the hearing record reflects that the student did not require PT, that the CSE terminated the student's PT based upon the Mary McDowell report and with the mother's agreement, that the student did not require adaptive physical education or a health paraprofessional, and that the student was able to play football and tennis (Tr. pp. 20, 36-37, 38, 223-24, 252; Dist. Ex. 2 at pp. 2, 5). Accordingly, I find that the CSE appropriately addressed the student's health/physical management needs with the recommendation by the CSE for OT.

I will next consider whether the May 2009 CSE adequately considered and addressed the student's social/emotional needs. The parents assert that the CSE failed to address the student's performance anxiety and low tolerance for frustration and further assert that the recommendation by the CSE of teacher redirection as needed and programmatic supports to address the student's social/emotional needs was not appropriate. Regarding the student's social/emotional needs, I initially note that the CSE acknowledged the student's anxiety and frustration in its recommendation for teacher redirection and programmatic supports to accommodate the student (Dist. Ex. 2 at p. 4). In addition, I further note that the hearing record supports a finding that the May 2009 CSE acknowledged the student's anxiety and frustration, by noting under the social/emotional "present performance" portion of the May 2009 IEP that the student benefitted from reassurance, exhibited a "very low frustration tolerance," desired to "please the adults around him" and that the student became easily fatigued. In addition, the May 2009 IEP indicated that the student's social skills "still necessitate teacher prompting" (id.).

Regarding the finding by the impartial hearing officer that the CSE did not indicate to what extent the student's behavior interfered with his instructional process, I note that the CSE did not indicate on the student's IEP whether the student's behavior interfered with the instructional process (see Dist. Ex. 2 at p. 4). The failure to check the appropriate box on the IEP to indicate whether the student's behavior interfered with the instructional process and/or the extent of interference, however, is not determinative where, as here, the CSE did note that the student was "motivated," had become more open and accepting regarding peer play activities and that the CSE described the student's required level of support as teacher redirection as needed, as well as "[p]rogrammatic supports" and that the CSE recommended "[t]eacher redirection as needed" and "[p]rogrammatic supports" as environmental modifications to address the student's social/emotional management needs (id.). In addition, the hearing record reflects that at the May 2009 CSE meeting, the student's mother was asked if the student had been in private therapeutic counseling for his anxiety and that his mother responded that he had never had such counseling (Dist. Ex. 6). Accordingly, I find that the hearing record supports a finding that the May 2009 CSE adequately identified the student's social/emotional needs, and more specifically, the student's anxiety.



While I find that the CSE adequately described the student's social/emotional needs, I must now consider whether the CSE recommendation of "teacher redirection as needed" and "programmatic supports" was sufficient to address the student's anxiety, given the recommendation by the May 2009 CSE that the student be placed in an ICT class with related services of speech-language therapy and OT (Dist. Exs. 2 at pp. 1, 14). Upon review, I find that the hearing record reflects that the student's social/emotional needs interfered with the student's instructional process and learning skills; that the student's May 2009 IEP does not identify what "programmatic supports" would be provided to the student to address the student's social/emotional management needs; and, as further described below, the CSE did not adequately address the student's social/emotional management needs on the student's May 2009 IEP.

In support of the conclusion that the May 2009 IEP did not appropriately address the student's social/emotional needs, I note testimony of the student's teacher from Mary McDowell that the student struggled with social/emotional difficulties, including anxiety, and that when the student was confused, his anxiety increased (Tr. pp. 102, 103, 105-106, 107, 108, 112, 120, 124-25). Next, I find that the January 2009 Mary McDowell progress report also supports a finding that the student struggled with social/emotional difficulties (see Dist. Ex. 8 at pp. 2, 6, 10, 14). In addition, testimony by the student's mother indicated that the student had "a lot of complicated issues that affect his ability to learn" (Tr. p. 216). The parent indicated that the student was "acutely aware of his deficits," something that created anxiety for him, as reflected by his low tolerance for problems and his need for a "huge amount of support" to meet his challenges (Tr. p. 219). In regard to the student's low frustration, the parent's testimony indicated that the student found it difficult to cope "when things go awry, when he can't do something, and he knows he should be able to do it, and why he can't do it," the student tended to "give up easily," "tear up easily," or needed to take a break (Tr. p. 219). While the student's mother testified that the May 2009 IEP provided information about the student's "positives," in that the IEP noted the student was motivated and benefited from reassurance (Tr. p. 281), the parent asserted that the student's IEP did not reflect the student's high anxiety and tears, his need for breaks due to his low frustration tolerance, or his need for a teacher to intervene in order to help the student when there was conflict in the classroom (Tr. pp. 281-82). The student's mother further indicated that without the necessary supports in the classroom setting the student "just sort of breaks down and can't function" (Tr. pp. 222-23).

In addition, I find that the March 2009 classroom observation conducted by the district social worker further supports a finding that the student's social/emotional needs interfered with the student's instructional process and learning skills, and moreover that the recommendation of teacher redirection as needed and programmatic supports in the student's May 2009 IEP failed to adequately address his social/emotional needs (see Dist. Exs. 2 at p. 2; 5). The hearing record reflects that when the student was observed in the classroom in a group of four to five students engaged in skywriting and reading, that the student had difficulty with the skywriting, and that one of the two teachers in the classroom provided assistance with the skywriting by placing the student's hand on a chair to complete the task (Dist. Ex. 5). The hearing record further reflects, as reported by the student's mother, that the district social worker stated during the CSE meeting that he had seen some of the student's anxiety during his observation, and the March 2009 classroom observation report also supports a finding that the student's anxiety was noted during the observation (Tr. pp. 225-26; see Dist. Ex. 5). In view of the substantial amount of evidence regarding the student's anxiety, I find that that the teacher redirection and the single reference to "programmatic supports" in the May 2009 IEP does not describe services that are adequate to address the student's social/emotional needs and, therefore, was not reasonably calculated to enable

the student to receive educational benefits (see Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192 [2d Cir. 2005]).

Although the CSE failed to adequately address the student's social/emotional needs, I am not persuaded that the student must be placed a special class in order to receive educational benefits or that an ICT class placement would not, under any circumstance, be appropriate for the student. The hearing record reflects that the district's ICT class is comprised of a special education and a regular education teacher who collaborate in teaching the class by modifying and tailoring the curriculum to meet the needs of specific students according to their IEP, and using a multisensory approach to learning (Tr. pp. 59, 61-62). Reading, writing, and mathematics instruction is provided in both a whole class and a small group format (Tr. pp. 65-66). The district special education teacher testified that both reading and mathematics are taught using multisensory programs, as indicated in the student's IEP, that the mathematics program spiraled,<sup>15</sup> and that concrete materials and visual aids are utilized during mathematics instruction (Tr. pp. 70-71). In addition to the regular education and special education teachers in the ICT class who "constantly assess" students through formal assessments at the end of each unit, conference with students on an individual basis, and provide individual support to students in need of more help; the hearing record reflects that students in the ICT class can receive additional help during a 35-minute "morning school," that consists of four teachers and 10 students (Tr. p. 66). The district special education teacher testified that the special education and regular education teachers provided students in the ICT class with preferential seating, teacher prompting as needed, repetition of concrete directions, and previously presented materials, which are the academic management needs identified in the student's May 2009 IEP (Tr. pp. 68-9). Students in the ICT class receive individual OT and speech-language therapy as recommended by their IEP (Tr. pp. 63, 69).

Upon review of the student's May 2009 IEP, the evaluative data in the hearing record, and the district's description of an ICT placement, I am not persuaded by the parents' assertion that the student was unable to receive educational benefit in an ICT setting;<sup>16</sup> however, I find that this does not overcome the deficiency of the IEP in terms of the lack of supports to address the student's social/emotional needs in the classroom, which leads me to conclude that district did not offer the student a FAPE.

Having found that the district failed to offer the student a FAPE, I turn to the appropriateness of the parents' unilateral placement. 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).

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<sup>15</sup> The hearing record reflected that a curriculum that spirals means that skills are taught and then reinforced throughout the program (Tr. p. 71; see also Tr. p. 105).

<sup>16</sup> I note that one aspect favoring placement in an ICT setting is that the student would have a greater opportunity to participate in learning with regular education students.

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).

A review of the hearing record reflects that the program and services that the student received at Mary McDowell during the 2009-10 school year were appropriate to address his needs and that the student demonstrated progress while attending the program. The head teacher from Mary McDowell for 2009-10 testified that she held a master's degree in early childhood, general, and special education; she was trained in the O-G program, two mathematics programs and in the Lindamood-Bell program (Tr. p. 98). The head teacher was familiar with the student because he was in her class for the 2009-10 school year, and as his general lower elementary school classroom teacher, she taught writing, social studies, and social/emotional classes (Tr. pp. 100-01). Her assistant teacher was the student's reading teacher, and the student's mathematics teacher was someone with whom she worked closely and met with regularly (Tr. p. 101). The student's head teacher from Mary McDowell indicated that there were nine students in her class who

demonstrated deficits in speech-language, visual-perceptual, reading, writing, mathematics, social/emotional (often related to language impairments), and various OT needs (Tr. p. 100).

The student's teacher from Mary McDowell testified that the student exhibited speech-language, visual-perception, and social-emotional development difficulties (Tr. p. 102). In regard to the student's speech-language concerns the teacher indicated that the student attended a speech-language therapy group two times per week in a group of two and participated in an all class group lesson conducted by the speech-language therapist and the occupational therapist one time per week (id.). The head teacher from Mary McDowell also indicated that the student's speech-language needs were supported through the private school's social/emotional curriculum (Tr. pp. 102-03). Specific to the student, the teacher indicated that he was encouraged to verbalize his emotions when his anxiety increased, and that he was given strategies such as being provided with words he could use and ways he could ask for help in order to cope with his anxiety (Tr. p. 103). In addition, the student was assisted in listening to what other people were saying and in processing all that he heard (id.). The teacher described the student as tending to need direct interaction in order to be comfortable with classroom activities, and to make sure he understood everything clearly, because when he was confused his anxiety increased (id.). The teacher indicated that the student's need for comfort and clarity was part of his struggle with language; that often one of his teachers would provide him with "a quick little check in with one-on-one direction, being very clear about what the expectations [were];" and that either the teacher or the assistant teacher supported the student to make sure he understood what they were saying (Tr. p. 103; see Tr. p. 108). The teacher also noted that having a specific weekly time with the entire class to engage in explicit instruction for dealing with feelings of frustration, friendship, or conversation skills benefited the student as he was able to carry over what he learned at that time to other parts of his day (Tr. p. 105).

The head teacher from Mary McDowell indicated that in order to address some of the student's reading and visual-perceptual difficulties, the O-G program was multisensory and used to help the student develop reading and writing skills (Tr. pp. 103-04). She stated that MMCL was able to tailor the program to the student's visual-perceptual needs; that daily gross motor work assisted the student's practice of correct letter formation using his large muscles, as fine motor tasks were difficult for him (Tr. p. 104). At Mary McDowell, the student was provided with special paper that the school printed for him that included thicker lines for the student to write on, so that he could see in higher contrast where the letters are supposed to fit on the page (id.). The student was also instructed in the use of different strategies to help him finger space between words and sentences and organize writing on a page (id.).

The head teacher from Mary McDowell indicated that some of the student's visual-perceptual needs affected his mathematics ability (Tr. p. 104). The teacher stated that the mathematics program used at Mary McDowell was similar to the O-G program used for reading because it was repetitive, allowed for a lot of time for practice, and "spiral[ed]," whereby the student was constantly revisiting and building upon previously learned mathematics skills (Tr. p. 105). The teacher explained that because of the student's anxiety, both the reading and mathematics programs used at Mary McDowell assisted the student in understanding expectations, as there was a specific way that each lesson flowed (Tr. p. 106). The head teacher's extensive description of a typical day for the student at Mary McDowell reflected how the private school specifically addressed the student's academic and social/emotional needs across curriculum areas and offered multiple opportunities to practice and build upon learned skills (see Tr. pp. 113-18).

Furthermore, the head teacher testified that the other students in her class were working at similar levels as the student in mathematics and reading (Tr. p. 122).

In addition, the OT progress report included in the Mary McDowell mid-year progress report for the period September 2008 to January 2009 noted that the occupational therapist provided the student with a specific chair with an inflated wedge in the classroom, to provide physical support for the student to face forward in his seat and address his hypotonia (Tr. pp. 132-33; Dist. Ex. 8 at p. 23). According to the head teacher from Mary McDowell, the occupational therapist also provided the teachers with strategies to use with the student for drawing and to help him focus on different parts of a photograph to obtain more information from it (Tr. p. 133).

With regard to the student's progress, the head teacher from Mary McDowell explained that at the beginning of the 2009-10 school year the student needed to develop self-help strategies in order to deal with confusion regarding expectations and resultant anxiety so that he could progress academically (Tr. pp. 108-09). Although it was initially difficult for the student, he learned to ask his teachers for help, whereby throughout the day, while one of the teachers in the classroom was teaching, the other teacher in the classroom was available to respond to the student's questions or need for reassurance and clarification about what he was supposed to be doing, and to make certain he understood expectations (Tr. p. 109). The head teacher opined that such a classroom structure helped the student emotionally and academically (*id.*). The teacher also indicated that the student received reading and mathematics instruction in a group of five students (Tr. p. 110).

In addition, the head teacher from Mary McDowell stated that in comparison to the beginning of the 2009-10 school year, by the time of the impartial hearing, as the student's anxiety appeared to decrease, his academic progress in reading, writing, and mathematics improved, as did his emotional and social relationships (Tr. p. 112). The head teacher attributed the student's improvement to the 1:1 check-ins with the extra teacher in the classroom, the small group size, and the teachers' ability to tailor accommodations for the student and structure lessons that specifically addressed the student's visual-perceptual and language difficulties within a "real structure and context" (Tr. pp. 112-13).

Consistent with the January 2010 mid-year progress report from Mary McDowell covering the time period September 2009 to January 2010, by January 2010 the student was working at the end of the first grade level in reading and at the beginning first grade level in mathematics (Parent Ex. J at pp. 7, 18). Testimony by the lower elementary school director and the head teacher from Mary McDowell for 2009-10 indicated that at the time of the impartial hearing the student was working at a beginning second grade level in reading and at the end of the first grade level in mathematics, a demonstrable improvement for the student from the time of the May 2009 IEP, and even more of an improvement from the time of the January 2009 mid-year progress report (Tr. pp. 115, 122, 176-77; Dist. Ex. 2 at p. 3; Parent Ex. J at pp. 7, 18). The student's head teacher from Mary McDowell also indicated that on proficiency tests for reading the student obtained a higher percentage of questions correct (Tr. p. 136). He had also carried over acquired information to his journal (*id.*). The head teacher noted that at the time of the impartial hearing, the student's anxiety

and need for teacher intervention to help him cope in the classroom seemed to have decreased (id.).<sup>17</sup>

Regarding the district's contention that Mary McDowell is "too restrictive," while parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 2010 WL 1253698, at \*19 [S.D.N.Y. Mar. 21, 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]; Application of the Dep't of Educ., Appeal No. 10-042). Upon review, I find that, in light of the student's needs, LRE considerations do not, in this instance, factor so heavily that they preclude a finding that the parent's unilateral placement was appropriate.

Based on the foregoing evidence, including the January 2009 Mary McDowell progress report, I find that the parents demonstrated that the program at Mary McDowell offered educational instruction specially designed to meet the unique needs of the student for the 2009-10 school year (see Gagliardo, 489 F.3d at 112, citing Frank G., 459 F.3d at 364-65).

I now turn to the issue of whether equitable considerations favor of an award of tuition reimbursement. 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

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<sup>17</sup> Regarding OT, some progress was reported for alphabet recall (written), visual memory, eye-hand coordination, and for some of the sub skills required for shoe tying (see Dist. Ex. 8 at pp. 21-23; Parent Ex. J at pp. 26-28).

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 v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at \* 13 [E.D. Pa. Oct. 22, 2007]).

The district contends that equitable considerations do not weigh in favor of reimbursement for the parents because the parents never "seriously" intended to enroll the student in a public school and the parents gave insufficient notice of their intention to unilaterally place the student and seek tuition reimbursement because their notice failed to indicate any concerns with the student's May 2009 IEP and did not explicitly reject the recommended program.

The hearing record reflects that before the student's May 8, 2009 annual review, the student's parents had executed an enrollment contract with Mary McDowell and had paid a \$6,500 deposit to Mary McDowell in January 2009 (Parent Ex. K).<sup>18</sup> The hearing record further reflects that the student's mother did not advise the CSE at the May 2009 CSE meeting that the parents had signed a contract with Mary McDowell (Tr. pp. 261-62).

According to the hearing record, the student's mother and teacher discussed their concerns with the proposed program at the May 2009 CSE meeting (Tr. 24, 26, 38-39, 224, 226-27, 258, 259; Dist. Ex. 6). Specifically, the hearing record reflects that at the May 2009 CSE meeting, both the student's teacher and mother advised the CSE that an ICT class was not appropriate for the student and that a small class size was necessary for the student; the student's mother additionally advised the CSE that the student would "shut down" and not be able to function in an ICT class (id.). The hearing record further reflects that at the time of the May 2009 CSE meeting the student's mother was familiar with ICT classes (Tr. p. 227). In addition, the hearing record reflects that at the May 2009 CSE meeting, although the student's mother told the CSE that she thought the student needed a smaller classroom setting, "until [she] had observed, [she] wasn't going to say definitely yes or no" (Tr. p. 259).

The hearing record further reflects that, after receiving a notice from the district dated June 30, 2009 that identified the specific school location to which the student was assigned for the 2009-10 school year (Dist. Ex. 3),<sup>19</sup> the student's father wrote to the district by letter dated July 15, 2009, and indicated that he was unable to agree or disagree with the recommended program within ten days of receipt of the FNR because he was unable to view the recommended placement as it was

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<sup>18</sup> According to the terms of the contract, the parents declined to participate in Mary McDowell's "tuition refund plan" (Tr. p. 238; Parent Ex. K). The student's mother testified that it was her understanding that she would still be refunded tuition money paid subsequent to the initial deposit if the district offered an appropriate placement (Tr. p. 264). She based this conclusion upon information that was "generally known" and Mary McDowell was "a nice school" (Tr. pp. 264, 267).

<sup>19</sup> The student's mother testified that she received the placement letter between July 6th and July 10th 2009 (Tr. pp. 229, 269).

closed (Parent Ex. E).<sup>20</sup> The student's father requested "any information" about the program and advised that he would visit the program when school opened (*id.*). In a letter dated August 24, 2009 from the parents' attorney to the district, the parents advised of their placement of the student at Mary McDowell for the 2009-10 school year and of their intent to seek funding for the placement from the district as well as bussing (Parent Ex. B). The parents further advised that the final notice of placement was not sent by the district until June 30, 2009, although the CSE review was held on May 8, 2009, and that the parents were unable to visit the placement and make an assessment as to the appropriateness of the placement (*id.*). In addition, the parents further advised that once they had an opportunity to visit the program, they would either "place the child accordingly" or file a "detailed hearing request" (*id.*). It is not clear from the hearing record why the parents did not disclose to the CSE at the May 2009 CSE meeting that they had already secured a unilateral placement for the student at Mary McDowell for the 2009-10 school year (*cf.* Application of the Dept. of Educ., Appeal No. 10-101 [noting that the parent disclosed that she had obtained a placement for the student]). With regard to the district's actions, the evidence shows that the student's father contacted the district by letter and telephoned the district as set forth in its June 30, 2009 FNR, but that the parent was not able to obtain further assistance from the district (Parent Ex. E).

Upon review of the hearing record, I find that the parents failed to provide the district with the notice required by the IDEA of their intent to enroll the student in a private school at public expense, including a statement of their concerns regarding the district's recommendations for the 2009-10 school year (*see* 20 U.S.C. § 1412[a][10][C][iii][I]; 34 C.F.R. § 300.148[d][1]). In particular, I find that the hearing record reflects that the parents communicated their concern regarding the ICT class and class size; but that the parents did not reject the May 2009 IEP until they submitted their September 21, 2009 due process complaint notice, which was filed after the student had already been unilaterally placed at Mary McDowell at the beginning of the 2009-10 school year (*see* Parent Exs. A; B; E).<sup>21</sup> Although the student's mother testified that the student's father made multiple attempts to arrange for a visit to the proposed school but that the school was closed, and the hearing record includes correspondence sent to the district by the student's father and the parents' attorney before the parents' September 21, 2009 due process complaint notice indicating, among other things, that a visit to the proposed school could not be arranged, I find that the failure of the parents to properly reject the placement recommended in the May 2009 IEP and advise the CSE of their concerns with the student's May 2009 IEP, including CSE procedures, until after the unilateral placement in their September 21, 2009 due process complaint notice, under the facts in the instant case, warrants a finding that the equitable considerations do not favor the parents. I note that it was not necessary for the parents to visit the placement in order to advise the CSE of many of their concerns, including that the CSE did not rely on necessary evaluations to properly measure the student's skill levels; that the IEP did not reference any testing or evaluations; that the May 2009 IEP was incomplete because the CSE failed to adequately address the student's social/emotional needs as well as his health and physical development needs (*see*

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<sup>20</sup> The hearing record reflects that the student's father called the telephone number provided in the June 30, 2009 FNR four or five times in July, but he was not able to speak to anyone about the program (Tr. pp. 230, 270).

<sup>21</sup> While the parents' September 2009 due process complaint notice provided the district with the notice required of their intent to enroll the student in a private school at public expense, including a statement of their concerns with the district's recommendations for the 2009-10 school year (*see* 20 U.S.C. § 1412[a][10][C][iii][I]; 34 C.F.R. § 300.148[d][1]; *see also* Parent Ex. A), it did not provide the district with an opportunity to remedy the parents' objections at least ten days prior to the date that the student was removed from the public school for the 2009-10 school year (*see* Application of a Student with a Disability, Appeal No. 10-095).



Parent Ex. A). I further note that, if the parents had advised the CSE of their concerns, the CSE would have had an opportunity to address the parents' concerns, and specifically would have had the opportunity to adequately address the student's social/emotional needs (see Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]).<sup>22</sup> As set out above, the IDEA requires that the parents' notice be given either 10 business days prior to the removal of the child from the public school or at the last CSE meeting prior to the removal of the student (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]).<sup>23</sup> In this case, the hearing record reflects that the student was enrolled at Mary McDowell at the beginning of the 2009-10 school year and the parents did not provide the requisite notice 10 days prior to the start of the school year.

In summary, the evidence shows that the parents took substantial steps to obtain a unilateral placement for the student for the 2009-10 school year prior to meeting with the CSE but did not communicate their rejection of the recommended IEP, which precluded the opportunity to correct the social/emotional aspects of the May 2009 IEP, and if appropriate, adjust the recommended services and or placement. Additionally the parents did not comply with the IDEA's statutory notice requirement. A factor weighing against the district is unrebutted evidence that the parent attempted to contact the district by letter and telephone, but was unable to receive additional information about the placement during summer 2009 (Dist. Ex. E). In the exercise of my discretion, I find that the equities only partially support the parents' request for tuition reimbursement (Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at \*10 [March 18, 2010]; S.W., 2009 WL 857549, at \*11; Arlington Cent. Sch. Dist. v. D.K. and K.K., 2002 WL 31521158, at \*11 [Nov. 14, 2002]; Application of the Dept. of Educ., Appeal No. 09-059; Application of the Dept. of Educ., Appeal No. 09-046; Application of the Dept. of Educ., Appeal No. 07-032; Application of a Student with a Disability, Appeal No. 09-048), and I find that the district should be directed to pay 50 percent of the student's tuition at Mary McDowell for the 2009-10 school year.

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the portions of the impartial hearing officer's decision dated September 3, 2010 which found that an ICT placement was inappropriate for the student and that equitable considerations favored the parent are annulled, and

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<sup>22</sup> Examples of how a CSE could have further addressed the student's social-emotional needs include defining "programmatic supports," recommending additional supports to be provided in the classroom to address the student's social-emotional needs, additional annual goals that address how the student could compensate for his anxiety, and/or recommending counseling.

<sup>23</sup> The projected date for initiation of the student's May 2009 IEP was September 8, 2009 (Dist. Ex. 2 at p. 2).

**IT IS FURTHER ORDERED** that the district shall reimburse the parents for 50 percent of the student's tuition at Mary McDowell for the 2009-10 school year.

**Dated:**            **Albany, New York**  
                         **December 20, 2010**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**