



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-015

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

Regina Skyer and Associates, LLP, attorneys for respondents, Jesse Cole 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 them for their son's tuition costs at the Bay Ridge Preparatory School (Bay Ridge) for the 2009-10 school year. The appeal must be sustained in part.

During the 2009-10 school year, the student attended Bay Ridge, where he also received speech-language therapy (Tr. pp. 109, 190).¹ Bay Ridge has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this appeal (Tr. p. 12; 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

¹ According to the hearing record, during the first three months of the school year, the student's speech-language therapy was delivered in a group on a push-in basis; however, in December 2009, the student was receiving two group sessions of speech-language therapy, push-in group sessions, and one 1:1 session of speech-language therapy per week (Tr. pp. 109, 190). The student also received "social emotional tutoring" at Bay Ridge, which the hearing record describes as daily informal counseling sessions that addressed academics, but more from the standpoint of the student's difficulty with anxiety (Tr. pp. 105, 205, 213).

Background

The student's early history is significant for speech and language difficulties (Dist. Ex. 5 at p. 8). At two years, ten months of age, the parents enrolled him in a private school, where staff suggested that the parents have the student evaluated, as his language was very difficult to understand (Tr. p. 164; Dist. Ex. 5 at p. 8). At age three, the student was evaluated by the Committee on Preschool Special Education (CPSE) and found to have mildly delayed expressive syntax and significantly delayed articulation, with multiple phonological errors (Tr. pp. 164-65; Dist. Ex. 5 at p. 8). The student received home-based speech-language therapy and, later, special education itinerant teacher (SEIT) services at school (Tr. p. 195; Dist. Ex. 5 at p. 9). Prior to his fifth birthday, the student transitioned to a different private school where he "repeated" prekindergarten and subsequently attended kindergarten (Tr. p. 194; Dist. Ex. 5 at p. 9). Due to staffing ratios at the second school, the student no longer required SEIT services; however, he continued to receive speech-language therapy (Dist. Ex. 5 at p. 9). The student's teachers reportedly suggested that for first grade, the parents enroll the student in a small and "more supportive" general education program (*id.*). In response, the parents enrolled the student in Bay Ridge, where he has remained since (Tr. pp. 166-67; Dist. Ex. 5 at p. 9).

When the student's language skills were assessed in spring 2005 (first grade), he continued to demonstrate articulation and expressive language difficulties (Dist. Ex. 5 at p. 9). In addition, the student's first grade teachers reportedly indicated that the student had difficulty with reading, listening comprehension, body awareness, motor planning, organization, and self-confidence (*id.*). Administration by the district of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) in summer 2005 confirmed the student's average cognitive functioning, but also revealed academic delays ranging from nine months to "slightly" over a year (*id.* at p. 10). In second grade, the student began to receive in-school academic support along with speech-language therapy (Tr. p. 201; Dist. Ex. 5 at p. 10).² His progress was described as "steady" (*id.*). By third grade, the student's school-based support services began to focus on math and writing, as the student continued to struggle in these subjects (*id.*). According to the student's mother, the student developed anxiety during fourth grade (2007-08) and, at the recommendation of his doctor, began to receive counseling services through a local university at the beginning of fifth grade (Tr. pp. 172-73, 203-04; Dist. Ex. 5 at pp. 7, 10).³ For fifth grade at Bay Ridge, the student received speech-language therapy and 1:1 tutoring support for math (Dist. Ex. 5 at p. 7).

The student's first trimester report for fifth grade (2008-09) indicated that the student had met grade-level standards for competencies in reading, social studies, and science (Dist. Ex. 6 at

² The student's mother reported that in first grade, the student was identified as a student who needed extra support in reading and math (Tr. p. 201). She recalled that in second or third grade, the student began attending the Bridge program at Bay Ridge (*id.*). According to the hearing record, the Bridge program was designed to work with students who had "significant learning issues that make it hard for them to cope in a mainstream environment full-time" (Tr. p. 83). Students in the Bridge program often had specific learning difficulties, such as "dyslexia" or speech and language deficits (Tr. p. 84). They received more intensive "work," normally in the areas of reading and writing, and also in mathematics (*id.*).

³ The parents challenged the IEP developed by the district for the 2007-08 school year (Parent Ex. C at p. 3). By decision dated October 29, 2008, the parents were awarded tuition reimbursement for Bay Ridge for the 2007-08 school year (*id.* at p. 12).

pp. 2-4).⁴ According to the report, the student had not yet mastered grade-level writing skills, but was making steady progress toward generating his own ideas, applying taught skills, expressing his ideas clearly, and writing sentences of varying complexity (id. at p. 3). The report described the student as a "tentative writer" who was unsure of himself and who struggled to generate ideas independently (id. at p. 5). In mathematics, the report revealed that the student had mastered necessary computation skills and could recall basic math facts (id. at p. 4). The report further indicated that the student was making steady progress toward understanding mathematical concepts, skills, and strategies; inventing strategies and approaches to solve problems; and understanding and using math vocabulary (id.). However, the report noted that the student relied on traditional algorithms for problem solving, which made it challenging for him to improve his number sense and invent other problem solving approaches (id. at p. 6). According to the report, the student had mastered many areas of social development and work habit competencies and was making steady progress toward respecting others, demonstrating self-control, and responding to others' feelings with sensitivity (id. at p. 2). However, the report also stated that the student struggled to understand body language and occasionally made insulting comments in a joking spirit (id. at p. 7). According to the report, the student was unable to anticipate how others would react to his statements and was unsure of how to resolve resulting issues (id.). The report indicated that the student was making progress toward completing his work in a reasonable amount of time, transferring strategies from group lessons to independent work, and completing his homework assignments on a timely basis (id. at p. 2). The report further revealed that the student struggled with transitions and that he needed reminders to prepare for his next subject (id. at p. 7).

In anticipation of the student's triennial review, the parents privately obtained a neuropsychological evaluation of the student, which took place over three days in February and March 2009 (Dist. Ex. 5 at p. 1). The evaluating psychologist recounted the student's educational history from preschool through fifth grade (id. at pp. 8-11). The psychologist described the student as "[a] socially engaged youngster" who demonstrated effective pragmatic communication skills (id. at p. 11). She noted that the student maintained consistent eye contact, was attentive to non-verbal cues, and comfortably engaged in the typical give and take of conversation (id.). According to the psychologist, the student was "extremely" cooperative and attentive during the formal assessment and generally grasped what was being asked of him without difficulty (id. at p. 12). However, the psychologist also reported that the student's capacity to hold details in working memory was inconsistent and the student often needed repetition of highly detailed material (id.). According to the psychologist, the student's response to verbal questions reflected a sophisticated capacity to reason, but the student had difficulty with word retrieval, which caused his expressive language to have a disorganized quality (id.). The psychologist noted that the student confused sounds within words and lacked understanding of certain vocabulary words (id.). With respect to visual perceptual and visual manipulative tasks, the psychologist reported that the student worked slowly in a careful and deliberate manner, but that his strategies were not well organized (id.). She indicated that the student processed information slowly and needed additional time and exposure to learn how to approach novel tasks in the most efficient and organized ways (id.). The psychologist found that the student's most significant challenges were in phonological processing and that these challenges were exacerbated by executive function weaknesses (id. at pp. 14, 20,

⁴ The school report indicated that the student was participating in modified language arts and mathematics programs (Dist. Ex. 6 at pp. 3-4).

27). The psychologist further opined that the student presented with a complex pattern of auditory linguistic and expressive language challenges (id. at p. 14).

Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded the following standard scores: verbal comprehension 112, perceptual reasoning 115/117, working memory 97, processing speed 97, and full scale IQ 109 (Dist. Ex. 5 at pp. 1, 13).⁵ The psychologist characterized the student's level of measured intelligence as "on the cusp of the [h]igh [a]verage [r]ange" (id. at p. 13). The psychologist further reported that clinically significant discrepancies were evident in the student's ability to reason as compared to his less effective capacities to hold information in working memory when problem solving and rapidly process incoming information (id.).

The psychologist reported that due to the student's phonological processing, retrieval, and working memory challenges, the student decoded words that were presented out of context slowly and somewhat inefficiently and consequently, he met the criteria for a diagnosis of a reading disorder (Dist. Ex. 5 at p. 14).⁶ She noted that the student could often compensate for his decoding and apply his conceptualization and reasoning skills to understand the literal meaning of what he read (id.). However, challenges arose when a reading task required higher order language processing, integration, inferential analysis, and understanding of how to summarize a story (id.). With respect to mathematics, the psychologist reported that the student had developed conceptual mathematical understanding that was well above age level and "mature" math problem solving abilities (id. at pp. 14, 27). She indicated however, that the student could become confused by the wording of certain problems and that he made organizational errors, and could not easily retrieve the correct math facts or calculation strategies on demand (id. at pp. 14, 28). The psychologist further found that the student met the DSM IV criteria for a diagnosis of a disorder of written expression (id. at p. 14). The psychologist commented that the student's knowledge of expressive syntax, punctuation, and spelling was underdeveloped and that it was challenging for him to generate ideas, simultaneously reason, mentally integrate, organize, and plan how to express his ideas in a well-organized manner (id. at pp. 14-15, 27). The psychologist stated that socially and emotionally, the student presented as a sweet, self-critical, anxious boy who was experiencing a heightened sense of vulnerability due to his awareness of his auditory processing and learning challenges (id. at p. 15). She concluded that the student also met the criteria for the DSM IV diagnosis of generalized anxiety disorder (id. at p. 28).⁷ Additionally, the psychologist determined that although the student demonstrated a few neuropsychological and behavioral manifestations that could be construed as indicative of "an attentional disorder," the student did not meet the DSM IV criteria for a diagnosis of this disorder (id. at p. 23).

⁵ The psychologist reported that when the student was allowed unlimited time to complete tasks he attained a perceptual reasoning score of 117 and opined that when the student was allotted additional time to compensate for his slowed processing speed his true abilities were more evident (Dist. Ex. 5 at p. 13).

⁶ The psychologist noted that the student demonstrated a clinically significant difference between his high average intellect and his mildly delayed decoding skills that met the Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition (DSM-IV) criteria for a diagnosis of reading disorder (Dist. Ex. 5 at p. 27).

⁷ The psychologist reported that the student's feelings of anxiety were significantly reduced since he started to receive cognitive behavioral intervention earlier in the school year (Dist. Ex. 5 at p. 29).

The psychologist opined that the student required placement in a "warm, supportive, specialized, well-structured, learning environment in a special school for bright, language-based learning disordered students that allow[ed] for specialized, multisensory support throughout the school day" (Dist. Ex. 5 at p. 30). Among other things, the psychologist further opined that the student would require continued intervention in reading comprehension, math, and writing; language therapy to improve the student's ability to process complex instructions, as well as phonological processing; and cognitive behavioral therapy to assist the student in coping with his heightened anxiety level (*id.* at p. 33). She also recommended that the student receive a formal auditory processing evaluation (*id.* at p. 19). Lastly, the psychologist recommended that the student be afforded the following testing accommodations: extended time, separate location with as few students as possible, and use of a computer, as appropriate (*id.* at p. 33).

On April 2, 2009, a district special education teacher observed the student in his regular education math class at Bay Ridge (Dist. Ex. 4). Using a behavioral checklist, the observer indicated that the student was motivated, participated in class discussion, and remained on task when he knew what to do (*id.*). The observer noted that the student was prepared for class and related to his teachers and aides (*id.* at p. 1). The observer found that the student had some difficulty sustaining concentration and working independently, and although he was distractible in class, the student was not disruptive (*id.*). According to the observer, the student participated in a tic-tac-toe game with three other students which involved substituting mathematical equations in the boxes (*id.*). In addition, she stated that the student participated in the game for several turns, but then lost interest and needed reminders from the teacher to take his turn (*id.* at pp. 1-2). According to the observer, the student worked with a partner to solve multi-step problems (*id.* at p. 2). Based on an interview with the student's teacher, the observer reported that the student was making steady progress and that he received additional 1:1 support each morning to help him keep up with school work (*id.*). In addition, the student knew basic math facts, but used his fingers to count and required extra time to complete tasks (*id.*). The observer noted that the teacher estimated the student's calculation and word problems skills were at a fourth grade level and reported that the student worked at a slow pace (*id.*). Further, the teacher estimated that the student's reading skills were at a fifth grade level, but that his writing skills were delayed (*id.*). Based on her discussion with the student's teacher, the observer stated that the student benefited from the use of an outline, and without one, he tended to "go off track" (*id.*). Additionally, she noted that the student participated in class, but was not always able to retrieve and organize his thoughts (*id.*).

On April 3, 2009, the Committee on Special Education (CSE) convened for the student's triennial review (Dist. Ex. 2 at pp. 1-2). Meeting participants included the district representative, the district's psychologist, the parents, as well as the student's math and language arts teachers from Bay Ridge who participated in the meeting telephonically (Tr. p. 35; Dist. Ex. 2 at p. 2).⁸ Available for CSE review were the student's Bay Ridge school report, the March 2009 neuropsychological evaluation, and the district's classroom observation (Tr. p. 35). The student's present levels of performance as described in the academic performance and learning characteristics portion of the resultant individualized education plan (IEP) reflected elements of the evaluation and observation reports, as well as the discussion that took place at the CSE meeting

⁸ The district representative was the special education teacher who conducted the April 2009 observation of the student at Bay Ridge (Tr. p. 30).

(see Tr. pp. 35, 39; Dist. Exs. 2 at pp. 3-5; 8). The April 2009 CSE recommended that the student continue to be classified as a student with a speech or language impairment and placement in a 12:1 special class with related services consisting of 1:1 speech-language therapy two times per week, group speech-language therapy one time per week, and group counseling one time per week (Dist. Ex. 2 at pp. 1, 10). In addition, the April 2009 CSE recommended the following testing accommodations for the student: extended time (1.5) for exams over 40 minutes, tests to be administered in a special location with no greater than 15 students, and directions read and reread aloud (*id.* at p. 10). The April 2009 CSE developed annual goals for the student related to improving reading comprehension, receptive language/comprehension, expressive language/vocabulary, sense of self, attention span, ability to spell multi-syllabic words, and ability to produce detailed sentences (*id.* at pp. 6-7).

In a letter dated August 7, 2009, the district notified the parents of the assigned school for the 12:1 special class placement that was recommended for the student for the 2009-10 school year (Dist. Ex. 3). The letter further stated that the parents had "the right" to visit the assigned school and provided contact information should the parents desire to arrange a visit (*id.*).

By letter dated August 24, 2009, the parents informed the district that they were unilaterally placing the student in the Bridge program at Bay Ridge for the 2009-10 academic year and that they intended to seek funding for the placement from the district (Parent Ex. E at p. 1). The parents rejected the recommendations of the CSE, and without offering specific details regarding their objections, they maintained that the district failed to offer the student a free appropriate public education (FAPE) on both substantive and procedural grounds (*id.*). The parents asserted that the CSE had not recommended a placement for the student that would provide functional grouping or meet the student's individualized special education needs (*id.*). They further alleged that the district had frustrated the parents' efforts to be involved in their son's education by failing to identify the specific school that to which the student would be assigned while classes were in session and indicated that they did not receive the proposed IEP and placement recommendation until August 11, 2009 (*id.*).⁹ The letter stated that the parents would visit the proposed program when school reopened and make a determination as to whether the school was appropriate for their son (*id.*). The parents requested that the district forward "any and all" information that it had available regarding the other students in the proposed program "in an effort to allow the Parents to make this determination as soon as possible" (*id.*). The parents indicated that a due process complaint notice, describing the nature of the problems with the IEP and/or placement, would follow under separate cover (*id.*).

In a letter to the district dated September 4, 2009, the student's father noted that he had attempted to contact the first assigned school, as outlined in the district's August 7, 2009 letter, but had not received a response to the three messages that he had left with the district's identified contact person (Dist. Ex. 7).¹⁰ According to the student's father, the parents had been unable to

⁹ In early August 2009, the parents received the August 2009 notice of placement and the student's father subsequently attempted to contact the individual listed on the August 2009 letter (Tr. pp. 178-79; Dist. Ex. 7).

¹⁰ A review of the letter shows that it was originally dated "September 8, 2009;" however, the student's father crossed out this date and changed it to "September 4, 2009" (Dist. Ex. 7). A review of the letter further revealed that the student's father initialed the revised date (*id.*).

visit the assigned school and as a result, they were unable to accept or reject the district's recommendation (*id.*). The student's father added that once the parents had visited the assigned school, they would respond to the district's notice accordingly (*id.*). On September 22, 2009, the student's father spoke with the assistant principal from the first assigned school, who advised him that the recommended 12:1 class was filled to capacity at that time (*see* Tr. pp. 137-38; Parent Ex. F). In a second notice to the parents dated September 24, 2009, the district offered a different assigned school to the student (*see* Tr. p. 181; Parent Exs. B at p. 4; G at p. 1).¹¹ By letter dated September 29, 2009, the student's father notified the district that the assistant principal of the first assigned school had advised him that there were no openings in the recommended 12:1 special class (Tr. pp. 230-31; Parent Ex. F).

By letter dated October 1, 2009 to the district, the parents indicated that pursuant to the September 24 notice they had visited the second school assigned by the district, but were unable to accept the recommendation on procedural and substantive grounds (Parent Ex. G at p. 1).¹²

On October 27, 2009, the parents signed a contract enrolling the student in the sixth grade Bridge program at Bay Ridge for the 2009-10 school year (Parent Ex. I at p. 1).

The student attended the Bridge program at Bay Ridge for the 2009-10 school year, where he received the following final grades for his core academic courses: language arts "A," math "A+," science "B+," and social studies "A" (Tr. p. 92; Parent Ex. J). Report cards issued throughout the school year indicated that the student demonstrated progress in decoding and reading comprehension, but that he continued to have difficulty with spelling, written expression, and the mechanics of writing (Parent Exs. J at p. 2; K at pp. 1-2, 5). The student's math teacher reported that word problems and problem solving were a challenge for the student, but that when tasks were broken down and simplified, and the student was provided with support, he could answer problems correctly (Parent Exs. J at p. 3; K at p. 3). The student's science teacher reported that the student had difficulty learning through "aural" instruction and had a tendency to be very literal (Parent Ex. J at p. 3). According to the report cards, Bay Ridge teachers provided the student with accommodations when needed including visual prompts, graphic organizers, scaffolding, directions read and clarified, checks for understanding, support of a speech-language pathologist, and preferential seating (Parent Exs. J at pp. 3-4; K at pp. 2-5). The student's teachers noted that he displayed a strong work ethic (Parent Exs. J at pp. 2-4; K at pp. 2, 4).

Due Process Complaint Notice

By due process complaint notice dated January 21, 2010, the parents asserted that the district failed to offer the student a FAPE for the 2009-10 school year and requested an impartial hearing to adjudicate claims for reimbursement for tuition at Bay Ridge (Parent Ex. A). In a January 28, 2010 response to the parents' due process complaint notice, the district argued that the

¹¹ The September 24, 2009 notice of placement is not included in the hearing record (Tr. p. 150).

¹² The parents reiterated their rejection of the second placement in a letter dated November 5, 2009 (Parent Ex. H).

placement offered by the April 2009 CSE was reasonably calculated to enable the student to obtain meaningful educational benefits (Parent Ex. D at p. 3).

Amended Due Process Complaint Notice

On June 2, 2010, the parents amended their due process complaint notice, to include claims regarding their attempt to visit the first assigned school recommended by the district, their visitation and subsequent rejection of the second assigned school offered by the district and to further reflect their assertion that there was not an opening in the first assigned school for the student at the time of their visit (Parent Ex. B at p. 4). With respect to the provision of a FAPE to the student during the 2009-10 school year, the parents specifically alleged, among other things, that the April 2009 CSE was improperly constituted due to the absence of an additional parent member (*id.* at p. 2). Next, the parents alleged that the April 2009 IEP did contain any academic management needs (*id.*). Turning to the goals and objectives contained in the challenged IEP, the parents described them as generic, vague and not measurable (*id.* at p. 3). With respect to the second assigned school, the parents asserted that it did not offer the student a suitable and functional peer group for instructional and social/emotional purposes (*id.*). The parents further maintained that Bay Ridge was an appropriate placement for the student and equitable considerations favored their request for relief (*id.*).

Impartial Hearing Officer Decision

An impartial hearing convened on September 21, 2010 and concluded on December 16, 2010, after three days of testimony (Tr. pp. 1-286). By decision dated December 28, 2010, the impartial hearing officer awarded tuition reimbursement to the parents for Bay Ridge for the 2009-10 school year (IHO Decision at p. 15).¹³ With regard to whether the district offered the student a FAPE, the impartial hearing officer considered a number of issues and concluded that the parents prevailed for several reasons (*id.* at pp. 4-12). Procedurally, the impartial hearing officer determined that although an additional parent member did not attend the April 2009 CSE meeting and the CSE failed to execute a valid waiver excusing the attendance of an additional parent member, the student was not denied a FAPE as a result of an additional parent member's absence (*id.* at p. 4).¹⁴ However, the impartial hearing officer found that the April 2009 IEP did not accurately reflect and provide for the student's special education needs (*id.* at p. 5). She stated that the April 2009 IEP did not contain academic management skills for the student; however, the impartial hearing officer also took note of testimony by the district representative that they were incorporated into the student's present levels of performance (*id.* at pp. 7-8). Next, the impartial hearing officer found that the goals were "totally inadequate" for the student, who she further characterized as someone who had "significant academic/social needs" (*id.* at p. 8). She went on to describe the goals as generic and further determined that despite the student's deficits in math, the April 2009 IEP lacked math goals to address those needs (*id.*). Moreover, the impartial hearing

¹³ Although the impartial hearing officer explained in her decision that the parents were entitled to tuition reimbursement dating from January 21, 2010, the date of the initial due process complaint notice, through the end of the school year, a review of the hearing record reveals that she awarded tuition reimbursement for the entire 2009-10 school year to the parents (compare IHO Decision at pp. 14-15, with Parent Ex. I).

¹⁴ The impartial hearing officer characterized the April 2009 CSE's failure to secure the attendance of an additional parent member as an "offensive" disregard for parents' rights (IHO Decision at p. 4).

officer concluded that the IEP did not accurately reflect the anxiety exhibited by the student and failed to include strategies to enable the student to make progress with regard to his anxiety (*id.* at pp. 9-10). Next, the impartial hearing officer determined that the district failed to show that it offered the student a suitable placement (*id.*). She noted that the principal testified that there had been a spot for the student at the first assigned school at the beginning of the school year, but that there was no spot available by September 21, 2009 (*id.* at p. 9). However the impartial hearing officer further found that the district failed to offer any evidence at the impartial hearing that the second school identified the September 24, 2009 notice was appropriate for the student and, therefore, concluded that the notice failed to recommend a program that was reasonable calculated to enable the student to make education progress (*id.* at pp. 9-10).

The impartial hearing officer also found that the Bridge program at Bay Ridge was "reasonably calculated for [the student] to receive educational benefits for the 2009-2010 school year and that in fact he did receive those benefits" (IHO Decision at p. 13). Lastly, she concluded that equitable considerations favored the parents' request for relief (*id.*). Specifically, the impartial hearing officer found that the hearing record did not contain evidence showing that the parents had no intention of sending the student to a district school (*id.* at p. 14). She further noted that the parents entered into a tuition agreement with Bay Ridge following their visit to the second assigned school and that they had attempted to visit the first assigned school (*id.*).

Appeal for State-Level Review

The district appeals and requests an order annulling the impartial hearing officer's decision. The district maintains that it offered the student a FAPE during the 2009-10 school year. Specifically, the district contends that the April 2009 IEP was based on sufficient evaluative material. Next, the district alleges that the goals contained in the disputed IEP were adequate to allow the student to make progress. Moreover, although the impartial hearing officer did not make any findings with respect to the measurability of the goals, the district asserts that the April 2009 CSE purposefully decided against setting forth methods of evaluation in the IEP, in order to allow the teacher to determine the method of measurement. The district also argues that the April 2009 IEP was sufficient to address then student's difficulties with anxiety. In addition, although the district acknowledges that the "Academic Management Needs" section on April 2009 IEP was left blank, the district asserts that the failure to complete this section of the IEP did not deprive the student of a FAPE. Next, the district maintains that a placement was available for the student at the first assigned school on the first day of school. Additionally, the district asserts that the parents conceded that the issue of appropriateness of the first assigned school was not an issue at the impartial hearing, and consequently, that the impartial hearing officer precluded any testimony on the appropriateness of the first assigned school. Under the circumstances, the district asserts that no adverse inference should be drawn against it due to its failure to present evidence on the appropriateness of the first assigned school. Turning to the equities, the district argues that the parents should be barred from an award of relief because the parents failed to afford it proper notice of their intent to enroll the student in Bay Ridge. In addition, the district contends that the parents never seriously intended to enroll their son in a district school, given that the student's mother failed to express her concerns regarding the proposed program during the April 2009 CSE meeting. Lastly, the district asserts that the parents could have visited the first assigned school on the first day of school.

In their answer, the parents assert that the student was denied a FAPE during the 2009-10 school year. Regarding the composition of the CSE, the parents allege that they were not offered an opportunity to reschedule the meeting in light of the absence of an additional parent member. In addition, the parents contend that the classroom observation report was not provided to them until the day of the CSE meeting and had it been offered to them in a timely fashion, its contents could have been reviewed and addressed. They also argue that the CSE failed to distill relevant information to its members, which in turn, resulted in a denial of a FAPE. Next, the parents contend that the failure to list the student's academic management needs on the challenged IEP resulted in a deprivation of a FAPE to the student. The parents further argued that the goals listed in the April 2009 IEP were generic and they were not designed to address the student's identified areas of concern. Moreover, the parents disputed the district's allegation that the April 2009 IEP's reading comprehension goals could also address the student's math needs. They further maintained that the CSE was responsible for developing measurable annual goals and including methods of measurement in the resultant IEP. With respect to the district's recommended 12:1 program, the parents contend that it was not appropriate for the student, because, the recommended program would not have placed the student in a special education class with a special education teacher throughout the day.

Additionally, the parents allege that equitable considerations favor their request for relief, in part because, they were not obligated to comply with the Individuals with Disabilities Education Act's (IDEA's) notice requirements because the student had been previously withdrawn from public school. Additionally, the parents maintain that they shared their concerns with the CSE during the April 2009 meeting. They further argue that they attempted to contact the first assigned school, and despite repeated requests, they were denied an opportunity to visit the first assigned school. Lastly, the parents allege that they did not enter into a contract with Bay Ridge until October 2009, when it became clear to them that the district had no intention of offering the student an appropriate placement.

Applicable Standards

Two purposes of the IDEA 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist.

Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

April 2009 IEP

Present Levels of Performance

Turning first to the impartial hearing officer's determination that the IEP did not accurately reflect the student's needs (IHO Decision at p. 5), I note that the parents did not challenge the accuracy of the present levels of performance in their due process complaint notice but instead focused on the adequacy of the goals in the IEP (Parent Ex. at p. 3). State regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; A.B. v. San Francisco Unified Sch. Dist., 2008 WL4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 10-055; Application of a Student with a Disability, Appeal No. 09-140). Assuming, for the sake of argument, that the impartial hearing officer had properly reached the issue, she concluded that the student's IEP failed to accurately reflect the student's needs because the IEP did not mention the student's anxiety (IHO Decision at p. 8); however, the impartial hearing officer's finding is not accurate insofar as the IEP expressly noted that the student sees a therapist for anxiety related issues (Dist. Ex. 2 at p. 4). Additionally, the evidence in the hearing record does not otherwise support the impartial hearing officer's determination that the IEP misidentified the student's areas of need.

Annual Goals

With regard to the parties' dispute over the adequacy of the annual goals, an IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's

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

The impartial hearing officer found that the goals contained in the April 3, 2009 IEP were "totally inadequate", noting that "[o]ne would never know from this IEP what [the student's] needs are other than the generic improve reading comprehension, receptive language skills and expressive language skills with only one generic goal for each" (IHO Decision at p. 8). The impartial hearing officer further found that the IEP lacked math goals despite evidence in the hearing record that the student was struggling in math and also that the recommended counseling goal did not address the student's anxiety (id.).

On appeal, the district maintains that the goals contained in the April 3, 2009 IEP were adequate to allow for the student's advancement and progress; however, as detailed below, I concur with the impartial hearing officer that the goals contained in the April 3, 2009 did not adequately address the student's areas of identified need. The hearing record indicates that as early as third grade the student's school-based support services began to focus on math and writing, as the student was struggling in these areas (Dist. Ex. 5 at p. 10). Although the student performed well on mathematics subtests administered as part of the March 2009 neuropsychological evaluation, the evaluating psychologist reported that the student could become confused by the wording of certain math problems and made organizational errors, and that he could not easily retrieve the correct math facts or calculation strategies on demand (id. at pp. 14, 28). Although the district representative characterized the student as "doing well" in math, the student's math teacher reported that the student was performing at a fourth grade level with respect to calculation and problem solving skills (Tr. pp. 54, 62, 63-64; Dist. Exs. 4 at p. 2; 8). The teacher also noted that the student used his fingers to count, worked at a slow pace and required extra time to complete tasks (Tr. p. 62; Dist. Ex. 4 at p. 2; see Tr. pp. 114-15; 116-17). Furthermore the hearing record indicates that the student was participating in a modified math program at the private school and that he received additional support outside of class, which in part addressed the student's difficulties with math (Dist. Ex. 6 at pp. 4, 6-7; see Tr. pp. 123-24). Testimony by the district representative that the reading comprehension goal included in the student's IEP would address the student's math deficits is unconvincing, as the goal references identifying the elements of a plot and is not related to solving word problems (Tr. p. 45; see Dist. Ex. 2 at p. 6). In the absence of math goals, the April 3, 2009 IEP also does not identify any environmental modifications or human/material resources ("academic management needs") that the district would employ to address the student's math deficits. Given that historically mathematics was one of the student's greatest areas of academic need, and continued to be so, I find that the CSE's failure to develop math goals or identify classroom modifications and supports to assist the student during math resulted in a denial of FAPE. Additionally, this case is distinguishable from those identified by the district in which other goals may have addressed a predominate area of need (see, e.g., Application of a Student with a Disability, Appeal No. 08-064) insofar as the student's deficits in

math were more pronounced and several of the other goals contained in the student's April 3, 2009 IEP are not sufficiently measurable (Dist. Ex. 2 at p. 7).¹⁵

Scope of Claims at the Impartial Hearing

In their amended due process complaint notice, the parents raised a number of claims regarding the challenged IEP and proposed placement (Parent Ex. B at pp. 2-4). However, as set forth herein, a review of the hearing record reflects that during the impartial hearing, counsel for the parents objected to the introduction of evidence with regard to the district's case in chief and agreed to limit the scope of the parents' claims to the single issue of whether the district had a spot available to the student at the first assigned school (see Tr. pp. 146-52).

During the impartial hearing, counsel for the parents indicated that the parents did not indicate any substantive defects with the district's first assigned school (Tr. p. 146). According to the parents' attorney, the parents' only allegation with regard to the first assigned school was that there was no spot for the student (Tr. pp. 146-47). As clarification, the impartial hearing officer then asked the parents' attorney whether or not he wanted the district to present testimony about whether or not a FAPE was offered to the student (Tr. p. 149). The parents' attorney maintained that there was nothing further that was alleged within the due process complaint notice (id.). Following a discussion that took place between the parties off the record, the impartial hearing officer again asked the parents' attorney if their only allegation was that there was no seat available for the student, to which he responded "that is correct" (Tr. p. 150). The impartial hearing officer directed that testimony of the witness be limited to whether a seat was available for the student at the first school assigned by the district (Tr. p. 151). Counsel for the district clarified the scope of the parents' claims as follows:

If indeed the parties are agreeing that the scope of the hearing request, as it concerns [the first assigned school], is that the only complaint is concerning whether a spot was available and the [district] will indeed limit the questioning of this witness as to whether or not a spot was available and when. And that it will not be held against the [district] in their prong 1 case as to whether or not a FAPE was offered due to a lack of testimony regarding things such as functional grouping, etc.

(Tr. pp. 151-52). When asked if he had anything to add to the representations made by district's attorney, counsel for the parents responded that he did not (Tr. p. 152). After concluding testimony with regard to whether a spot was available, the district's case was concluded and the impartial hearing proceeded with the parents' case (Tr. pp. 152-61).

In view of the foregoing evidence, I find that counsel for the parents effectively withdrew any claims raised in the amended due process complaint notice regarding whether the district was required to have a placement in effect for the student other than the first assigned school identified by the district. Under the circumstances, as alleged by the district in its petition, the impartial hearing officer improperly went on to determine that the student was denied a FAPE because of

¹⁵ One of the goals indicated that "[the student] will increase and develop attention span and the ability to stay focused 4 out of 5 times" (Parent Ex. 2 at p. 7).

its continued efforts to identify schools in which the student could attend a 12:1 special class (IHO Decision at p. 10).¹⁶

Availability of Classroom

I will next address the parties' argument regarding whether the district was capable of providing the student with a classroom. The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe v. New York City Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement ... for the beginning of the school year in September'"). However, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; T.Y. v. Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; 584 F.3d 412 [2d Cir. 2009]; Application of a Student with a Disability, 09-082; Application of a Student with a Disability, 09-074; Application of a Student with a Disability, 09-063; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5). The United States Department of Education (USDOE) has noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability,¹⁷ and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).¹⁸ This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement

¹⁶ In particular I strongly disagree with the impartial hearing officer's characterization of the district's efforts to work cooperatively with the parents in the event they wished to avail themselves of a public school placement as "malfeasance" (IHO Decision at p. 10).

¹⁷ See 8 NYCRR 200.6 for New York State's continuum of services.

¹⁸ The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room? (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); 8 NYCRR 200.4(d)(2)(v)(b)(7).

recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]; Application of a Child with a Disability, Appeal No. 07-049).¹⁹

In this case, the district prepared an IEP for the student prior to the beginning of the school year (Dist. Ex. 2). Prior to the beginning of the school year, the district also notified the parents of the school with a recommended 12:1 special class to which the district assigned the student and informed the parents that they had the option of visiting the school (Dist. Ex. 3). Although the evidence shows that on September 22, 2009, the assistant principal advised the student's father that the recommended 12:1 class was filled to capacity, during the impartial hearing, the assistant principal testified that there was a space available for the student on the first day of school (Tr. pp. 142, 231; see Tr. pp. 137-38; Parent Ex. F). The hearing record does not contain any evidence to rebut her testimony. Therefore, based on the hearing record before me, there was a spot available for the student in the first assigned placement on the first day of school.²⁰ Moreover the evidence in the hearing record does not support the conclusion that, had the parents enrolled the student in the public school, the district would have deviated from substantial or significant provisions of an appropriately developed IEP for the student in a material way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

Unilateral Placement

Having determined that the April 2009 IEP was inadequate, I now turn to the appropriateness of Bay Ridge. I note that neither party has appealed the impartial hearing officer's determination that Bay Ridge was reasonably calculated to enable the student to receive educational benefits for the 2009-10 school year (IHO Decision at p. 13). Therefore, that aspect of the impartial hearing officer's decision is final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5]; see Application of a Student with a Disability, Appeal No. 09-095; Application of a Student with a Disability, Appeal No. 09-079; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-013; Application of a Student with a Disability, Appeal No. 08-073; Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application

¹⁹ Although the district offered the parents the opportunity to visit the assigned school, neither the IDEA or State regulations confer upon the parents a right to visit the recommended school and classroom. In general, the IDEA requires parental participation in determining the educational placement of a student (see 34 C.F.R. §§ 300.116, 300.327, 300.501[c]). The U.S. Department of Education's Office of Special Educational Programs (OPSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-097; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-013). Consequently, although the parents may have wished to visit the assigned school, the fact that they were unable to do so while it was closed during summer 2009 did not result in the denial of a FAPE.

²⁰ Additionally, neither the IDEA nor State regulations require a district to maintain a particular classroom opening for a student while the student is enrolled elsewhere in a private school (Application of a Student with a Disability, Appeal No. 11-008 [noting that districts may modify class assignments in light of changing circumstances]).

of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

Equitable Considerations - Notice

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

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

In the instant case, the district first argues that the equities should preclude relief because the parents gave insufficient notice of their intent to enroll the student at Bay Ridge and seek tuition reimbursement for the 2009-10 school year in that their notice failed to specify their concerns surrounding the challenged IEP. Moreover, the student's mother testified that she had participated in 10 or 11 CSE meetings prior to the meeting at issue in this matter (Tr. p. 202). According to the student's mother, she was able to voice her opinion and the CSE elicited her input regarding the April 2009 IEP and proposed program (Tr. p. 203). The student's mother understood at the time of the April 2009 CSE meeting that the CSE recommended a 12:1 classroom for her son, and although she stated that she was not satisfied with this recommendation, there is no indication in the hearing record that the student's mother advised the CSE at the time of the CSE meeting of her dissatisfaction with its recommendation (Tr. pp. 206-08). Additionally, notwithstanding the parents' assertion that they were not required to submit a 10-day notice because the student had been already been placed in a private school, I find that their claim is without merit (Wood v. Kingston City School Dist., 2010 WL 3907829, at *8 [N.D.N.Y. Sept. 29, 2010] [holding that the parent failed to provided appropriate notice of the unilateral placement when the student had previously been placed in a private school]).

By letter dated August 24, 2009, counsel for the parents advised the district that they planned to place the student at Bay Ridge for the 2009-10 school year and seek funding for the placement from the district (Parent Ex. E at p. 1). Although the 10-day notice stated that the IEP and placement denied the student a FAPE on procedural and substantive grounds, counsel for the parents failed to identify the nature of the parents' concerns in the August 2009 letter; and instead advised that their concerns with the IEP would be identified "under separate cover" (see id.). The hearing record further reflects that the parents thereafter did not communicate their concerns regarding the CSE process or the challenged IEP with the district until January 21, 2010, when they commenced their impartial hearing, and over four months after they had unilaterally placed their son at Bay Ridge (Parent Exs. A; I; see Application of the Bd. of Educ., Appeal No. 10-087; Application of a Student with a Disability, Appeal No. 09-083). In light of the foregoing evidence, I find that the parents did not satisfy the notice requirements by informing the district of their concerns with the April 2009 IEP and the CSE process placement prior to placing the student at Bay Ridge for the 2009-10 school year. In the exercise of my discretion, I will annul the portion of the impartial hearing officer's determination which determined that equitable considerations supported the parents' claim (Thies, 2008 WL 344728 at *4).

Conclusion

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated December 28, 2010 that determined that equitable considerations supported the parents' claim for the student's tuition costs at Bay Ridge for the 2009-10 school year is annulled.

Dated: **Albany, New York**
 March 31, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER