The University of the State of New York

The State Education Department
State Review Officer
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No. 11-016

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, Tracy Siligmueller, Esq., of counsel

The Law Offices of 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') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Mary McDowell Center for Learning (MMCL) for the 2009-10 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending MMCL, where she was unilaterally placed by her parents in April 2004 (Tr. p. 274). The Commissioner of Education has not approved MMCL as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as student with a speech or language impairment is not in dispute in this appeal (Dist. Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

Background

The student was initially evaluated by the Committee on Preschool Special Education (CPSE) when she was four years old and subsequently received speech-language services before entering kindergarten (Tr. pp. 272, 307-08). In kindergarten, the student had difficulty learning

the alphabet and letter sounds (Tr. p. 273).[1] As a result, the parents provided the student with private Orton-Gillingham reading tutoring twice per week after school (id.). The student's mother described the student's progress as "really" slow (Tr. pp. 273-74). In second grade, the student transferred to a different elementary school within the district (Tr. p. 273).[2] In addition to tutoring, the parents provided the student with private individual speech-language therapy for ninety minutes per week outside of school (Tr. p. 274). The student's mother reported that despite tutoring and speech-language therapy, the student "still did not make the grades" and in April 2004 (second grade), the parents removed the student from the public school and enrolled her in MMCL (id.). The student remained at MMCL through the 2009-10 school year at issue in this case (eighth grade) (Tr. pp. 274-75, 314).

On December 5, 2006 (fifth grade), a district school psychologist conducted a psychoeducational evaluation of the student as part of a triennial reevaluation (Dist. Ex. 5).[3] As an initial observation, the school psychologist noted that the student presented as friendly and pleasant and was very talkative (id. at p. 2). He reported that during the evaluation the student attempted all tasks and "appeared to want to do well" (id.). Administration by the school psychologist of the Wechsler Abbreviated Scale of Intelligence (WASI) yielded a verbal IQ of 128 (superior), a performance IQ of 139 (very superior), and full scale IQ of 138, which placed the student's overall intellectual functioning in the "[v]ery [s]uperior range" (id.). As assessed by the Woodcock-Johnson III Tests of Achievement (WJ-III ACH), the school psychologist determined that the student's reading skills were at a mid-third grade level and her math abilities at a low-fifth grade level (id. at p. 4). With regard to social/emotional functioning, the school psychologist reported that the results of projective testing indicated that the student "tend[ed] to see the world as others her age" did (id. at p. 2). In addition, he commented that the student did not exhibit difficulties regarding self-esteem or emotional functioning (id.).

On October 27, 2008, as part of the district's annual review/triennial review process, a district special education teacher conducted an observation of the student during her science class at MMCL (Dist. Ex. 6). In her observation report, the special education teacher described the science class as having two teachers and 13 students (id.). The students in the class sat at individual desks aligned in rows as the teachers instructed them using a smart board (id.). The special education teacher reported that the room was wired for sound amplification and the teachers wore microphones during the lesson (id.). According to the district's special education teacher, the student was prepared for class with her binder and daily planner (id.). The special education teacher also reported that the student was an active participant in the lesson and completed all

[1] The hearing record does not indicate whether or not the student was classified during kindergarten, first, and second grades or whether the student received services from the district. The student's mother reported that at the first elementary school the student's speech-language services were "taken away" (Tr. p. 273). She later reported that in second grade "speech was only like once a week" and therefore the student had "additional speech outside" (Tr. p. 274).

[2] The student's mother indicated that the student received a diagnosis of "dyslexia" in second grade as reflected on a neuropsychological report; however, the hearing record did not contain the neuropsychological report or any other related documentary evidence (Tr. pp. 280, 306).

[3] The school psychologist noted that according to the student's March 30, 2006 individualized education program (IEP) the student was classified as having a speech or language impairment (Dist. Ex. 5 at p. 2).

assigned tasks (id.). She further noted that the student did not exhibit any behavioral concerns (id.).

A 21-page MMCL first trimester report dated "September 2008 – June 2009" was prepared for the student during fall 2008 and was divided into sections by subject area (Dist Ex. 10).[4] With respect to "homeroom," the student's teachers indicated that the student arrived promptly to school and easily transitioned into the classroom routine (id. at p. 2). The teachers further indicated that the student was a willing participant in all whole group and small group homeroom activities (id.).

Also as reflected by the report, the student participated in a daily literacy group that addressed skills related to decoding, comprehension, writing, and spelling (Dist Ex. 10 at p. 4).[5] The student's literacy teacher reported that the student was an "incredibly hard worker" and "eager to follow directions and succeed" (id. at p. 5). The literacy teacher also indicated that the student displayed organizational skills, always completed her homework assignments in a timely manner, and actively participated in class activities and discussions (id.). According to the literacy teacher, the student's greatest challenge was her struggle to understand figurative language and implied meaning, which affected the student's ability to make predictions, infer meaning, and participate in discussions about implied meaning (id. at p. 6). The student also struggled with writing, and as noted by the literacy teacher, the student excelled at generating ideas but struggled to express herself in coherent, succinct paragraphs (id.). With respect to reading fluency, the literacy teacher characterized the student's oral reading as "labored" and noted that the student struggled to maintain "fluidity" while reading extended passages, at times due to difficulty with decoding and punctuation, and other times due to stamina (id.). As assessed by the student's literacy teacher, the student read at a mid-sixth grade level with supports (id.). The literacy teacher reported that the student benefited from extra support and structure (id. at p. 5).

According to the math subsection of the MMCL first trimester report, the focus of the student's math class included a series of units on decimals, factoring, and fractions (Dist. Ex. 10 at p. 7).[6] In addition, the students worked on word problems throughout the semester (id.). The student's math teacher reported that the student exhibited strength in math calculation and appeared to "grasp the more abstract and multi-step problems" (id. at p. 8). The math teacher also reported that the student demonstrated a "solid understanding" of adding, subtracting, multiplying, and dividing fractions (id.). According to the math teacher, the student took notes during class, but could become reliant on her notes and had difficulty remembering previously learned information if she had not taken diligent notes (id.). As determined by the student's teacher, the student demonstrated early seventh grade math skills (id.).

The history subsection of the MMCL first trimester report noted that the focus of the student's history class was on the United States government (Dist. Ex. 10 at p. 9). The student's history

[4] It is apparent from the content of the report that it concerned the student's "first trimester" during the 2008-09 school year at MMCL as each of the subsections in the report is labeled "Fall 2008" (Dist. Ex. 10).

[5] The first trimester report indicated that the student attended a literacy group with six other students and one teacher (Dist. Ex. 10 at p. 4). According to the report, the group met daily, Monday through Thursday, for 75 minutes and Friday for 45 minutes (id.).

[6] The report indicated that the student attended a math group with four other students (Dist. Ex. 10 at p. 7). The group met daily, Monday through Friday, for 40 minutes (id.).

teachers reported that the student maintained her attention during class and displayed accurate note taking skills (id. at p. 10). In addition, they reported that the student displayed a strong conceptual understanding of the material and successfully integrated previously learned knowledge when studying related topics (id.). However, the history teachers also observed that the student "frequently ask[ed] for validation of her work" and would infrequently participate in class (id.).

According to the science subsection of the first trimester report, the focus of the student's science class was on the make up of cells (Dist Ex. 10 at p. 11). The student's science teachers reported that the student was organized and completed class and homework assignments in a timely manner (id. at p. 13). They noted that the student was confident during tasks which required her to read aloud from the textbook and that she successfully participated during class lectures and discussions (id.). The teachers indicated that the student continued to require practice and supports related to making predictions and reasonable hypotheses, and understanding the importance of variables within an experiment (id. at p. 11).

As reflected by the current events subsection of the report, the seventh grade current events curriculum introduced students to identifying and analyzing news stories, while exposing students to different forms of media (Dist Ex. 10 at p. 14). According to the student's current events teachers, the student often volunteered to answer questions pulled directly from homework but was less likely to respond to questions that required critical thinking (id. at p. 15). In media literacy, the student's teachers indicated that the student maintained "close attention" and displayed "thorough" note taking abilities (id. at p 17). However, they also noted that at times the student's note taking interfered with her participation in group discussions (id.).

An MMCL speech and language report dated "Fall Trimester 2008" indicated that the student received one 40-minute session of speech-language therapy per week in a group of three (Dist. Ex. 7 at pp. 1-2). The speech-language pathologist noted that the student participated in a discourse program designed to assist the student in developing strategies needed for effective communication (id. at p. 1). Students in the group received practice in word retrieval skills, organizing and sequencing directions, and providing accurate information (id. at p. 2). The speech-language pathologist explained that as part of the discourse program, students were provided with the opportunity to lead a speech-language session (id.). According to the speech-language pathologist, when it was her turn with prompting, the student instructed the therapy group with appropriately sequenced directions, as well as relevant and accurate information (id.). The speech-language pathologist opined that the student required continued practice with supports for the purpose of giving instructions clearly, articulating goals and purpose, clarifying information, answering questions about a specific topic, and assessing audience comprehension, among other things (id. at p. 1). The speech-language pathologist indicated that the student's upcoming speech-language therapy sessions would target expressive and pragmatic language skills (id. at p. 2).

A winter 2008-09 MMCL report provided information regarding the student's academic and social/emotional progress (Dist. Ex. 8). The report described the student as a "creative, caring, serious, and hardworking student" (id. at p. 1). The report further noted that academically the student demonstrated many strengths, which allowed her to be successful; including a strong work ethic and an "unrelenting" desire to succeed (id.). With regard to the student's academic needs, the report indicated that the student exhibited delays in language processing, memory, and critical thinking (id.). According to the report, the student's "difficulties with language processing ma[de] classes in which she encounter[ed] new language on a day to day basis a struggle and many of her

teachers noted her reluctance to participate" (id.). The student's teachers addressed her language delays by presenting material using multiple modalities, limiting the use of language, and breaking down complex thoughts into manageable pieces (id.). The report indicated that although the student was increasingly willing and able to analyze material presented in literacy class, this success had not carried over to the student's other subject areas (id.). According to the report, the student's struggle to think critically was highlighted by many of her teachers as one of her greatest challenges (id.). The report also indicated that the student associated success with the ability to memorize facts and, as such, had become a "voracious note taker" (id. at p. 2). However, the report characterized the student's note taking as a "coping strategy" that did not address the "greater issue at hand" (id.). The report noted that the student would be encouraged to become a more critical thinker rather than relying on notes (id.).

On April 30, 2009, the Committee on Special Education (CSE) convened for the student's annual review and to develop her individualized education program (IEP) for the 2009-10 school year (Dist. Ex. 3). Meeting participants included a school psychologist (who also acted as district representative), the parents, a district regular education teacher, and one of the student's teachers from MMCL who participated in the meeting by telephone (id. at p. 2; see Tr. pp. 95-96).[7] According to the district's regular education teacher who attended the April 2009 CSE, the CSE participants reviewed documents prior to the meeting including the district's October 2008 classroom observation, the district's December 2006 psychoeducational evaluation, the 2008 MMCL fall trimester speech and language report, the MMCL winter 2008-2009 progress report, the student's physical examination report, and the MMCL September 2008-June 2009 first trimester report (Tr. pp. 94-95; Dist. Exs. 5-10).

The April 2009 CSE discussed the student's needs and developed a statement of present levels of performance in the areas of academic and functional performance, social/emotional performance, and health and physical development (Dist. Ex. 3 at pp. 3-5; see Tr. pp. 98-99, 107-111). According to the resultant IEP, the student's academic management needs included graphic organizers, outlines, "story-starters," preferential seating, and a multisensory approach to learning, visual cues, verbal cues, and manipulatives (Dist. Ex. 3 at p. 3). The April 2009 IEP contained nine annual goals in the areas of reading, writing, spelling, and math as well as receptive, expressive, and pragmatic language (id. at pp. 6-7). The April 2009 IEP also included testing accommodations which provided for extended time (2.0) and a separate location (id. at p. 9).

The April 2009 CSE determined that the student was eligible for special education and related services as a student with a speech or language impairment, and recommended that the student be placed in a 12:1 special class (Dist. Ex. 3 at p. 1). The April 2009 CSE considered recommending an integrated co-teaching (ICT) class, but determined that such a placement would be too large, especially given the student's auditory processing delays (id. at p. 12). The CSE also considered a 12:1+1 special class for the student, but determined that the placement would not meet the student's academic and behavioral needs, and would be too restrictive (id.).

The district issued a final notice of recommendation (FNR) to the parents dated June 24, 2009 (Dist. Ex. 4). The June 2009 FNR indicated the student's classification and summarized the

[7] The parents signed a letter indicating that they declined the participation of an additional parent member at the April 30, 2009 CSE meeting (Dist. Exs. 3 at p. 2; 11).

placement recommendation made in the April 2009 IEP (id.).[8] The notice also identified the name of the school to which the district assigned the student (id.).

In a letter to the CSE dated August 24, 2009 the parents, through their attorney, notified the district that they would be placing the student at MMCL and seeking funding from the district for tuition at the unilateral placement (Parent Ex. A at p. 1). In the letter, the parents contended that because the FNR had been sent to the parents at the end of June, they were unable to visit the assigned school (id.). The parents identified their concerns with the recommended program including that the April 2009 CSE was not properly composed, there was a "lack of objective evaluations", the goals in the student's IEP were inadequate, and there was a "policy" of lowering promotional criteria (id.). The parents stated that once they were provided the opportunity to visit the assigned school and "assess its suitability," they would determine if it was appropriate and either place the student there or file a due process complaint notice (id.).

Due Process Complaint Notice

In a due process complaint notice dated November 18, 2009, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) during the 2009-10 school year and requested reimbursement for the student's tuition at MMCL (Dist. Ex. 1). The parents alleged that the April 2009 CSE was improperly constituted because the person attending as the district regular education teacher did not comply with the federal or State requirements for CSE membership, there was no school psychologist or district representative at the CSE meeting, and the parents had been inappropriately required to waive their right to have an additional parent member present at the meeting (id. at pp. 2-3). The parents next contended that the CSE failed to use "objective measures or assessments" to determine the student's current levels of functioning and failed to perform an adequate evaluation of the student prior to recommending a change in placement (id. at p. 4). The parents also alleged that the CSE erred in lowering the promotional standards for the student and that the student would not have been properly grouped for instructional and social/emotional purposes at the assigned school (id. at pp. 4-5).

In a response dated November 24, 2009, the district identified the information upon which the CSE relied to develop the April 2009 IEP and asserted that it had offered the student a placement that was reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 2 at pp. 1-4).

Impartial Hearing Officer Decision

An impartial hearing convened on May 11, 2010, and concluded on December 9, 2010, after three days of testimony (Tr. pp. 1, 88, 221). During the impartial hearing, the district called 3 witnesses and entered 11 documents into evidence (Tr. pp. 7, 45, 91; Dist. Exs. 1-11). The parents called 3 witnesses and entered 20 documents into evidence (Tr. pp. 142, 192, 272; Parent Exs. A-T).

[8] According to the April 30, 2009 IEP, the student was classified as having a speech or language impairment (Dist. Ex. 3 at p. 1). However, the district's June 24, 2009 FNR erroneously listed the student's classification as a "learning disability" (Dist. Ex. 4).

In a written decision dated January 10, 2011, the impartial hearing officer summarized the evidence and testimony entered by the parties into the hearing record, summarized the positions of the parties, and set out the applicable law (IHO Decision at pp. 2-14, 23). The impartial hearing officer rejected the parents' arguments that the district failed to offer the student a FAPE because the April 2009 CSE was improperly composed, failed to appropriately evaluate the student, and erred in lowering the student's promotional criteria (id. at pp. 14-15). Next, the impartial hearing officer found that the district failed to offer the student a FAPE during the 2009-10 school year for the following reasons: (1) the CSE did not have a sufficient basis to change the student's recommended placement from a 12:1+1 placement to a 12:1 placement because the evidence showed that the student was performing well in the private 12:2 program at MMCL, the district impermissibly relied on the estimates of her teachers as the sole basis for determining the instructional levels on the April 2009 IEP, none of the other evaluations relied upon by the CSE recommended the change in placement , and the change in placement appeared to be based on the district's need, not the student's; (2) the district should have considered providing transitional support services for the student, especially given the recommended change in program; (3) the parents were denied a meaningful opportunity to participate in the district's decisions on how to implement the student's IEP by failing to offer the parents an opportunity for a "placement meeting" to discuss the particular school the student would attend, which allegedly violated a stipulation that addressed issues arising in a federal court action;[9] and (4) the 12:1 special class recommended by the district was not appropriate for the student because the student would not have been appropriately grouped with students having similar needs and functional abilities (id. at pp. 14-19).

Next, the impartial hearing officer determined that the parents met their burden of proving that MMCL was an appropriate placement for the student for the 2009-10 school year, as it was not overly restrictive and there was sufficient evidence that the student made progress; and equitable considerations did not preclude an award of tuition reimbursement to the parents (IHO Decision at pp. 19-21). The impartial hearing officer also decided that equitable considerations did not preclude an award of tuition reimbursement to the parents (id. at pp. 21-23). Therefore, the impartial hearing officer granted the parents' request for tuition reimbursement for the student's 2009-10 school year at MMCL (id. at pp. 22-23).

Appeal for State-Level Review

This appeal by the district ensued. The district argues that the impartial hearing officer erred in finding that it failed to offer the student a FAPE during the 2009-10 school year. Specifically, the district contends that the impartial hearing officer erred insofar as the 12:1 program recommended in the student's IEP was appropriate because the CSE team properly concluded that a 12:1 class in a community school would provide the student with educational benefits, although the student was not yet on grade level she had made recent academic gains, and the student had no social/emotional behavior issues and therefore did not require an additional adult in class. The district also contends that the student's placement in the recommended class at

[9] See Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 (E.D.N.Y. Jan. 5, 1982) aff'd 669 F.2d 865 (2d Cir. 1982).

the assigned school would have been appropriate because she would have been suitably grouped academically, and other students in the class had similar goals and concerns.

Regarding the impartial hearing officer's determination that the failure to offer the parents a "placement meeting" denied the student a FAPE, the district contends that its placement offer was timely, and did not violate the stipulation settling the Jose P. case (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982] aff'd Jose P. v. Ambach, 669 F.2d 865 [2d Cir. 1982]) because: (1) the district's FNR dated June 24, 2009 was timely; (2) the student was not a part of the Jose P. class because she was timely evaluated and offered a placement; and (3) the impartial hearing officer erred in reaching this issue because it was not raised by the parents in their due process complaint notice or at the impartial hearing. The district also argues that there was no violation of the requirement in the federal regulations that the parents be "a member of any group that makes decisions on the educational placement of [their] child," because "educational placement" refers only to the educational program to be offered to the student and not the physical school site where the program will be implemented.

Lastly, the district contends that the parents have not met their burden to show that the unilateral placement at MMCL was appropriate, because the placement was too restrictive and did not provide the student with speech-language therapy. The district further contends that equitable considerations do not favor reimbursement in this case because the hearing record demonstrates that the parents never seriously considered a placement in a public school as evidenced by their execution of a contract with MMCL prior to the CSE meeting and receipt of a placement recommendation.

In their answer, the parents contend that the impartial hearing officer appropriately conducted the impartial hearing, weighed the evidence, made credibility determinations upon hearing the testimony first hand, and issued a decision that complied with all statutory and regulatory requirements and reached the correct result. The parents also argue that the cases cited by the district in the petition are "irrelevant to the instant matter, are not related to the instant matter and are neither binding nor precedential." The parents request that the district's petition be dismissed.[10]

Applicable Standards

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]).

[10] In their answer the parents also assert that the district has failed to state a claim upon which relief may be granted. However, the petition clearly sets forth the reasons why the district is challenging the impartial hearing officer's decision and the relief that the district is seeking upon review (see 8 NYCRR 279.4). Accordingly, I will not dismiss the petition for review.

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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, but school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides

for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra., 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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

Discussion

Initially, I note that the parents have not cross-appealed any of the impartial hearing officer's determinations relating to the evaluation of the student, CSE composition, or promotional criteria that were rendered against them. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, these issues are not properly before me and I decline to address them.

2009-10 IEP − 12:1 Special Class Placement

Regarding the district's contention that the impartial hearing officer erred insofar as he found that the 12:1 special class on the student's April 2009 IEP was an appropriate placement recommendation; based upon an independent review of the evidence contained in the hearing record, I disagree with the impartial hearing officer's determination that the district failed to offer the student a FAPE during the 2009-10 school year.

In developing the placement recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or

district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. §§ 34 C.F.R § 300.116, 300.324[a]; 8 NYCRR 200.4[d][2]).

State regulations require that the CSE must indicate on an IEP the recommended special education placement and services from a continuum of services set forth in the State regulations and the class size of the recommended placement, if appropriate (8 NYCRR 200.4[d][2][v][a][b]; see 8 NYCRR 200.1[qq], [ww], [bbb] [defining special education, related services, and supplementary aids and services]; 200.6 [regarding the continuum of special education placements for non-preschool students]; 200.16[i] [regarding the continuum of services for preschool students]; see 34 C.F.R. §§ 300.39[a][1][i], 300.115; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419, cert. denied, 130 S. Ct. 3277 [2010]). The State regulations further mandate that the recommended special education programs and services are selected in order for the student to advance appropriately toward attaining the annual goals in the student's IEP, to be involved and progress in the general education curriculum to the extent appropriate, and to be educated and participate with other students with disabilities and non-disabled students in academic and nonacademic activities (8 NYCRR 200.4[d][v][a][1-3]; see 34 C.F.R §§ 300.114, 300.320[a][4]). Among other things, an IEP must also include the date of initiation of the program and services, the anticipated frequency, duration and location for each of the recommended programs and services, any assistive technology devices or services the student requires, a statement of any individual testing accommodations, and whether the student is eligible for 12-month special services and/or programs (8 NYCRR 200.4[d][v][b], 200.4[d][vi], 200.4[d][x]).

Prior to the April 2009 meeting, the CSE participants reviewed the district's October 2008 classroom observation, the district's December 2006 psychoeducational evaluation, the 2008 MMCL fall trimester speech and language report, the MMCL winter 2008-2009 progress report, the student's physical examination report, and the MMCL September 2008-June 2009 first trimester report (Tr. pp. 94-95; Dist. Exs. 5-10). At the impartial hearing, the district's regular education teacher testified that the April 2009 CSE members considered information provided by the student's parents and MMCL teacher regarding the student's academic delays and instructional levels in reading, writing, and math (Tr. pp. 98-99, 107-111; Dist. Ex. 3 at p. 3). According to the regular education teacher, the CSE developed annual goals, provided academic strategies, and recommended speech-language therapy services based on the information provided by the parents and the student's MMCL teacher (Tr. pp. 99, 104-07). In addition, the regular education teacher testified that the parents and the student's MMCL teacher did not object to the program accommodations and related services recommended by the April 2009 CSE (Tr. pp. 104-07).

I find that the information provided at the CSE meeting by the participants and in the evaluative documents supported the recommendation of the April 2009 CSE for a 12:1 special class for the student (Dist. Exs. 5-10). The MMCL September 2008-June 2009 first trimester report provided detailed information regarding the student's abilities in the areas of organization, behavior, social skills, literacy, and math (Dist. Ex. 10). The first trimester report indicated that the student transitioned well into her morning homeroom routine and between classrooms (id. at p. 2). In addition, the student was prepared for her upcoming classes and maintained an organized binder (id.). The first trimester report indicated that she participated in both whole group and small group class activities and maintained friendships with other students (id.). The student's literacy teacher described her as an "incredibly hard worker" who was "eager to follow directions and succeed" (id. at p. 5). The literacy teacher also indicated that the student completed her homework in a timely manner and actively participated in class activities and discussions (id.). The student's

math teacher at MMCL reported that the student demonstrated a strong ability to solve math computations and appeared to grasp abstract and multi-step problems (id. at p. 8).

I also find that the information provided in the MMCL winter 2008-2009 progress report, October 2008 classroom observation, 2008 MMCL fall trimester speech and language report, and the district's December 2006 psychoeducational evaluation all supported the recommendation of the CSE for a 12:1 special class for the student (Dist. Ex. 8 at pp. 1-3). In the 2008-09 winter progress report, the student's MMCL teachers reported that she demonstrated a strong work ethic and an "unrelenting desire to succeed" (id. at p. 1). For example, the student frequently checked with her teachers to verify her completion of assignments and she completed her class and homework in a thorough and timely manner (id.).

The district's October 2008 classroom observation reflected that the student was an active participant in her science class, which consisted of two teachers and 13 students (Dist. Ex. 6). In addition, the observation report reflected that the student displayed no behavioral concerns, completed all tasks requested by the teacher, and was prepared for class (id.). In the 2008 MMCL fall trimester speech and language report, the speech-language pathologist reported that the student was engaged, cooperative, and participated during therapy sessions (Dist. Ex. 7 at pp. 1-2).

In the district's December 2006 psychoeducational evaluation, the school psychologist reported that the student demonstrated cognitive abilities within the superior to very superior range as measured by the WASI (Dist. Ex. 5 at p. 2). The school psychologist further reported that the student related well with peers and school staff (id.). The school psychologist indicated that the student demonstrated no self-esteem or emotional concerns (id.). The school psychologist reported that the student's overall reading score fell at the mid-third grade level and her performance in math fell at the fifth grade level when the student was in fifth grade (id. at p. 3).

The student's MMCL teacher provided the student's instructional grade levels in the areas of reading, writing, and math at the April 2009 CSE meeting (Tr. p. 100; Dist. Ex. 3 at p. 3). At the time of the April 2009 CSE meeting, the parents did not disagree with the student's instructional levels as presented by the student's MMCL teacher, and there is nothing in the hearing record that reflects that the instructional levels were inaccurate at that time (Tr. p. 104).

Additionally, the testimony of the district's regular education teacher indicated that the student did not exhibit difficulties with social/emotional functioning or behavior that would require the assistance of an additional adult in the classroom (Tr. pp. 98, 135-36).

The hearing record shows that at MMCL the student received instruction in all subjects from two teachers in a group of 12 to 14 students, with the exception of the literacy and math groups (Tr. pp. 149-50, 167-68, 211-13). According to a special education teacher at the assigned school, instruction was provided to the students in his 12:1 class in small groups based on the students' academic and social/emotional functioning levels (Tr. pp. 13-14).

The April 2009 CSE recommended that the student attend a 12:1 special class in a community school for the 2009-10 school year (Dist. Exs. 3 at p. 1; 4). The district's regular education teacher testified that the 12:1 special class was an appropriate placement for the 2009-10 school year because the student demonstrated "great strength with her academics" (Tr. p. 98). The regular education teacher further testified that although the student continued to demonstrate

academic delays, she also continued to demonstrate progress in both her academic and social/emotional functioning (id.). The CSE also recommended speech-language therapy as a related service on the student's 2009-10 IEP to address the student's receptive, expressive, and pragmatic language delays (Tr. pp. 106-07; Dist. Ex. 3 at pp. 7, 13). The hearing record reflects that the parents agreed with the CSE's recommendation for speech-language therapy (Tr. pp. 107, 310). The special education teacher at the assigned school testified that based on the student's IEP, present levels of performance, and annual goals, the student would have obtained meaningful educational benefit from the recommended program (Tr. pp. 20-21). The student's mother testified that both parents were provided an opportunity to participate and provide input during the April 2009 CSE meeting (Tr. p. 308).

Based upon a careful review of the evidence contained in the hearing record, I conclude that, with respect to the 12:1 special class placement challenged by the parents, the April 2009 IEP proposed for the 2009-10 school year was premised upon evaluative material that was sufficiently comprehensive to identify the student's special education and related services needs and accurately reflected the results of the evaluative material (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe, 2008 WL 2736027, at *6; see Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Additionally, I conclude that the April 2009 CSE's decision to recommend a 12:1 special class setting was reasonably calculated to enable the student to receive educational benefits in the LRE and that the district did not fail in its obligation to offer the student a FAPE as a result of its educational placement recommendation (see Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Assigned School

A district must have an IEP in effect at the beginning of each school year for each student with a disability in its jurisdiction (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6; Application of the Bd. of Educ., Appeal No. 10-006; Application of a Student with a Disability, Appeal No. 09-111; Application of a Student with a Disability, Appeal No. 08-157; Application of a Student with a Disability, Appeal No. 08-088). I note that in this case, the parents decided to unilaterally place the student at MMCL prior to the time that the district was required to implement the IEP in September 2009 (Parent Ex. A). A meaningful analysis of the parents' claims with regard to the functional grouping of the student in the public school placement would require me to determine what might have happened had the district been required to implement the student's IEP. However, I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y., 584 F.3d at 420). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

In this case, the issue regarding functional grouping within the classroom identified in the June 2009 FNR is in part speculative because in August 2009 it became clear that the parents would not accept the services recommended by the district in the IEP and that they intended to enroll the student at MMCL (Parent Ex. A). If the student had attended the school identified in the June 2009 FNR, it is unclear whether the district would have attempted to adjust classroom assignments to comply with the functional grouping requirements, sought a variance to the requirements in accordance with State regulations, or done nothing. Insofar as the parents did not accept the recommendations of the CSE or the program offered by the district, I note that the hearing record, in its entirety, does not support the conclusion that, had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192; 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, 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]). However, I also note that in considering alternative placements on the continuum of special education settings when recommending an IEP for the student, the CSE determined that an appropriate peer group would not be available for the student in a 12:1+1 special class (Dist. Ex. 3 at p. 12). Accordingly, since it is set forth on the student's IEP, it is appropriate in this instance to review the evidence in the hearing record regarding functional grouping.

Functional Grouping

The district alleges that the impartial hearing officer incorrectly concluded that the student would not have been suitably grouped in the assigned 12:1 special class. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]–[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]). However, State regulations do not preclude a grouping of students in a classroom when the range

of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. Of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

The hearing record reflects that during the 2009-10 school year, when the student would have been in eighth grade, she was recommended to attend a 12:1 special class with approximately seven other students (Tr. pp. 9-10). The special education teacher of the 12:1 special class at the assigned district school testified that he modified the curriculum based on the individual needs of the students (Tr. p. 25). The special education teacher further testified that the students' reading levels ranged from third to eighth grade, with most of the students at a sixth grade level (Tr. p. 12). The special education teacher testified that the student's academic functioning level reflected on the April 2009 IEP fell "in the middle," in comparison to the students in the 12:1 special class (Tr. pp. 20-21, 25). He further testified that instructional groups within the class were based on the students' academic and social/emotional functioning levels and that the small group arrangements were modified over the course of the school year based on student success (Tr. pp. 13-14). Both daily informal assessments and weekly formal assessments were completed by the special education teacher in order to tailor instruction so as to address a student's individual functioning level (Tr. pp. 17-19).

Based on the evidence in the hearing record, I am not persuaded that the district would have been unable to suitably group the student for instructional purposes within the 12:1 special class recommended on the IEP (see M.P.G., 2010 WL 3398256, at *10-*11 [noting that student was not denied a FAPE when the hearing record showed that the student was suitably grouped for instructional purposes]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 290-292 [S.D.N.Y. 2010] [holding that a district did not fail to offer a FAPE because the student could have been functionally grouped with other similarly-aged students within the class who had sufficiently similar instructional needs and abilities in both reading and math]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]). Additionally, even assuming for the sake of argument that the district would have failed to implement the student's IEP in accordance with the functional grouping requirement in State regulations, based on the forgoing evidence, I am not convinced in this instance that this violation would rise to the level of a denial of a FAPE.

Placement Meeting

Turning next to the district's contentions that the impartial hearing officer erred in determining that the district failed to hold a "placement meeting," improperly determined, sua sponte, that the student was a member of a federal class action suit and that the district violated a stipulation related to that suit, I note that 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]). Under the IDEA, a placement team, which is a group of persons including the parents, who are knowledgeable about the child, the meaning of the evaluation data, and the placement options; is responsible for selecting an educational placement that is consistent with the student's IEP (see 34 § CFR 300.116). Although not required under federal law, certain states such as New York permissibly assign this function to the "IEP team" or, in other words, the CSE (see 8 NYCRR

200.4[d][2]−[4]).[11] However, the assignment of a particular school may be an administrative decision, provided that it is made in conformance with the CSE's educational placement recommendation (Letter to Veasey, 37 IDELR 10 [OSEP 2001]). The Second Circuit has established that "'educational placement' refers to the general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; 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]). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII], 34 C.F.R. § 320[a][7], 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20). In this case, the evidence in the hearing record shows that the parents had input into and participated in developing the student's IEP, which, as discussed above, included the student's educational placement recommendation. Therefore, I find that the impartial hearing officer's decision that the district violated the federal regulations by failing to hold a placement meeting was incorrect.

The impartial hearing officer further erred by premising his findings upon a purported violation of a stipulation in a class action suit, Jose P. v. Ambach (553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982] aff'd 669 F.2d 865 [2d Cir. 1982]). I note that the parents did not raise this issue in their due process complaint notice or during the course of the impartial hearing (Dist. Ex. 1; see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *6 [S.D.N.Y. Mar. 15, 2011]). Accordingly, I find that the impartial hearing officer exceeded his jurisdiction by basing his decision on issues that he raised sua sponte in his decision that were not identified in the parents' due process complaint notice. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at an impartial hearing (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an impartial hearing officer has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the impartial hearing officer to raise issues that were not presented by the parties and then base his or her determination on the issues raised sua sponte. The impartial hearing officer should have confined his determination to issues raised in the parents' due process complaint notice (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5 [i][7][i], [j][1][ii]; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019;

[11] Although no longer formally applicable, this point was also addressed by the United States Department of Education in federal regulations implementing IDEA 1997, which explained that it was permissible to use the IEP team as the placement team (see prior 34 C.F.R. Part 300, Appendix A, Question 37 [implementing the Individuals with Disabilities Act Amendments of 1997, Pub.L.No.105-17, 111 Stat. 37 amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub.L.No.108-446, 118 Stat. 2647]).

Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

Moreover, even if the issue had been identified in the due process complaint notice or the parties had agreed to expand the scope of the impartial hearing, jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services, 364 F.3d 925 [8th Cir. 2004]; M.S. v. New York City Dep't of Educ., 734 F.Supp. 2d 271, 279 [E.D.N.Y. 2010]; E.Z. v. New York City Dep't of Educ., 2011 WL 207974 *5 [S.D.N.Y. Jan. 24, 2011]). No provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency or a local educational agency to sit in review of or resolve disputes over injunctions or consent orders issued by a judicial tribunal. Consequently, neither the impartial hearing officer, nor I for that matter, have jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a District Court, or the appropriate remedy for the alleged violation of the order (R.K. v. New York City Dept. of Educ., 2011 WL 1131492, at *17 n.29 [E.D.N.Y. Jan. 21, 2011] adopted at 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]; W.T., 716 F. Supp. 2d at 289–90 n.15; see M.S. v. New York City Dept. of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010] [addressing the applicability and parents rights to enforce the Jose P. consent order]; Levine v. Greece Cent. School Dist., 2009 WL 261470, *9 [W.D.N.Y. 2009] [noting that the Second Circuit has consistently distinguished systemic violations such as those in Handberry v. Thompson (436 F.3d 52 [2d Cir. 2006]) and Jose P. to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators]; Application of a Student with a Disability, Appeal No. 10-115; see also R.E., 2011 WL 924895, at *12; E.Z.-L. v. New York City Dept. of Educ., 2011 WL 207974, at *5 [S.D.N.Y. Jan. 24, 2011]; Dean v. School Dist. of City of Niagara Falls, 615 F. Supp. 2d 63, 70 [W.D.N.Y. 2009]).[12] Accordingly, I find that the impartial hearing officer reached an issue sua sponte over which he lacked jurisdiction and, therefore, I will annul that portion of his decision which ruled on the applicability of the consent order (Application of a Child with a Disability, Appeal No. 07-130).

Accordingly, I find that the impartial hearing officer erred in finding that the district's failure to offer the parents a placement meeting resulted in a denial of a FAPE to the student.

Conclusion

Having determined that the district offered the student a FAPE for the 2009-10 school year, it is not necessary to reach the issue of whether MMCL was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v.

[12] Nothing precludes the parties to an administrative due process proceeding from developing a hearing record with regard to the individual needs of a student and asserting arguments regarding appropriate relief, which may, in some cases, be similar to the relief granted to individual plaintiffs in Jose P. (Application of a Student with a Disability, Appeal No. 10-115). However, no such hearing record was developed in this case, nor did the parents seek such relief.

Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated January 10, 2011 which determined that the district failed to offer the student a FAPE for the 2009-10 school year and ordered the district to pay for the student's tuition costs at MMCL is annulled.

Dated: **Albany, New York**
April 13, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER