



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-075

**Application of the [REDACTED] 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, G. Christopher Harriss, Esq., of counsel

Law Office of Anton Papakhin, attorney for respondents, Anton Papakhin, 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 IVDU/Beacon School (Beacon) for the 2007-08 school year. The appeal must be sustained.

At the time of the impartial hearing in April and June 2008, the student attended the third grade at Beacon where she had been enrolled by her parents since the 2004-05 school year (Tr. pp. 104, 115; Parent Ex. I). Beacon is not approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7; Parent Ex. I). The student's eligibility for special education programs and services as a student with mental retardation is not in dispute in this proceeding (Tr. p. 4; Dist. Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

The hearing record is sparse regarding the student's educational history. The student exhibited developmental and behavioral difficulties since early childhood and attended a private preschool program for one year when she was approximately three years old (Tr. pp. 99-103). During the 2003-04 school year, the student attended kindergarten at a district elementary school

in a class comprised of approximately 13 students (Tr. pp. 100-01).<sup>1</sup> For the 2004-05 school year, the student attended a district program at a community school in a class comprised of seven students, one teacher, and an "assistant" (Tr. pp. 101-03). The hearing record indicates that a teacher from that district program informed the parents that the student could not remain focused, was "all over the place in the classroom," and was biting other individuals (Tr. p. 102). According to the parents, the student "aged out" of the district program at the end of the 2004-05 school year, but the district failed to recommend a placement for the 2005-06 school year; therefore, the parents privately placed their daughter at Beacon (Tr. pp. 103-04). The district reportedly failed to recommend a placement for the student for the 2006-07 school year as well (Tr. p. 103).

A November 30, 2006 progress report from the student's teacher at Beacon indicated that the student was attending a special education class comprised of seven students and that she exhibited factual and processing skills at a beginning first grade level (Dist. Ex. 4). In reading, the student was working on phonemic awareness, decoding, language processing and consonant-vowel-consonant words (*id.*). The progress report indicated that she had difficulty when assessing new information and needed constant repetition, as well as, a multisensory approach during instruction (*id.*). In mathematics, the student was able to add up to the number five with the aid of manipulatives (*id.*). Her handwriting was described as having poor spacing and sizing and an overall legibility of "poor" (*id.*). The student's teacher reported that due to the student's "severe language processing challenges" she had difficulty processing directions, as well as, difficulty verbalizing her needs when she felt academically and socially challenged (*id.*). At times, the student screamed and became physically aggressive rather than verbally expressing her needs (*id.*). The progress report indicated that due to the student's short attention span and difficulty focusing on a lesson, she became frustrated and started "act[ing] out," thereby disturbing her classmates and the classroom routine and that this behavior interfered with the learning of her classmates (*id.*)<sup>2</sup>. According to the progress report, the student lacked appropriate play and social skills and would become very possessive over a toy or game which was meant to be shared, or would engage in behaviors such as pushing another child away or shouting (*id.*). The teacher reported that these behaviors caused the student's classmates to avoid her during play situations and indicated that the student required constant teacher supervision and intervention during both structured and unstructured classroom activities (*id.*).

On January 24, 2007, the district's school psychologist conducted a psychoeducational evaluation of the student, who was nine years old, as part of an "annual review" (Dist. Ex. 2). The psychologist noted that during the testing session, the student was attentive and cooperative; attempted all of the test items presented; appeared to have difficulty understanding complex directions, which needed to be repeated or rephrased; had articulation difficulties and appeared to be "somewhat immature" (*id.* at pp. 2, 5). The evaluator administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) which yielded a full scale IQ score of 42, a verbal comprehension index score of 47, a working memory index score of 50, a perceptual reasoning index score of 51, and a processing speed index score of 56; all determined to be in the

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<sup>1</sup> The hearing record is unclear whether the student attended a general education or special education program in kindergarten (Tr. p. 100).

<sup>2</sup> The hearing record reflects that the student's attending deficits and behavioral difficulties have been successfully managed by medication since approximately November 2007 (Tr. pp. 150-51).

deficient range (*id.* at pp. 2-3, 6). The school psychologist also administered the Woodcock Johnson Tests of Achievement, Third Edition (WJ-III ACH), which yielded standard (and grade equivalent) scores of 42 (<K.8) in broad reading, 63 (K.8) in broad math, and 56 (1.0) in broad written language (*id.* at pp. 3-5, 6). The Vineland Adaptive Behavior Scales (VABS)-Interview Edition as completed by the student's mother, yielded an adaptive behavior composite of 53 (0.1 percentile) and standard subtest scores in the communication, daily living skills and socialization domains that the school psychologist opined were "delayed compared to what [was] expected for a child her age" (*id.* at pp. 3, 7). The school psychologist noted that the student's adaptive behavior scores were consistent with her achieved scores in the areas of cognitive and academic functioning (Tr. p. 89).

On February 26, 2007, the Committee on Special Education (CSE) convened for the student's triennial review and to develop her individualized education program (IEP) for the 2007-08 school year (Tr. pp. 60, 78; Dist. Ex. 1 at p. 3). Participants included the student's mother, the district representative who was also the social worker, a district regular education teacher, the district's school psychologist who performed the January 2007 evaluation, and a special education teacher from Beacon (Tr. pp. 60, 78-79; Dist. Ex. 1 at p. 3). The CSE considered the January 2007 psychoeducational evaluation, a progress report from the student's teacher, and reports from the student's related service providers (Tr. p. 61; *see* Dist. Exs. 2; 4). Based on the results of the administration of the WISC-IV in January 2007, the CSE changed the student's eligibility classification from speech or language impairment to mental retardation, which was agreed to by all the meeting participants (Tr. pp. 62, 79-80; *see* Parent Ex. A at p. 1). The academic performance and learning characteristics portion of the student's February 2007 IEP reflected WJ-III ACH scores from the January 24, 2007 psychoeducational evaluation and indicated that the student's overall cognitive functioning was in the deficient range and that her adaptive behavior was at a "low level of functioning in all domains" (Dist. Ex. 1 at p. 4). The IEP stated that based on teacher report, the student's reading skills were "on a mid-first grade level," she could decode consonant-vowel-consonant words, and that she "ha[d] a mid-first grade level sight vocabulary" (*id.*). The student's math calculation skills were reportedly stronger than her ability to "work with word problems" and she was able to add and subtract rote numbers up to ten (*id.*). The February 2007 IEP also reflected that the student exhibited difficulty with language processing and oral directions and that she had a limited attention span (*id.*). In the area of social/emotional performance, the February 2007 IEP indicated that student's play and social skills were immature and the student was possessive with toys meant to be shared; therefore, peers tended to avoid her during play situations (*id.* at p. 5). The student had difficulty expressing herself verbally, which resulted in her expressing frustration; however, the February 2007 IEP indicated that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher (*id.*). The CSE did not develop a behavioral intervention plan (BIP) for the student (*id.*). In the area of health and physical development, the February 2007 IEP stated that the student displayed decreased balance, coordination and poor body awareness (*id.* at p. 7). The February 2007 IEP described the student's speech as "often unintelligible" (*id.* at p. 8). Her fine motor and perceptual motor skills were reported to be minimally delayed, with graphomotor skills moderately delayed (*id.*). The February 2007 IEP indicated that the student's self-care skills were "at or near age appropriate" (*id.*). The February 2007 IEP included goals and objectives related to reading, math, spelling, and writing, as well as improving attention, auditory memory skills, decoding skills, receptive language skills, expressive language skills, perceptual motor skills and functional shoulder, arm and hand control (*id.* at pp. 9-16).

The February 26, 2007 CSE recommended that for the 2007-08 school year, the student participate in a 10-month program of a 12:1+1 special class with related services of individual occupational therapy (OT) two times per week for 30 minutes per session, individual physical therapy (PT) two times per week for 30 minutes per session, and individual speech-language therapy three times per week for 30 minutes per session (Tr. p. 79; Dist. Ex. 1 at pp. 1-2, 19).<sup>3</sup> The February 2007 CSE considered and rejected a general education placement for the student because her "significant delays in cognitive and language development warrant a full time modified curriculum" (Dist. Ex. 1 at p. 17). With regard to alternative placement options, the February 2007 CSE determined that a "special class (12:1) in a community school would not provide sufficient support to address [the student's] educational needs" and a "special class (12:1:1) in a specialized public school would be too restrictive of an educational program" (*id.* at p. 18).

In a letter dated May 22, 2007 addressed "To Whom It May Concern," the student's speech-language pathologist reported that the student exhibited severe delays in receptive and expressive language skills; decoding and pragmatics; phonological, articulation and oral motor deficits; and had difficulty focusing (Parent Ex. F). The speech-language pathologist opined that although the student made "some progress during the year," she required continued speech-language therapy throughout the summer to prevent regression (*id.*).

In another letter also dated May 22, 2007 and addressed "To Whom It May Concern," the student's occupational therapist reported that the student presented with bilateral upper extremity weakness that affected her fine motor/grapho motor and object manipulation skills; decreased sensory processing, "visual perceptual/cognitive perceptual/visual motor skills," eye hand coordination skills, and attention to task; as well as significant low tone throughout her body, which affected her ability to perform fine movements and her postural control (Parent Ex. G). The occupational therapist indicated that the student was receiving 30-minute sessions of individual OT two times per week; however, the student's progress was minimal which she opined was due to the late start date of treatment (*id.*). The occupational therapist recommended that the student continue to receive 30-minute sessions of individual OT two times per week and that the student would benefit from 12-month services to "insure carryover during the summer months and to prevent the loss of newly learned skills" (*id.*).

On May 30, 2007, an educational advocate on behalf of the parents requested that the CSE reconvene to discuss the student's speech-language and OT providers' recommendations to provide the student with ESY services (Parent Ex. D).

On June 25, 2007, the CSE reconvened to review the related service providers' recommendations and address the student's need for ESY related services (Tr. p. 5; Dist. Ex. 1). Participants included the student's father; the district representative who was also the social worker; the school psychologist; a special education teacher from Beacon; and the parents' advocate (Tr. p. 120; Dist. Ex. 1 at p. 2). Based upon the information presented and discussed at

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<sup>3</sup> With the exception of the first two pages, District Exhibit 1 is the IEP developed by the CSE in February 2007. On June 25, 2007, the CSE reconvened to amend the student's IEP to include a recommendation for extended school year (ESY) services for summer 2007 for related services only (Dist. Ex. 1 at p. 1; *see* Pet. at p. 3, n. 2).

the June 2007 CSE meeting, the CSE amended the student's IEP, pursuant to the parents' request, to include ESY services for summer 2007 for related services only (Dist. Ex. 1 at pp. 1-2).

A July 2, 2007 Final Notice of Recommendation (FNR) indicated that the student was offered a 12:1+1 special class at one of the district's community schools with related services of individual OT, individual speech-language therapy and individual PT for the 2007-08 school year (Parent Ex. C).<sup>4</sup> An undated, handwritten notation on the FNR by one of the student's parents states "I cannot accept or reject this placement now because I need to visit in September. I will go when school begins and let you know" (id.).

On August 1, 2007, the student's father signed an agreement with Beacon for the student's enrollment for the 2007-08 school year and the parents paid a registration fee (Parent Exs. H; I; O at pp. 1-3).

By letter dated January 23, 2008, the parents requested an impartial hearing alleging that the district failed to offer the student a free appropriate public education (FAPE) on procedural and substantive grounds (Parent Ex. A at p. 1). The parents asserted that the student would not be able to achieve her reading and math goals proposed in the June 2007 IEP (id. at p. 2). The parents further alleged that the district's recommended program was inappropriate because it was not reasonably calculated to allow the student to progress (id.). According to the parents, the students in the recommended class were higher functioning than their daughter and were fluent readers (id.). The parents requested that their January 23, 2008 letter also serve as notice to the district that they had reenrolled their daughter at Beacon for the 2007-08 school year (id.). The parents sought reimbursement for the student's tuition at Beacon for the 2007-08 school year, transportation for the student to and from Beacon, and that the district provide the student with the related services recommended in her IEP (id. at pp. 2-3).

The impartial hearing convened on April 10, 2008 and concluded on June 4, 2008 after two days of testimony (Tr. pp. 1, 95). At the impartial hearing, the district presented documentary evidence and offered testimony by the special education teacher of the recommended program, the regular education teacher who participated at the February 2007 CSE meeting<sup>5</sup> and the district's school psychologist (Tr. pp. 9, 55, 60, 72; Dist. Exs. 1-6). The parents presented documentary evidence and offered testimony by the student's father, the educational director at Beacon and the student's special education teacher at Beacon (Tr. pp. 99, 127, 163; Parent Exs. A-O).

By decision dated June 24, 2008, the impartial hearing officer determined that the district did not meet its burden to show that it offered the student a FAPE for the 2007-08 school year (IHO Decision at pp. 6-7). Specifically, the impartial hearing officer concluded that the district's recommended program was inappropriate because the student required "a setting with a sufficiently small staffing ration [sic]" due to her low cognitive levels, attention difficulties, and

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<sup>4</sup> I note that the hearing record contains duplicative exhibits. For purposes of this decision, only the parents' exhibits are cited in instances where both the parents' and district's exhibits are identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

<sup>5</sup> The hearing record reflects that the teacher is certified in both regular education and special education (Tr. p. 57).

"severe delays in receptive and expressive language" (*id.* at p. 6). She further determined that the redirecting techniques described by the district's special education teacher were not appropriate for the student because of the student's difficulties with attention and limited verbal abilities (*id.*). The impartial hearing officer also concluded that the district's recommended program was inappropriate because the student's classification, functional levels, and social/emotional levels differed from the other students in the recommended class (*id.*). Additionally the impartial hearing officer determined that the parents established that Beacon, other than its religious component, was an appropriate placement for the student and that the parents were cooperative with the June 2007 CSE (*id.* at pp. 7-8). Accordingly, the impartial hearing officer ordered the district to reimburse the parents for 80 percent of the student's tuition (representing a 20 percent reduction in light of the religious components of the instruction) at Beacon for the 2007-08 school year, upon proof of payment by the parents (*id.* at p. 8).

The district appeals, asserting that the impartial hearing officer erred in finding that it did not offer the student a FAPE for the 2007-08 school year and awarding the parents tuition reimbursement. The district maintains that, at the time it was offered, its recommended program, related services and placement offered the student a FAPE and were reasonably calculated to enable the student to receive educational benefit in the least restrictive environment (LRE). Specifically, the district contends that: (1) the impartial hearing officer erred by concluding that the district failed to offer the student a FAPE based on her disagreement with the teaching techniques and/or methodologies used by the special education teacher for the district's recommended class; (2) the impartial hearing officer's concerns regarding the functional grouping of the student in the recommended class were without merit; (3) the parents had opportunities prior to the impartial hearing to raise concerns to the CSE about the student's goals contained in her February 2007 IEP, but chose not to; and (4) the impartial hearing officer's concerns that the district inappropriately failed to offer the student a program with a small staffing ratio were misplaced. The district also argues that the parents did not meet their burden to show that their placement of the student at Beacon was appropriate because they did not show that the placement was specifically designed to meet the unique needs of the student and they provided only generalized information about Beacon's educational program. The district further argues that the equities do not favor the parents because the parents failed to provide timely notice to the district of their intention to unilaterally place the student at Beacon at public expense. As relief, the district requests that the impartial hearing officer's decision be annulled in its entirety.

In their answer, the parents maintain that the impartial hearing officer correctly decided that the district failed to offer the student a FAPE for the 2007-08 school year. The parents contend that the student's IEP did not adequately describe the student's social/emotional and academic management needs, thereby providing insufficient specificity regarding the student's deficits that needed to be addressed. The parents further assert that the district failed to conduct an updated classroom observation of the student as part of the student's triennial evaluation, thereby making it unclear how the CSE determined appropriate goals and objectives for the student; that the student's IEP failed to adequately describe the student's behaviors; and that the district failed to conduct a functional behavioral assessment (FBA) and develop a BIP for the student.<sup>6</sup> The parents also contend that the impartial hearing officer correctly determined that

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<sup>6</sup> I note that the parents' assertions that the district failed to conduct an updated classroom observation, failed to conduct a FBA and failed to develop a BIP for the student have not been preserved for appeal because these

the student would not have been suitably grouped for instructional purposes with students having similar individual needs in the district's recommended placement and that the impartial hearing officer did not exceed her authority in disagreeing with the teaching methodologies used by the district's special education teacher. The parents further maintain that Beacon is an appropriate placement to meet the student's unique special education needs. Lastly, the parents argue that the ten-day notice requirement is inapplicable in this case because the student was not removed from a public school. In the alternative, the parents maintain that even if the ten-day notice does apply, the balance of the equities does not support a reduction in tuition reimbursement in this case because the district was not prejudiced by the lack of timely notice of the student's unilateral placement.

Two primary purposes of the Individual 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<sup>7</sup> 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 Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [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 (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]; 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]).

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arguments were not raised in the due process complaint notice, nor were they addressed during the impartial hearing or by the impartial hearing officer in her decision. Therefore, these arguments are not properly before me (see Application of the Bd. of Educ., Appeal No. 08-009; Application of the Bd. of Educ., Appeal No. 07-031; Application of the Bd. of Educ., Appeal No. 06-110; Application of a Child with a Disability, Appeal No. 05-078; Application of a Child with a Disability, Appeal No. 04-100).

<sup>7</sup> The term "free appropriate public education" means special education and related services that--  
(A) have been provided at public expense, under public supervision and direction, and without charge;  
(B) meet the standards of the State educational agency;  
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;  
and  
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.  
(20 U.S.C. § 1401[9]).

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 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]). A student's educational 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 200.6[a][1]; see Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the 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 (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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 New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as

amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

A thorough review of the hearing record demonstrates that the district adequately complied with the necessary procedural requirements and that the special education program and related services recommended by the district in the February 26, 2007 IEP were reasonably calculated to confer educational benefits to the student and were offered in the LRE. Thus, at the time it was formulated, the February 26, 2007 IEP offered the student a FAPE for the 2007-08 school year.

The hearing record reflects that the February 26, 2007 CSE considered current evaluative and anecdotal data regarding the student's present levels of academic performance including a January 2007 psychoeducational evaluation, a progress report from the student's teacher at Beacon, and reports from the student's related service providers (Tr. p. 61; see Dist. Exs. 2; 4). At the time of the February 2007 CSE meeting, the student's overall cognitive functioning was reported to be in the deficient range and her adaptive behavior skills at a "low level of functioning in all domains" (Dist. Ex. 1 at p. 4; see Dist. Ex. 2 at pp. 2, 6-7). Standardized testing reflected that the student's academic skills were generally in the "low" to "very low" range with the exception of her math calculation skills which were in the "low average" range (Dist. Ex. 2 at pp. 3-4). The February 2007 CSE developed 13 annual goals and 38 short-term objectives to address the student's needs in reading, math, spelling, and writing; her attention span, memory skills, decoding skills, receptive and expressive language skills, and her perceptual and gross motor skills (Dist. Ex. 1 at pp. 4, 9-15). The hearing record indicates that none of the February 2007 CSE members, including the student's mother or special education teacher at Beacon, voiced any objections or concerns about the student's goals (Tr. p. 63; see Dist. Ex. 1 at p. 3).<sup>8</sup> The February 2007 CSE recommended a 12:1+1 special class in a community school with related services of OT, PT, and speech-language therapy (Dist. Ex. 1).

First, I will address the district's contention that the impartial hearing officer erred by finding a denial of a FAPE based on her concerns about the functional grouping of the students in the district's proposed class. Pursuant to State regulations, students with disabilities placed together for the purposes of special education shall be grouped so that the range of academic or educational achievement allows for individual students to achieve individual goals (8 NYCRR 200.1[ww][3][i], 200.6[a][3][i]; Application of a Child with a Disability, Appeal No. 07-060). 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

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<sup>8</sup> Although the parents raised in their due process complaint notice that they did not believe the student would be able to achieve the reading and math goals proposed by the February 2007 CSE, the impartial hearing officer did not make a finding in her decision as to the appropriateness of the student's math and reading goals. The hearing record demonstrates that the CSE was responsive to the request made by the parents' advocate to reconvene the CSE to discuss ESY services for the student; however, neither the student's father nor his advocate who participated at the June 2007 CSE raised any concerns about the student's goals (see Parent Ex. D; Dist. Ex. 1 at pp. 1-2). Some of the goals were ambitious, but not inadequate. The goals were also subject to being revised before or during the school year pursuant to a request to reconvene a CSE meeting to adjust or revise the IEP (8 NYCRR 200.4[f]), and they were capable of being carried over into the following year, or changed, if they were not met during the 2007-08 school year.

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 further provide that the composition of the students in a special class program shall be based on the similarity of the individual needs of the students according to academic achievement 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]). Moreover, a special class shall be composed of students with disabilities with similar individual needs (8 NYCRR 200.6[h][3]). The chronological age range within a special class of students with disabilities who are less than 16 years of age shall not exceed 36 months (8 NYCRR 200.6[h][5]).

The special education teacher who taught the district's recommended 12:1+1 special class during the 2007-08 school year testified that at the beginning of fall 2007 his class contained seven students<sup>9</sup>, was staffed by two adults and the students' ages ranged from seven to nine years old (Tr. pp. 12-13; see Dist. Ex. 6 at pp. 2-3). The proposed class included students with eligibility classifications of learning disabled and emotionally disturbed (Tr. pp. 13, 25). The special education teacher testified that the students' cognitive abilities were "below low average" and they exhibited significant delays in math and reading skills (Tr. p. 52). According to the special education teacher, the students' instructional levels in both math and reading ranged from approximately kindergarten to "just under" the first grade (Tr. p. 13). He further testified that as to the social skills of the students in the class, some of the students played independently with each other and none of the students exhibited physical aggression (Tr. pp. 36-37). Approximately three children exhibited difficulty expressing themselves verbally (Tr. p. 27). All of the students in the district's recommended placement received related services of speech-language therapy, OT or counseling services (Dist. Ex. 6 at p. 2). The proposed class participated in community based activities with both general education students and students from a program for "children of very high intellectual abilities" (Tr. pp. 23-24).

The special education teacher testified that he groups students in accordance with their instructional levels, and that during a reading lesson the paraprofessional assists those students who are experiencing difficulties (Tr. pp. 13, 28-29). Students who are reading at a lower level are provided with different reading materials and different exercises to complete (Tr. p. 14). The students in the higher level reading group are reading at approximately the first grade level and require "continual drill and practice" (Tr. p. 30). The special education teacher further testified that the retention level of the students in the proposed class is approximately three to five days and that in order to avoid regression he "do[es] the same thing" every day and provides continual repetition, especially before and after the weekend (Tr. pp. 31-32).

The special education teacher testified that he had reviewed the student's IEP (Tr. pp. 20, 43) and when presented with information regarding the student's weaknesses, he testified that the student would be well suited for his classroom because she had the same characteristics as the other students in his class (Tr. p. 20). In regard to the student's reading weaknesses, the teacher asserted that he would address those needs by having the student write the ABCs for him to make sure she knew her alphabet, then after she mastered the alphabet, he would familiarize her with "minimal side [sic] words," such as "at, it, us" to acclimate her to writing words (Tr. pp. 20-

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<sup>9</sup> The special education teacher testified that at the time of the impartial hearing in April 2008, there were 11 students in his class (Tr. p. 29).

21). The teacher indicated that he would address the student's handwriting needs by working in conjunction with the student's occupational therapist (Tr. p. 21). In regard to the student's math needs, the teacher stated that he would start with adding and subtracting one digit numbers (Tr. pp. 21-22). The special education teacher testified that he provides more individualized attention to those students who are socially withdrawn or have difficulty with verbal expression (Tr. p. 49). He testified that he and his paraprofessional would both intermittently work with such students on a one-to-one basis (Tr. p. 49). When asked what he would do if he felt that a goal on a student's IEP seemed inappropriate, the special education teacher testified that he would first give the student a period of time to try to achieve the goal (Tr. p. 22). If within that time period the goal was not being achieved, he would speak to the "testing team" and ask them how they arrived at the student's goals or if necessary, request that the student be "retested" (Tr. pp. 22-23). The teacher further testified that in the past, he has had students in his class who had a classification of mentally retarded or "borderline," such as this student, and that he had no doubt in his mind that he could "communicate with a child effectively on any level" (Tr. pp. 53-54).

Based upon the evidence in the hearing record, I find that the district demonstrated that the student would have been appropriately grouped for instructional purposes with students of similar needs in the proposed placement. The hearing record indicates that the student fell in the age range of other students in the district's recommended class (Dist. Ex. 6 at pp. 2-3). Academic achievement testing completed in January 2007 reflects that the student's overall skills were at a "low kindergarten" level in reading; at a "late kindergarten" level in math, and at an "early 1st grade" level in writing (Tr. p. 77; Dist. Ex. 2 at p. 5). The district psychologist who evaluated the student testified that the student was cooperative and pleasant during the testing situation; however, she presented as "somewhat younger" than expected for her chronological age (Tr. p. 76). He indicated that the student exhibited an "upbeat and positive demeanor" and that she responded well to simple directions, but appeared confused as to complex or multi-step directions (Tr. pp. 76, 84-85). The student did not exhibit any refusal to attempt to complete any tasks presented to her (Tr. p. 85). The hearing record demonstrates that the student's reading and math abilities were similar to that of the other students in the class, that the special education teacher grouped students for instruction based on their functioning levels in math and reading, and that all of the students in the class demonstrated cognitive abilities that were below the low average range. Although the impartial hearing officer determined that "[the students in the proposed class] may not have been far ahead of this student in September 2007 in reading and math but their learning characteristics as LD and ED youngsters suggests they will progress much more quickly in skills acquisition," this finding is not supported by the hearing record (IHO Decision at p. 6). Moreover, in response to questions posed by the impartial hearing officer, the district's psychologist testified that students with limited cognitive abilities require instruction that focuses on the student's relative strengths and weaknesses, provides consistency and clear expectations, and provides "a lot of rehearsal" of previously learned material before introducing new concepts (Tr. pp. 89-90). In the instant case, the student exhibits similar learning characteristics as the students in the proposed class, the special education teacher routinely provides consistency and repetition of previously learned material, and the teacher collaborates with the students' related service providers to consistently address the students' needs in the classroom (Tr. pp. 13, 14-17, 27, 30-32, 36-37, 52; Dist. Ex. 6).

Next, I turn to the district's contention that the impartial hearing officer erred by disagreeing with the teaching methodologies and/or techniques that the special education teacher used in the district's recommended class to refocus his students. According to the district's

psychologist's unrebutted testimony, the proper way to instruct a student with limited cognitive skills is through consistency, repetition of learned concepts before introducing new ideas and following a consistent schedule (Tr. pp. 89-90). The district's special education teacher testified about specific techniques that he has used to refocus students or assist students who are socially withdrawn. For example, concerning those students who have difficulty staying focused, the teacher testified that he may clear his throat or tap chalk on the blackboard to refocus them (Tr. pp. 34-35). He indicated that he or his paraprofessional may walk around the room and lightly tap students' desks to refocus them (Tr. p. 34). The teacher further testified that at times he may change the students' seats or give them a "stern look" (Tr. pp. 38-39).

Although an IEP must provide for specialized instruction in the student's areas of need, a CSE is not required to specify methodology on an IEP and the precise teaching methodology to be used by a student's teacher is generally a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46). Here, this issue was not raised by the parents in their due process complaint notice or at the impartial hearing. Rather, the impartial hearing officer raised this issue sua sponte in her decision stating that she did not find the "techniques" that were used by the district's special education teacher in the recommended class to refocus students to be appropriate for this student due to her "significant attentional issues and limited verbal abilities" (IHO Decision at p. 6). However, the impartial hearing officer did not identify why such techniques would not meet the student's need for refocusing and the hearing record does not show that the student's refocusing needs could not be met by the techniques described by the district's special education teacher. Therefore, I am not persuaded by the impartial hearing officer's finding on this issue.

Turning next to the district's contention that the size of its recommended 12:1+1 class was appropriate, the facts in this case do not demonstrate that a smaller class size is required for this student to receive a FAPE. Furthermore, the fact that the class at Beacon is a smaller class size than the public school class offered by the district does not render the district's placement inappropriate. Although the impartial hearing officer stated that the student needs a "setting with a sufficiently small staffing ration [sic]" (IHO Decision at p. 6), the hearing record demonstrates that the 12:1+1 class that was recommended by the district was able to meet the student's special education needs. The special education teacher for the district's recommended class testified that he grouped his students according to their instructional levels and that he and his paraprofessional would meet with the different groups (Tr. pp. 13-14, 18). He further testified that the lower level reading group is comprised of approximately three students and the remainder of the class is in the higher level reading group, which is only "a little higher" (Tr. pp. 29-30). The teacher also testified that he is available for additional help if a student needs or desires it (Tr. p. 19). As noted above, the special education teacher and the paraprofessional work one-to-one with students as necessary and petitioner testified that the special education teacher stated that he would work specifically with petitioner's daughter (Tr. pp. 49, 113). Generalized statements that a small classroom setting helps or is appropriate, are insufficient to show that a small class size is needed to provide the student with a FAPE. Likewise, the

conclusion by a teacher that a small class is needed, without more, is insufficient (see Application of a Student with a Disability, Appeal No. 08-043; see also Application of a Child with a Disability, Appeal No. 06-069; compare Application of the Bd. of Educ., Appeal No. 07-103). In this case, the hearing record does not show that this particular student required a smaller class size than the recommended 12:1+1 class to meet her established special education needs.

In light of the forgoing evidence, I find that the district offered an appropriate program to the student with sufficient supports for the 2007-08 school year. The student would have been appropriately grouped in the district's recommended class and the district's special education teacher would have been able to address the student's academic and attention deficits. Consequently, I do not agree with the impartial hearing officer's conclusion that the district failed to offer the student a FAPE during the 2007-08 school year. Based upon the evidence in the hearing record, the district's recommended special education program and services in the February 2007 IEP, at the time it was formulated, were reasonably calculated to enable the student to receive educational benefits in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006] [citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386 at 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021).

Having determined that the challenged IEP offered the student a FAPE in the LRE for the 2007-08 school year, I need not reach the issues of whether the parents' unilateral placement of the student at Beacon was appropriate or whether equitable considerations supported the parent's claim,<sup>10</sup> and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

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

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED**, that the impartial hearing officer's decision dated June 24, 2008 is annulled.

**Dated:** Albany, New York  
September 25, 2008

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**

<sup>10</sup> See Application of a Child with a Disability, Appeal No. 07-079 for discussion of equities and notice requirements for a student enrolled in a private school.