



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-087

**Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the [REDACTED] School District**

### **Appearances:**

Legal Services of the Hudson Valley, attorney for petitioners, Mary Jo Whateley, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorney for respondent, Jeffrey J. Schiro, Esq., of counsel

### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition costs at the Children's Center of Montclair State University (Children's Center) for the 2006-07 and 2007-08 school years and at the Suffern Montessori School (Montessori) for the 2007-08 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending Montessori, a private day school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. p. 1513; see 8 NYCRR 200.1[d], 200.7). The student has been found to meet the criteria for a diagnosis of a pervasive developmental disorder – not otherwise specified (PDD-NOS) (Dist. Ex. 28 at p. 1). The student exhibits significant delays in speech-language skills, motor and social skills, and attending skills that interfere with her participation in age appropriate activities (Dist. Ex. 19 at p. 3). Her overall cognitive functioning is described as "within the significantly delayed range" (id.). She demonstrates limited social interactions and exhibits difficulty transitioning from one activity to another (id. at p. 4). The student's oral motor and sensory deficits affect her feeding and articulation skills and she also exhibits a short attention span, high activity level, distractibility, and limited eye contact (id. at p. 3). The student's eligibility for special education services and

classification as a student with multiple disabilities are not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

The student's early educational history is discussed in a prior decision, Application of the Bd. of Educ., Appeal No. 07-125, and will not be repeated here.

Preliminarily, I will address a procedural matter. The parents timely served respondent (the district) with an amended verified petition on September 25, 2008.<sup>1</sup> The district timely served an answer on October 6, 2008. The parents served a memorandum of law and eight documents as additional evidence upon the district on October 28, 2008. By letter dated October 29, 2008, the district objected and requested that a State Review Officer decline to consider the parents' memorandum of law and the attached additional evidence on the ground that they were untimely submitted. The district argued that the memorandum of law should have been submitted along with the petition, citing 8 NYCRR 279.4(a) (2004). The district also argued that a State Review Officer should reject the additional evidence because each of the documents was available at the time of the impartial hearing and was not necessary to enable a State Review Officer to render a decision, given the large number of exhibits and the lengthy transcript, already in evidence. The parties submitted additional correspondence to the Office of State Review pertaining to these issues, the last of which was received on November 14, 2008. I find the district's argument persuasive that the regulations required the simultaneous filing of the petition, memorandum of law, and additional documentary evidence. Accordingly, I decline to consider both the memorandum of law and the additional evidence.

The impartial hearing officer in this matter consolidated two due process complaint notices into a single hearing and decision (IHO Decision at p. 1). By due process complaint notice dated May 7, 2007, the parents requested an impartial hearing, in which they asserted that the district's October 3, 2006 individualized education program (IEP) and recommended placement for the student at the Fred S. Keller School (Keller School) were inappropriate to meet the student's special education needs and sought tuition reimbursement for their unilateral placement of the student at the Children's Center (IHO Ex. 1 at pp. 1, 3). The parents contended, among other things, that the program recommended by the district's Committee on Preschool Special Education (CPSE), specifically the proposed placement at the Keller School, used applied behavioral analysis (ABA) techniques that did not address the student's sensory-based learning needs identified in the October 2006 IEP (IHO Ex. 1). The parents further asserted that the student regressed and made no progress while she was attending the Keller School (*id.* at pp. 6, 8, 9). They contended that the Keller School's facilities were inadequate and the staff used foods for rewards that were not healthy for the student (*id.* at pp. 7, 8). They argued that the

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<sup>1</sup> Initially, the parents timely served the district with a petition for review on August 21, 2008, having received a copy of the impartial hearing officer's decision, seven pages in length by e-mail on July 14, 2008 and a second copy of the decision, 21 pages in length on July 16, 2008 by e-mail. Both of these decisions were dated June 27, 2008, the compliance date for issuing the decision. A third copy of the decision, 28 pages in length, also dated June 27, 2008, was received by the parties on August 25, 2008. This copy was sent by mail and postmarked June 27, 2008. The parties contacted the Office of State Review by telephone on September 3, 2008 to discuss how to proceed, given the receipt of the third, and presumably final, copy of the decision. By letter dated September 4, 2008, the Office of State Review granted the parents leave to serve an amended petition by September 25, 2008 and leave to the district to serve an amended answer within 10 days of service of the amended petition.

goals in the IEP were inadequate and in any event were not properly used by the Keller School (*id.* at pp. 8-9). The parents argued that their concerns with the program were ignored, and no changes were made when the student regressed (*id.* at pp. 7, 8). The parents removed the student from the Keller School after the Christmas break in December 2006, and placed the student at the Children's Center and requested tuition reimbursement and funding for the Children's Center (*id.* at pp. 3, 8, 11).

Before the impartial hearing, the parents requested that the impartial hearing officer issue a determination regarding the student's pendency placement. After telephone conferences with the parties, the impartial hearing officer issued a pendency determination dated September 21, 2007 (IHO Ex. 9 at p. 4). As discussed more fully below, the district appealed that pendency determination and the hearing did not reconvene until after the decision in Application of the Bd. of Educ., Appeal No. 07-125 was rendered.

In the interim, the district's Committee on Special Education (CSE) had finalized a new IEP for the student for the 2007-08 school year dated August 7, 2007 (IHO Ex. 2).<sup>2</sup> By due process complaint notice dated November 11, 2007, the parents requested a consolidated hearing, and asserted that the district's August 7, 2007 IEP and recommended placement for the student at the Rockland Board of Cooperative Educational Services (BOCES) School (Rockland BOCES) were inappropriate to meet the student's special education needs (*id.* at pp. 1, 5-6). The parents contended, among other things, that the program recommended by the CSE for the 2007-08 school year was flawed in that it failed to provide extended school year (ESY) services, appropriate mainstreaming, and sufficient related services or related services in a separate setting (*id.* at p. 5). The parents further argued that the class placement was flawed in that the program utilized CABAS/TEACCH methodology, which included ABA type discrete trials which were improper for the student (*id.*). The parents next argued that the placement was overly restrictive in a self-contained setting and used a reward system that the student did not need (*id.*). The parents also argued that the district failed to deliver all services under pendency, forcing the parents to obtain and fund those services (*id.*). Lastly, the parents contended that any resolution of their allegations would require an increase in services, redesigned goals, an integrated class, staff familiar with the DIR-Floortime methodology for teaching children with autism, reimbursement for the expense of providing related services during pendency, and compensatory services (*id.*).

As noted above, by decision dated September 21, 2007, the impartial hearing officer determined the student's pendency placement (IHO Ex. 9). The district appealed that determination which was annulled and remanded to the impartial hearing officer to develop a hearing record regarding the need to implement the student's pendency placement at a specific site or location (see Application of the Bd. of Educ., Appeal No. 07-125). A second pendency determination resulted, dated January 30, 2008, after two days of hearings were held on January 16 and 24, 2008 (Tr. pp. 1, 246). The second determination by the impartial hearing officer has

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<sup>2</sup> The hearing record contains a third IEP, dated June 5, 2007, that pertained to the months of July and August 2007 (Dist. Ex. 13). No due process complaint notice was brought challenging this IEP and, although the parents appeal the "2006-07 school year" and "2007-08 school year," they bring forth no arguments regarding the June 2007 IEP, which is part of the 2007-08 school year. Accordingly, this IEP will not be addressed in this decision.

not been appealed. Both determinations rendered by the impartial hearing officer found that the October 3, 2006 IEP constituted the student's pendency placement and found that the district must provide related services in the same fashion and amounts as set forth on that IEP (IHO Exs. 9; 10).

The Individuals with Disabilities Education Act (IDEA) and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the district otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; see 34 C.F.R. § 300.518; 8 NYCRR 200.5[m]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current

placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). Moreover, a prior unappealed impartial hearing officer's decision can establish a student's pendency placement (Student X, 2008 WL 4890440 at \*23; Letter to Hampden, 49 IDELR 197, [OSEP 2007]; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

Within the Second Circuit, compensatory education has been viewed as instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It has been awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 2008 WL 3474735, at \*1 [2d Cir. Aug. 14, 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]; but see P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [upholding an award of compensatory education for a school aged student without finding a gross violation of the IDEA). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). State Review Officers also have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Child with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054). Lastly, a district's violation of the IDEA's "stay put" or pendency provisions in regard to an educational placement or the provision of related services may give rise to an equitable award of compensatory education or additional services (see, e.g., Mr. C. v. Maine School Administrative Dist. No. 6, 538 F. Supp. 2d 298 [D. Me. 2008]).

The parents' due process complaint notice dated November 11, 2007 stated that the district had ceased providing related services during the pendency of the appeal and requested reimbursement for those services that the parents had obtained and compensatory education for those services that the parents were unable to obtain due to financial constraints (IHO Ex. 2 at p. 5). The matter was extensively discussed at the impartial hearing, but the impartial hearing officer did not make a determination regarding reimbursement for the cost of related services provided by the parents during pendency or the parents' request for compensatory education in the form of additional services to compensate for the missed pendency services (see IHO Decision at pp. 1-2, 7-8, 12, 28). The parents have continued their requests in their amended petition.

The hearing record shows that the district continued to provide the related services contained in the October 3, 2006 IEP after the parents had removed the student from the Keller School and while the student attended the Children's Center (Tr. pp. 1512, 1592-93). The district ceased providing related services in September 2007, after the August 6, 2007 IEP was drafted, which did not include the same related services as the previous IEP (*id.*). The parents continued to provide some, but not all of the related services at their own expense after that point and until the impartial hearing officer's second pendency order dated January 30, 2008 (Tr. pp. 1512, 1592-93, 1557-58). The district began to provide related services again shortly after the impartial hearing officer's second pendency determination (Tr. pp. 1557-58). Accordingly, I find that the parents obtained and paid for related services that the district was required to provide pursuant to pendency during the period commencing when the district ceased providing related services at the time that the August 7, 2007 IEP was drafted until the district recommenced providing related services after the January 30, 2008 pendency determination (Tr. pp. 1592-96; Parent Ex. D at p. 2). I also find that the parents have accurately calculated the expense of the related services they were able to obtain and have accurately calculated the number of hours of each type of services that they were unable to obtain, but were entitled to under pendency, and, as a result, are now entitled to as additional services (Tr. pp. 1555-1610, 1711-14; Parent Ex. D).<sup>3</sup>

After the impartial hearing officer issued the second pendency determination, testimony was taken regarding the procedural and substantive arguments contained in the parents' due process complaint notices over six days starting January 31, 2008, and ending April 14, 2008. During the course of the impartial hearing, testimony was taken from a total of eight witnesses, several of whom testified on more than one occasion (Tr. pp. 78, 403, 509, 585, 663, 780, 882, 989, 1078, 1229, 1424, 1687).

By decision dated June 27, 2008, the impartial hearing officer found in favor of the district and dismissed both due process complaint notices (IHO Decision at p. 28). The impartial hearing officer assigned the burden of persuasion to the parents, citing Schaffer v. Weast, 546 US 49, 57-58 (2005) (IHO Decision at pp. 18-19). The impartial hearing officer held that there were no procedural inadequacies in the creation of the 2006-07 IEP and that the substantive recommendations contained in that IEP were appropriate (*id.* at pp. 21-24). The impartial hearing officer further concluded that the teaching methodologies to be employed by a placement did not need to be specified on the IEP (*id.* at p. 21 citing Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-052). The impartial hearing officer further found that there were no procedural inadequacies in the creation of the 2007-08 IEP and that the substantive recommendations contained in that IEP were appropriate (IHO Decision at pp. 24-26). The decision also found that the parents' unilateral placements were inappropriate because the parents had not presented sufficient evidence to meet their burden regarding the appropriateness of the programs at the Children's Center and at Montessori (*id.* at pp. 26-27). The decision did not address the equities pertaining to reimbursement.

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<sup>3</sup> I note that the hearing record contains an accounting of both the related services that the parents obtained during the pendency of the impartial hearing, as well as an accounting of the amount of related services that were due to the student under pendency that the parents were unable to obtain (Parent Ex. D). The district does not dispute the accuracy of these documents.

This appeal ensued. In their amended petition, the parents argue that the impartial hearing officer erred by placing the burden of persuasion on the parents, that the impartial hearing officer mischaracterized the facts in the hearing record, and that he failed to consider important evidence. The parents argue that the CPSE recommendations for the 2006-07 school year were inappropriate because the October 2006 IEP failed to include services to address the student's need for sensory integration therapy and failed to place the student in the least restrictive environment (LRE). They also argue that the district failed to properly implement the 2006-07 IEP because the actual class size at the Keller School differed from the recommended IEP and that the teachers at the Keller School failed to use the IEP goals in teaching the student. The parents next argue that the CSE's recommendations contained in the August 2007 IEP for the 2007-08 school year were inappropriate because the IEP failed to provide services for the student's identified sensory needs and failed to provide required home-based services. The parents also argue that the recommended placement at Rockland BOCES was not in the LRE, that the CSE failed to consider a less restrictive placement, that the CSE failed to investigate the placement and improperly relied upon the opinion of BOCES staff. The parents also argue that their unilateral placements for both the 2006-07 and 2007-08 school years were appropriate and that the impartial hearing officer erred in finding that there was not sufficient evidence in the hearing record to find for the parents. The parents further argue that the equities favor the parents and that tuition reimbursement, and reimbursement for related services provided during pendency is appropriate.

In their answer, the district requests that a State Review Officer affirm the impartial hearing officer's decision in its entirety because the district's IEPs for the student's 2006-07 and 2007-08 school years were procedurally appropriate and reasonably calculated to confer educational benefits. The district contends that the impartial hearing officer correctly found that the parents had not proven that their unilateral placements were appropriate. The district also argues that the equities do not favor reimbursing the parents for their tuition costs for the 2006-07 school year at the Children's Center because the parents did not give the district notice of their intent to unilaterally place the student. Lastly, the district argues that the equities do not favor reimbursing the parents for their tuition costs for the 2007-08 school year and for the costs of their private evaluation because the parents failed to make the student and her records sufficiently available to the district for its own evaluation.

The parents argue that the impartial hearing officer erred in placing the burden of proof upon them for all issues in the hearing. The New York State Legislature amended the Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof 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). Here, the parents' original due process complaint notice, dated May 7, 2007 (IHO Ex. 1) was consolidated with a second due process complaint notice, dated November 11, 2007, after the amended statute took effect (IHO Ex. 2). The parents' first due process complaint notice regarding the 2006-07 school year was filed prior to the effective date of the amendment to the statute; therefore, I find that the parent bore the burden of proof for the claims raised under that

complaint. The parents' second due process complaint notice regarding the 2007-08 school year was filed after the effective date of the amendment to the statute; therefore, I find that the burden of proof should have been placed upon the district for claims raised under that complaint. However, I have independently reviewed the hearing record and find that regardless of which party bore the burden of proof, the evidence supports the impartial hearing officer's ultimate determination that the district's recommended educational programs for the student's 2006-07 and 2007-08 school years offered the student a FAPE.

Two purposes of the 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 Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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]).

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]; 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).

In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 114; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968 at 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

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]), 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, whereby a district must provide special education and related services in accordance with the student's IEP (8 NYCRR 200.4[e][7]).

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 parents contend that the impartial hearing officer erred in finding that the October 2006 IEP was appropriate. They assert that the IEP failed to include services to address the student's recognized need for sensory integration therapy and did not offer a placement in the LRE. They also assert that the district failed to properly implement the student's October 2006 IEP.

The hearing record reflects that the CPSE convened on March 24, June 6, August 15 and October 3, 2006 to develop and make subsequent amendments to the student's IEP for the 2006-07 school year (Dist. Exs. 2; 9; 13; 19). CPSE meeting comments indicated that the CPSE's recommendations were based on parent report and observations, teacher and related services progress summaries, and annual testing conducted by the physical and speech-language therapists (Dist. Ex. 19 at pp. 5-6). The results of recently conducted standardized testing, which included an April 2006 administration of the Peabody Developmental Motor Scales-Second Edition (PDMS-2), a March 2006 administration of the Preschool Language Scale-Fourth Edition, and a February 2006 administration of the "Brigance," and the Westby Play Scales, were reflected in the resultant October 2006 IEP (id. at pp. 3-4).

The October 2006 IEP reflected the CPSE's recommendation for a 12-month program of a self-contained special education class at the Keller School with related services of individual occupational therapy (OT) three times weekly, individual physical therapy (PT) two times weekly, individual speech-language therapy two times weekly, and group speech-language therapy one time weekly (Dist. Ex. 19 at p. 2). CPSE meeting comments indicated that based on committee discussion, the student would start the 2006-07 school year in a self-contained classroom and that should it be appropriate to move her to an integrated classroom, the CPSE would reconvene (id. at p. 5). The October 2006 CPSE also recommended six hours of special education itinerant teacher (SEIT) services weekly and three hours of teaching assistant services weekly, provided in a "flexible setting;" individual OT two times weekly, provided at home; and individual speech-language therapy two times weekly, provided in the provider's office (id. at pp. 1-2). The October 2006 IEP noted that one half hour of an OT session and one half hour of a speech-language therapy session could be conducted collaboratively, one time weekly, "to address [the student's] oral motor/feeding and facial sensory issues" (id. at p. 2). The student's present levels of academic achievement, functional performance, and individual needs as reflected in the October 2006 IEP indicated that the student had significant delays in speech-language skills, motor and social skills, and attending skills that interfered with her participation in age appropriate activities (id. at p. 3). Her overall cognitive functioning was described as "within the significantly delayed range" (id.). The student demonstrated limited social

interactions and exhibited difficulty transitioning from one activity to another, becoming agitated at times (*id.* at p. 4). The IEP further reflected that the student exhibited oral motor and sensory deficits that affected her feeding and articulation skills and that the student also exhibited a short attention span, high activity level, distractibility, and limited eye contact (*id.* at p. 3). The student's receptive and expressive language skills were stated to be consistently assessed at the 24-month age level with her speech intelligibility at the phrase level judged to be "poor" (*id.*). The October 2006 IEP noted the student's need to decrease her tactile hypersensitivity to different textures, colors, and tastes; as well as to improve her sensory integration skills (*id.*). The CPSE developed goals and corresponding short-term objectives to address the student's identified deficits in study skills including following a classroom routine by independently working on seat-time activities; attending to tasks without distraction during group lessons; pre-reading skills including sequencing and grouping; pre-math skills including sorting and concepts of more/less/the same; oral/motor feeding skills; articulation; expressive language skills; play skills; her ability to transition without tantrums; gross and fine motor skills; social interaction skills; and basic cognitive and daily living skills (*id.* at pp. 6-20).

As described above, and contrary to the parents' contentions, the October 2006 IEP reflected the student's sensory deficits, provided for occupational and speech-language therapies both during and after the student's school day program to address those deficits, and developed goals and corresponding short-term objectives related to the student's needs in the areas affected by her sensory deficits (Dist. Ex. 19 at pp. 2-4).

The parents further contend that the October 2006 CPSE did not offer the student a placement in the LRE. The October 2006 IEP reflected that based on committee discussion the student would start the 2006-07 school year in a self-contained classroom and that should it be appropriate to move her to an integrated classroom, the CPSE would reconvene (*id.* at p. 5). The hearing record shows that from the start of the 2006-07 school year until her withdrawal in January 2007, the student was attending a 6:1+2 self-contained class at the Keller School (Tr. pp. 614, 649, 665). The director of the Keller School testified that in fall 2006, it was seeking State approval to open an integrated special class, which required demonstration of a "regional need" for such a program (Tr. pp. 641-43). While waiting to receive State approval, the Keller School combined students from its day care with the students in the self-contained class for activities (Tr. pp. 647-50).<sup>4</sup> The day care students were assigned their own specific staff person, but participated in all activities in the self-contained class daily, for all but one half hour each day (Tr. pp. 647-48). The director further testified that all students in the 6:1+2 class, including the parents' daughter, were anticipated to become part of an integrated 12:1+2 class once State approval was received (Tr. pp. 622-23). The student's mother also testified that she had no concerns about the CPSE's recommendation for a self-contained class because she believed that it was only for a few weeks, until the Keller School received State approval for an integrated class and that "the children were there, that's what I saw, that's what I was concerned about, the children were there" (Tr. pp. 1623-25). Although the parents now argue that the 2006-07 IEP failed to recommend a placement in the LRE, I note that they did not raise this concern at any time prior to their withdrawal of their daughter from the Keller School nor did they indicate such in their May 7, 2007 due process complaint notice (*see* Tr. pp. 164, 168, 214-15; IHO Ex. 1). Moreover, the hearing record reflects that the Keller School provided the student with many

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<sup>4</sup> State approval for an integrated special class was received by the Keller School in October 2007 (Tr. p. 644).

opportunities to participate in activities with nondisabled peers throughout the school day (Tr. pp. 647-648). Based on the above, I find that the October 2006 CPSE and resultant IEP offered the student a placement in the LRE.

The parents also contend that the district failed to properly implement the student's October 2006 IEP, specifically that the class size violated the IEP mandate and that the student's teacher in the proposed placement failed to work on specific goals contained in the student's 2006-07 IEP. There is no indication in the hearing record that at any time prior to their withdrawal of their daughter from the Keller School, the parents raised a concern regarding the size of the student's class at the Keller School nor did they indicate such in their May 7, 2007 due process complaint notice (see Tr. pp. 164, 168, 214-15; IHO Ex. 1). Therefore, I will not address this issue.

The parents argue that the student's teacher at the Keller School failed to work on specific goals contained in the October 2006 IEP, citing to testimony by the special education teacher indicating that she did not recall working on the student's specific math IEP goals and that she did not work on other goals because the student lacked the necessary prerequisite skills. The parents also assert that the teacher's recollection of working on other specific goals was unreliable. Based on my review of the entire hearing record, I find that the parents' contention that some of the student's October 2006 IEP goals were not addressed by the student's teacher prior to the student's withdrawal from the Keller School is accurate; however, I do not find that this resulted in a denial of a FAPE for this student under the circumstances of this case.

The director of the Keller School testified that on a typical day in the student's 6:1+2 placement "in the morning the children come in and they take care of all their toileting needs, then they would all go to the group table to do a morning meeting very similar to any other preschool, take attendance, give out jobs, talk about the weather, calendar. At that point they would break up into dyads or triads into academic instruction and we would pair children that had similar goals together so we could deliver some tandem instruction to students that had like needs" (Tr. pp. 625-26). The director further testified that goal instruction occurred for approximately two hours in the morning (Tr. p. 626). She indicated that following lunch and recess, the students again broke up for goal instruction and then ended the day with a whole group lesson (Tr. p. 626). The director provided extensive testimony regarding how students are instructed at the Keller School indicating that discrete trial instruction is not used, but rather instruction is provided in "learn units" which are based on each student's IEP goals (Tr. pp. 635-40). The student's special education teacher testified that on the first day of class all of the students were assessed using the Preschool Inventory of Repertoires for Kindergarten (PIRK), an instrument based on "the New York State standards" which identified skills required for kindergarten (Tr. p. 671). The special education teacher indicated that she always used a student's IEP, in concert with PIRK results, to determine classroom instruction (Tr. p. 691). Administration of the PIRK revealed that the student needed to learn "attentional" skills, such as following teacher directions, sequencing skills, and sitting appropriately in her chair, as well as how to engage in activities without exhibiting inappropriate behaviors (Tr. pp. 672-73). The special education teacher testified that she worked on socially appropriate behaviors with the student, which included looking at books, playing with toys, and turn-taking; as well as on the student's pencil grasp and imitation of writing, letter identification, and counting skills (Tr. pp.

678-685, 695). The special education teacher provided extensive testimony regarding each goal on the student's October 2006 IEP (Tr. pp. 691-705), which reflected that four of the student's forty six annual goals had not been addressed by the Keller School prior to her withdrawal in January 2007; two were not addressed due to a lack of prerequisite skills, one due to mastery, and one due to appropriate food not provided by the parent (Tr. pp. 697, 699, 701, 705). The hearing record also reflects that the special education teacher was unable to state if she had addressed the student's goal related to sorting objects by color, size, or shape (Tr. p. 696).

A progress report from the Keller School dated November 6, 2006 reflected that the student had met 16 short-term objectives since the beginning of the academic year (Dist. Ex. 47 at p. 1). The student's teacher reported that she was collecting data to determine how many directions the student was typically given during the course of the school day (*id.*). Following data collection the program would set a criterion level to determine the number of directions presented and the criterion level at which the student would need to perform in order to increase her attending skills (*id.*). The teacher reported that the student was working on sitting still for one second and on pointing to her nose and ear, with a long-term objective to be able to point to 20 body parts on herself and her teacher following a vocal antecedent telling her to which body part to point (*id.*). The student was able to follow one-step directions and imitate one gesture and was working on following two-step directions and imitating two gestures, respectively (*id.* at p. 2). The student was also working on sustaining eye contact for one second, imitating one teacher gesture in a group, and auditory matching activities (*id.*). The student demonstrated "tacting" of community helpers including firefighter, doctor, and mailman (*id.* at p. 3).<sup>5</sup> The student was also working on "mands" with several "autoclitic" phrases and had mastered "\_\_\_ please" (*id.*).<sup>6</sup> The student was also working on saying "hi" and "goodbye" to her teachers and peers (*id.*). In the area of academics, the student could read numbers one through twelve and was working on thirteen and fourteen, was working on sequencing two pictures, could count any interval of three numbers from one to ten, could count the entire sequence of one to ten, was working on counting sequences of three intervals from eleven to fifteen, could point to numbers one to twelve, and was working on pointing to numbers thirteen and fourteen (*id.* at pp. 3-4). The student also knew her name and age and was working on learning her birthday and the city that she lived in (*id.* at p. 4). The school progress report further indicated that the student was working on appropriately engaging in activities such as looking at books, playing with toys, or coloring without exhibiting stereotypy, passivity, or nonfunctional vocalizations, which for the student included talking about the "Very Hungry Caterpillar book," sucking her thumb, and/or pulling her hair (*id.*). Regarding school routine, the student had mastered cleaning up two objects at a time and was working on raising her hand while answering "here" after the teacher asked if the student was present, pointing to her name, selecting a classroom job, and matching her name to the job (*id.* at p. 5). The student was also working on pointing and tacting pictures in books during story time (*id.*). Her teacher commented that the student was progressing nicely and had learned a lot in a short period of time (*id.*). According to the teacher, the student was learning to work with her

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<sup>5</sup> The hearing record defines "tact" as "a verbal behavior" term used to describe a vocal response emitted to come in contact with the environment, which is reinforced by a generalized reinforcer (Dist. Ex. 47 at p. 3).

<sup>6</sup> The hearing record defines "mand" as a verbal behavior term used to describe a vocal request for an object or an activity, which is reinforced by the requested object (Dist. Ex. 47 at p. 3). "Autoclitic" is defined as a verbal behavior term describing words added to mands and tacts that function to specify or quantify the target reinforcer (*id.*).

teachers and follow their directions, sitting for a longer duration in her chair, sitting appropriately and following directions during group time, and staying in the toy area and playing with the toys (id.).

The hearing record contains extensive data collection, between September 2006 and January 2007, regarding the student's level of mastery in identifying "community helpers," labeling categories, imitating written symbols and letters, vowel sounds, sight words, reading and pointing to numbers, sequencing, greeting others, requesting by use of a phrase, following teacher directions, sitting still, eye contact, imitating gestures, identifying body parts, auditory matching (to address articulation), reading lowercase letters, identifying personal information (name, age, birthday, city, address), and pencil grasp (Dist. Ex. 57 at pp. 2-30). The hearing record also demonstrates that the Keller School collected data regarding the frequency of the student's palilalia (nonfunctional vocalization), hair pulling, and thumb sucking (id. at pp. 31-33; see Dist. Ex. 47 at p. 4).

Although the parents argue that the student's special education teacher did not work on the goals and objectives "specifically detailed" in the student's October 2006 IEP, but rather on the goals and objectives developed by the Keller School outside of the CPSE process, this is not supported by the hearing record. I also note that although the student's private special education teacher testified that the student had mastered all prerequisites prior to her attendance at the Keller School, she also testified that the student had been instructed on a one-to-one basis at home and further testified that the student often required a verbal prompt to elicit a correct response (Tr. pp. 1230-88). Moreover, the hearing record reflects that the private special education teacher and the student's special education teacher at the Keller School did not utilize the same criteria for mastery (Tr. pp. 721-24, 1251-52). The hearing record also reflects that the student's private neuropsychologist testified that the student exhibited a "pattern known as Landau-Kleffner Syndrome" which he described as "abnormality in electrical activity in her brain" resulting in lack of consistent capabilities to efficiently and quickly process information (Tr. p. 1096). Therefore, I find that the Keller School appropriately implemented the student's October 2006 IEP, which as indicated above, I also find was designed to confer educational benefits to the student in the LRE.

Regarding the August 2007 IEP for the 2007-08 school year, the parents contend that the impartial hearing officer erred in holding that the district's proposed IEP was appropriate. The parents argue that the 2007-08 recommendation of a BOCES placement was not the student's LRE, that the district failed to meaningfully consider options less restrictive than a BOCES self-contained class, that the district failed to investigate and determine the appropriateness of the BOCES placement for the student but instead relied upon the opinion of BOCES staff, that the IEP failed to include services to address the student's significant sensory needs, and failed to provide home-based services that were still required for the student.

The CSE convened on August 7, 2007 to develop an IEP for the student's kindergarten year beginning September 2007 (Dist. Ex. 28). The CSE found the student eligible for special education programs and services as a student with multiple disabilities and recommended an 8:1+2 special class placement with related services of individual OT five times weekly, individual PT four times weekly, individual speech-language therapy two times weekly, and

speech-language therapy in a small group three times weekly (id. at p. 1). The CSE also recommended parent counseling and training (id. at p. 6). The August 2007 IEP reflected the results of current standardized testing including a May 2007 administration of the Functional Emotional Scale as well as the Goldman Fristoe Test of Articulation-Second Edition, the Verbal Motor Production Assessment for Children, and the Brigance Diagnostic Inventory of Basic Skills; an April 2007 administration of the Peabody Developmental Motor Scales-Second Edition (id. at pp. 3-4). The present levels of academic achievement, functional performance, and individual needs portion of the August 2007 IEP indicated that the student exhibited significant delays in her speech-language, motor, social, and attentional skills which interfered with her participation in age appropriate activities (id. at p. 3). The student had mastered reading upper and lower case letters, could sequence two pictures, read the numbers one through twelve, imitate two gestures, follow one-step directions, count intervals of three numbers from one through ten, and knew her name, age, address, phone number, birthday, and school (id.). The student was beginning to learn phonics and foundational words (id.). The August 2007 IEP further noted that the student had learned to work with all of her teachers and sit for the duration of instruction (id.). The student exhibited a mixed sensory reactivity to her environment, language deficits continued to affect her learning, and oral motor and sensory deficits continued to affect her feeding skills (id.). Although described as improving, the August 2007 IEP indicated that she continued to exhibit a short attention span, high activity level, distractibility, and limited eye contact (id.). In the area of social development, the August 2007 IEP indicated that the student showed emotional interest and connection with her parents and therapists by vocalizing and smiling at them (id. at p. 5). The student presented as self-directed, exhibiting a short attention span, inconsistent eye contact, distractibility, and a high activity level (id.). The student was beginning to interact with "symbolic" toys and had particular dolls and animals representing her favorite cartoon characters, with which she related on a discrete level (id.). Management needs on the August 2007 IEP reflected the student's needs for a small teacher to student ratio with minimal distractions and frequent prompting to remain on task (id.). The CSE developed annual goals to address the student's identified deficits in study skills including following a classroom routine by independently working on seat-time activities; attending to tasks without distraction during group lessons; pre-reading skills including sequencing and grouping; pre-math skills including sorting and concepts of more/less/the same; oral/motor feeding skills; articulation; expressive language skills; play skills; her ability to transition without tantrums; gross and fine motor skills; social interaction skills; and basic cognitive and daily living skills (id. at pp. 6-14).

The hearing record reflects that for the 2007-08 school year, the recommended BOCES placement was comprised of four students, one special education teacher, and two certified teacher assistants (Tr. pp. 787-88). Related services were provided via a "push-in" model (Tr. p. 787). The assistant principal for district-based BOCES programs testified that the class proposed for the student was not limited to students with a particular disability and that although all the students in the class were developmentally disabled, they were capable of being in a "regular" school (Tr. p. 790). He further testified that the intake process included the parents and district personnel as well as a discussion about methodology (Tr. pp. 791-92, 818-22). The proposed class was in session for 6 hours and 15 minutes daily (Tr. p. 795). Students began the day with a group "circle time," the main purpose of which was socialization and was a "fun way" to prepare the students for the day through discussion of the weather, calendar, songs and movement, and

each student's individual visual schedule (*id.*). The assistant principal also testified regarding the use of the TEACCH and ABA methodologies in the classroom (Tr. pp. 797-803). He indicated that TEACCH provides a structure for students with developmental disabilities to help them organize their day by "visually showing what is coming up," building independence and an understanding of schedules and structure in a classroom (Tr. pp. 797-98). He testified that TEACCH concepts are infused throughout the program and instruction in the classroom (Tr. p. 799). The assistant principal also testified regarding the use of ABA in the classroom, stating that ABA is "really a systematic way of teaching and data collection...there is a goal of something to be taught, they teach to that goal and they collect data on progress" (Tr. pp. 800-01). Regarding the provision of related services, the assistant principal testified that related service providers "push-in" to work with students in the classroom, either individually in a separate area of the room or within a group activity (Tr. pp. 805-06, 1037). As a result, there is constant communication between the related service providers and the teacher and teaching assistants who carry out the students' related service goals throughout the week (Tr. pp. 814-15, 1038-39). Students in the proposed self-contained BOCES placement spent varying amounts of time in the general education kindergarten class on a daily basis (Tr. pp. 1020-21). The students also participated with the general education students in gym weekly, recess daily, computer lab weekly, lunch daily, and various other activities as they occur such as assemblies and birthday parties (Tr. pp. 1022-24, 1027, 1030, 1036). Additionally, every day the students in the proposed class participated in "buddy reading" whereby they picked out books, which were read to them by fourth grade general education students (Tr. p. 1027). Two times each month the students in the proposed class attended community outings, first learning skills in the classroom and then incorporating them into the community based instruction (Tr. pp. 1040-42).

A student profile report contained in the hearing record revealed that the students in the proposed 8:1+2 BOCES class exhibited significantly below grade and age level skills in language, cognitive, academic, social, and motor areas (Dist. Ex. 79). The special education teacher from Rockland BOCES testified that the skills of the students ranged from knowing letters, learning to read, and identifying numbers and counting to just learning to identify numbers, letters, and the sounds of letters (Tr. p. 996). She indicated that each student's IEP provided the basis for the student's needs, but that she also tested each student at the start of the school year to identify further areas of need or if she needed to "take stuff back a step" (Tr. p. 997). Some students in the classroom received all their instruction one-to-one (Tr. pp. 998-99). The special education teacher followed the general education curriculum, but modified it based on her students' needs (Tr. p. 1020). She indicated that the students in the proposed class had difficulty focusing, completing tasks, complying with participation in activities and exhibited distractibility and social-emotional needs (Tr. pp. 998-1002). She further testified that many of these behaviors had diminished from the start of the school year, and she attributed this to the behavioral techniques utilized in the classroom and that the students integrated into the general education kindergarten class, stating that they get to see how their peers are in a general education class and they usually want to act the way their peers are acting (Tr. pp. 1001-03, 1057-58). The special education teacher also testified regarding how students' sensory needs are addressed in the classroom through brushing, seat cushions, balls to bounce on, weighted vests, carrying heavy objects, massaging chins or gums, and use of "chew toys" (Tr. pp. 1061-62).

Based on the above, I find that the proposed 8:1+2 BOCES placement was appropriate to meet the student's identified special education needs in the LRE. Although the parents contend that the student has always participated in an integrated classroom, I note that the student's educational settings prior to the 2006-07 school year were privately obtained by the parents and augmented by one-to-one SEIT and teaching assistant services provided by the CPSE (Tr. pp. 1611-12, 1230-32, 1427; Dist. Exs. 2 at pp. 1-2, 5; 37 at p. 1). The parents' witnesses testified that the student required one-to-one teaching to learn skills and if she mastered a skill, she could generalize it to a group activity with "typical" students and that the student also required opportunities to model appropriate behavior from nondisabled peers (Tr. pp. 489, 1195-96, 1201-02, 1206-07). Furthermore, the student's private neuropsychologist opined that "since no specific curriculum is ideal," the most effective program for the student was one that is "individualized according to her IEP needs" (Parent Ex. B at p. 5). Although the private neuropsychologist testified that the student's school day should focus on her "emerging reciprocal skills" and be augmented by a home program which provided her with specific skill instruction and the student's mother testified that the student learned at home and generalized to the school environment, I concur with the finding of the impartial hearing officer that the district's proposed program "subsumed" the home-based services previously received by the student (compare Dist. Ex. 19 at pp. 1-2, with Dist. Ex. 28 at pp. 1-2). The district's recommendation of an 8:1+2 special class placement with related services of individual OT five times weekly, individual PT four times weekly, individual speech-language therapy two times weekly, and speech-language therapy in a small group three times weekly reflects a minimal amount of reduction in direct services to the student (compare Dist. Ex. 28 at p. 1, with Dist. Ex. 19 at pp. 1-2). The hearing record describes how the proposed classroom addressed generalization of learned skills and reveals that the CSE also recommended parent counseling and training (Tr. pp. 1021-23, 1041-42; Dist. Ex. 28 at p. 6). I concur with the impartial hearing officer's finding that the program offered by the district to the student for the 2007-08 school year was appropriate. The August 2007 IEP developed an educational program for the student that was reasonably calculated to enable her to receive educational benefit. It accurately reflected the results of standardized evaluations and progress reports prepared by the student's private providers, and properly identified the student's particular needs at the time the CSE developed the IEP. The student's deficits were accurately described in the August 2007 IEP, and the CSE established annual goals related to the student's particular needs in the areas of study skills, attending, sequencing and grouping; including sorting and concepts of more/less/the same; oral/motor feeding skills; articulation; expressive language skills; play skills; ability to transition; gross and fine motor skills; social interaction skills; and basic cognitive and daily living skills (Dist. Ex. 28 at pp. 6-14). Contrary to the parents' contentions, the August 2007 IEP reflected the student's sensory deficits, provided for occupational and speech-language therapies to address those deficits, and developed annual goals and corresponding short-term objectives related to the student's needs in the areas affected by her sensory deficits (id. at pp. 1-6, 8-14). As described above, the hearing record also shows that the proposed 8:1+2 BOCES placement utilized a variety of strategies to meet students' sensory needs throughout the day (Tr. pp. 814-15, 1038-39, 1061-62). Moreover, the hearing record reflects that the CSE considered a general education setting with support services such as related services, consultation services, and a resource room program in the general education kindergarten program, which it rejected because the student's academic functioning, social needs, physical needs, and language processing needs indicated that a more

intensive setting with support was needed to address her needs (Dist. Ex. 28 at p. 7). Therefore, I find that the district offered the student a FAPE in the LRE for the 2007-08 school year.

A final matter remains to be addressed; the parents request to be reimbursed for the costs of an independent educational evaluation (IEE) that they had conducted by a private evaluator. It appears that the impartial hearing officer treated the parents' IEE reimbursement request as a part of the parents' request for reimbursement of tuition for their unilateral placements and improperly analyzed the IEE request using the Burlington/Carter analysis, rather than analyzing it as a separate issue requiring its own determination (IHO Decision at p. 28 n. 12). The hearing record shows that the parents requested an IEE in their November 2007 due process complaint notice, stating that they disagreed with the evaluations conducted by the Keller School (IHO Ex. 2 at p. 2). The parents obtained an evaluation of the student at their own expense, which was conducted by a private neuropsychologist and memorialized in a neuropsychological summary dated December 6, 2007 (Parent Ex. B at p. 1).

Subject to certain limitations, federal and State regulations provide that a parent has a right to obtain an IEE at public expense if a parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]). A district may request the reason that the parent(s) disagree with an evaluation, but may not require an answer from the parents or impose any additional conditions prior to providing an IEE at public expense (8 NYCRR 200.5[g][1][ii], [iii]). Rather:

[i]f a parent requests an independent educational evaluation at public expense, the school district must, without unnecessary delay, either ensure an independent educational evaluation is provided at public expense or file a due process complaint notice to request a hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria.

(8 NYCRR 200.5[g][1][iv]). In the present case, the district failed to promptly ensure an IEE was provided at public expense and failed to file a due process complaint notice to defend its own evaluations. Accordingly, the parents must be reimbursed for the costs they incurred for obtaining the private neuropsychologist's neuropsychological summary at their own expense (see Application of a Student with a Disability, Appeal No. 08-101; Application of a Student with a Disability, Appeal No. 08-046).

In light of my decision herein, it is not necessary to address the parties' remaining arguments.

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

**IT IS ORDERED** that the impartial hearing officer's decision is annulled to the extent that it found that the parents were not entitled to reimbursement for their independent educational evaluation;

**IT IS FURTHER ORDERED** that, upon proof of payment, the district is to reimburse the parents for the independent educational evaluation that they obtained;

**IT IS FURTHER ORDERED** that, consistent with this decision and upon proof of payment, the district reimburse the parents for the related services that they obtained for the student pursuant to pendency; and

**IT IS FURTHER ORDERED** that, consistent with this decision, the district provide additional compensatory related services to the student that the parents were unable to obtain, but that the student was entitled to pursuant to pendency.

**Dated:**            **Albany, New York**  
                      **December 15, 2008**

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