



The University of the State of New York

The State Education Department State Review Officer

No. 08-150

Application of a STUDENT WITH A DISABILITY, by his 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] District

Appearances:

Legal Services of Central New York, attorneys for petitioners, Susan M. Young, Esq., of counsel

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., attorneys for respondent, Susan T. Johns, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which determined that respondent (the district) offered an appropriate educational program in the least restrictive environment (LRE) to their son (the student) for the 2008-09 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending a special class operated by the Board of Cooperative Educational Services (BOCES) in a 6:1+1 setting (Tr. pp. 186, 188). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student received a diagnosis of autism shortly before his third birthday (Tr. pp. 464-65) with noted "deficits in social reciprocity, communicative intent and habitual interest and/or behaviors" (Joint Exs. 2 at p. 2; 9 at p. 2).¹ The student received early intervention services followed by preschool special education services which included special education, occupational

¹ The hearing record index listed 62 total exhibits, the first 50 of which were identified as "District Exhibits" and the last 12 of which were identified as "Joint Exhibits." The impartial hearing officer's November 3, 2008 decision identified all of the exhibits as "Joint Exhibits" (IHO Decision at pp. 22-25). For the purpose of simplicity, I refer to all exhibits as "Joint Exhibits" throughout this decision.

therapy (OT), speech-language therapy, and applied behavioral analysis (ABA) services at home (Joint Exs. 2 at p. 1; 9 at p. 2).

On June 9, 2006, the district's Committee on Special Education (CSE) met and determined that the student was eligible for special education and related services as a student with autism (Joint Ex. 3 at pp. 1, 19). The CSE recommended that the student be placed in a general education kindergarten class where he would receive direct consultant teacher services, the support of a 1:1 aide and related services of speech-language therapy and OT (*id.* at pp. 15-16). In addition, the CSE recommended that the student be provided with program modifications consisting of the implementation of a "sensory integration diet" throughout the school day, adult implementation and monitoring of a gluten-free diet for the student, and support for school personnel on behalf of the student consisting of yearly training sessions to discuss particular issues related to autism and ABA as needed (*id.*). The June 9, 2006 individualized education program (IEP) detailed the student's cognitive, speech-language, social and motor needs and additionally noted that the student "continues to require the support of a 1:1 aide, due to safety concerns characterized by hitting teachers and peers and running out of the room" (*id.* at p. 6). The June 2006 IEP further noted that the student "continues to require a sensory diet that must be implemented throughout the day in order to achieve an arousal level in which [the student] can benefit most from during his school day" (*id.*). In September 2006, the CSE reconvened and added counseling and physical therapy (PT) to the student's IEP (Joint Ex. 5 at pp. 1, 15-16).

At the beginning of the 2006-07 school year, the student's kindergarten teachers were provided with training and follow-up consultation by a board certified behavior analyst (BCBA), which led to recommendations for the implementation of a formal token reward system, increased formal sensory breaks throughout the day for the student, and ignoring low-level problem behaviors (Joint Exs. 6; 7 at p. 3). Minutes from a November 2006 consultation session with the BCBA indicated that although there were continuing concerns regarding the student's behavior problems, his team decided that a change in placement would be premature at that time (Joint Ex. 8).

During the 2006-07 school year, the student manifested behavioral difficulties, which resulted in multiple incidents of physical aggression directed toward school staff, including hitting, kicking, head butting, punching, spitting upon, biting teachers and aides, and running out of the classroom; some of these incidents resulted in physical injuries to school staff (*see* Joint Ex. 48 at pp. 1-2, 4-17; *see also* Tr. pp. 24, 29-32). In December 2006, the student began receiving special education services for a portion of the school day in "the bookroom," a 1:1 setting in a separate location away from his classmates (Tr. pp. 26-29, 479-83; Joint Ex. 41 at p. 1).²

² The hearing record contains conflicting information as to the precise amount of time spent by the student in the bookroom upon its creation in December 2006. The student's special education teacher advised that the student initially spent "about an hour every day" in the bookroom (Tr. p. 28). His mother contended that "On average he was about 40 minutes a day in the classroom. The rest of the day he was out of the classroom segregated" (Tr. pp. 479-80). The student's daily schedule indicated that as of December 2006, he spent just over two hours per day in the bookroom (Joint Ex. 41 at p. 1).

In January 2007, the district conducted a psychological evaluation of the student as part of a triennial reevaluation (Joint Ex. 51). The evaluating psychologist reported that the student demonstrated "average cognitive ability," but noted that "a combination of language, attentional, and behavioral concerns negatively impacted [the student's] performance on assessment" (id. at p. 3). The evaluating psychologist believed the student's cognitive potential to be above average, and she considered the student's demonstrated reading readiness skills and understanding of basic math concepts as "age appropriate" (id.).

In January 2007, the parents sought an independent diagnostic evaluation from a developmental evaluation center (Joint Ex. 9). The independent evaluation was conducted by a team of professionals consisting of a psychologist, occupational therapist and speech-language pathologist (id. at p. 1). The evaluation was conducted using a variety of transdisciplinary assessment procedures including a review of records, parental interview, observations, informal play-based assessment, and discipline specific assessments (id. at p. 3). The psychologist opined that the student was functioning in the below average range with respect to cognitive development and commented that the student's cognitive skills were "unevenly developed," with the student showing "a relative strength in the area of nonverbal skill development" while "his verbal problem solving skills [were] an area of relative weakness" (id. at p. 7). The psychologist added that that the student's self-help and adaptive skills fell in the below average range and were commensurate with his measured cognitive abilities (id.). The speech pathologist observed that the student demonstrated difficulties in the areas of expressive language and language structure, but noted that the student's "understanding of language seems to be quite a bit higher" (id. at p. 9). The speech pathologist concluded that the student presented with "difficulties in speaking and organizing language concepts with differences in social communication skills often seen in children with autism," and cautioned that the student demonstrated "differences in language processing that might later be indicative of learning disabilities at a later time in his development and difficulty formulating sentences and/or word finding that will impact his abilities to interact with others" (id.). With regard to the student's motor development, evaluation of the student by an occupational therapist revealed below average gross motor and fine motor skills, as well as sensory processing difficulties (id. at pp. 10-16). The evaluators concluded that the student continued to demonstrate a pattern of atypical development that was characteristic of young children with autism spectrum disorders (id. at p. 16).

In summary, the independent evaluators recommended the continuation of the student's special education services, opining that the student "would continue to benefit from the services of a 1:1 assistant during his school day," and adding that "[w]ithin his current educational setting, [the student's] social skills would be enhanced by including him with same age peers whenever possible" (Joint Ex. 9 at p. 16). The report concluded that that OT services "should continue and should address fine motor delays as well as the sensory processing differences," and that the student would benefit from speech-language therapy and implementation of a sensory diet and visual strategies (id. at pp. 16-18).

In March 2007, the district reevaluated the student's speech-language skills as part of the student's triennial review (Joint Ex. 10). Based on the results of standardized testing the evaluating speech pathologist concluded that the student's receptive language scores fell in the average range, while his expressive language and auditory perceptual skills fell in the below

average range (id. at p. 2). The evaluating speech pathologist recommended: (1) that the student's speech-language therapy be reduced in light of his average receptive language scores; (2) that the student's speech-language therapy sessions focus on expressive language skills, including grammar and pragmatics, word retrieval strategies, and auditory perceptual skills; and (3) that new information be presented to the student "in visual, tactile and auditory modes whenever possible to aid him in learning" (id.).

An April 2007 OT annual review form recommended that the student's OT be reduced from four sessions per week to three individual sessions per week, and that therapy address the student's sensory processing and visual perceptual/motor skill deficits as well as maintain his current fine motor abilities (Joint Ex. 12). A May 9, 2007 PT annual review form indicated that the student's gross motor skills were at a four year old level and that he displayed limited attention and impulsivity (Joint Ex. 13). The student's static balance skills were characterized as "poor" as his movement, when slowed, was poorly graded/controlled (id.). The recommended level of PT services remained the same (id.).

On May 11, 2007, the CSE reconvened for the student's reevaluation/annual review (Joint Ex. 14). The May 11, 2007 IEP stated that the student had been receiving "mainly small group and one-on-one instruction with minimal whole group instruction" (id. at p. 2; see Joint Ex. 41 at pp. 1-6). The May 11, 2007 IEP described the student's performance as academically and behaviorally "inconsistent," but noted that he had "made gains in both areas during this school year" (Joint Ex. 14 at p. 2). According to the May 11, 2007 IEP, the student's scores on the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) placed him in the "some risk" category and therefore he would continue to receive additional practice in identified areas (id.). With respect to speech-language, the May 11, 2007 IEP reflected the results of the district testing completed in March 2007 (id. at pp. 3-4; see Joint Ex. 10). The May 11, 2007 IEP identified writing as the student's "biggest area of frustration at this time" and indicated that the student "requires one-to-one assistance to ease his transitions throughout the day" (Joint Ex. 14 at p. 3). The May 11, 2007 IEP indicated that "a visual schedule has helped, as well as verbal warnings" and affirmed the student's need for "repetition and visual cues" (id.). In the realm of the student's social development, the student's counselor noted that she had observed "positive social/emotional/behavior growth during this school year" (id. at p. 4). She commented that the student had benefited from the attendance of his 1:1 aide at counseling sessions and the aide's ability to assist the student in applying learned skills (id.). The counselor hypothesized that "behavioral data appears to support a decrease in the numbers of aggressive behavior toward others," but cautioned that "there continues to be ongoing concerns when incidences do occur. These incidences vary in levels of intensity/severity; and, they continue to defy a pattern or predictability" (id.). With respect to physical development, the May 11, 2007 IEP indicated a diagnosis of "mild-moderate autism," and noted the student's sensory processing difficulties and his need for a sensory diet to assist him with organization and to enable him to better attend and participate in presented tasks (id. at pp. 4-5). The May 11, 2007 IEP commented that sensory activities helped the student to regain focus after a period of escalation (id. at p. 4). The CSE characterized the student's gross motor skills as "delayed globally" and identified the student's "limited body awareness and motor planning" (id. at p. 5). In the area of management needs, the May 11, 2007 IEP indicated that the student required the support of a 1:1 assistant "due to safety concerns characterized by hitting teachers and peers, [and] running out of the room" and added

that he "continues to require a sensory diet that must be implemented throughout the day" (*id.*). The May 11, 2007 IEP reflected that the student used "a reinforcement chart throughout the day as part of his functional behavioral plan to address his need for continuous positive responses to his compliance, transitions and interactions," and indicated that the student's behavioral intervention plan (BIP) had been updated in May 2007 and that it would be reviewed quarterly "or more frequently if adjustments are needed" (*id.*).

The May 11, 2007 IEP recommended that for the 2007-08 school year, the student receive direct consultant teacher services five times weekly for one hour in a 15:1 integrated setting and five times weekly for 30 minutes per day in a 15:1 non-integrated setting, a 1:1 teacher assistant, group counseling once per week for 30 minutes, individual OT three times per week for 30 minutes, individual PT twice per week for 30 minutes, group speech-language therapy two times per week for 30 minutes, and individual speech-language therapy four times per week for 30 minutes (Joint Ex. 14 at p. 15).³ The May 11, 2007 IEP recommended that OT "include 1-2 push in sessions as to integrate [the student's] sensory diet in order to promote increased participation in fine motor tasks within the academic setting" (*id.* at p. 16). In the area of program modifications, the May 11, 2007 IEP further recommended the implementation of the student's sensory diet throughout the day, adult monitoring of his gluten-free diet, and checks for understanding and refocusing and redirection as necessary (*id.*). As for testing accommodations, the May 11, 2007 IEP also provided for the repeating of directions, frequent breaks, and a snack allowance for the student during testing to improve his self-organization and focus (*id.* at pp. 16-17). The IEP also called for quarterly team meetings as necessary, and recommended extended school year (ESY) services for summer 2007 (*id.* at pp. 16, 18).

On May 14, 2007, the student's BIP was updated (Joint Ex. 15). The BIP stated two goals, namely: (1) "To ensure the safety of [the student] as well as the adults and peers around him by decreasing the number of and intensity of his incidences of physical aggression," and (2) "To keep [the student] present in the classroom as much as safely possible" (*id.* at p. 1). The BIP specifically noted that the student's "behavior has been shown to be linked to his physical health – if he is sick or coming down sick – his behavior can deteriorate" (*id.*). The BIP included notes relative to the student's daily schedule, and outlined praise and reinforcement (rewards), methods and strategies for working with the student, supportive strategies, and suggestions for assessment and follow-up (*id.* at pp. 2-8). As an intervention strategy for addressing incidents of the student's aggression, the BIP suggested "A safe area outside of the classroom setting (bookroom) where [the student] can safely be removed to when his behaviors are too intense to manage in the classroom – do not continue talking – let him: sit quietly or do calm, quiet activities he can do independently" (*id.* at p. 7) (emphasis in original).

The student began the 2007-08 school year in a general education first grade classroom in his home school, where he received consultant teacher and related services, as well as the support of a 1:1 assistant (Tr. p. 487). Data sheets and a communication log were used to track

³ The May 11, 2007 IEP also recommended that from May 14, 2007 to June 21, 2007, the student receive group speech-language therapy services three times per week for 30 minutes and individual speech-language therapy services five times per week for 30 minutes (Joint Ex. 14 at p. 15). The May 2007 IEP indicated that the student would continue to be supported by a 1:1 aide for the remainder of the 2006-07 school year and that beginning in September 2007 the student would be assigned a 1:1 assistant (*id.*)

the student's aggressive behavior and educational performance at school, as well as significant events occurring within the student's home and the student's health (Tr. p. 489; Joint Exs. 30; 31). The student's educational team met on a regular basis, with the student's mother participating in numerous meetings (Tr. p. 490; Joint Exs. 19; 20; 22; 25; 28; 33). During the first half of the 2007-08 school year, numerous revisions were made to the student's BIP including modifying the student's reward system (Joint Ex. 17), amending the functional hypothesis (Joint Exs. 18; 27), updating staff members responsible for carrying out the plan (Joint Ex. 23) and modifying the crisis management section of the plan (Joint Ex. 24). In an e-mail to the student's mother dated November 19, 2007, the student's special education teacher reported that the student's team felt that "for the most part things are moving quite smoothly" and recommended reducing the frequency of the student's team meetings (Joint Ex. 54). However, notes from a December 3, 2007 team meeting with the student's mother, indicated that as reflected in the behavior charts, the student's behavior was "much lower than last month" which was "partly due to being sick" (Joint Ex. 33). The team identified as a concern the student's dislike of school and questioned whether it was due to the work becoming more difficult (*id.*).

On January 2, 2008, the day the student returned from a school break, he engaged in 27 incidences of physical aggression toward district staff (Joint Exs. 29 at p. 2; 30 at p. 69). Beginning on January 3, 2008, he was suspended for five days, and the principal of the student's elementary school requested a superintendent's hearing (Joint Ex. 32 at pp. 2-3; see 8 NYCRR 201.9[c]).

A manifestation team met on January 8, 2008 (Joint Ex. 34). The manifestation team determined that the student's behavior was a manifestation or result of a disability and concluded that modification of the student's May 11, 2007 IEP was required (*id.*). The district's notification to the parents advised them that it would conduct a functional behavioral assessment (FBA) and consider making appropriate changes to the existing BIP, and advised them of a scheduled CSE meeting on January 14, 2008 (*id.*).

On January 8, 2008, a pre-CSE meeting was held at the request of the student's mother, for the purpose of discussing the student's escalating behavior patterns (Joint Ex. 35). As recorded in the meeting minutes, the student's BIP had been updated five times since the beginning of the 2007-08 school year (*id.* at p. 1). The minutes revealed that the student's mother had graphed the student's behaviors and that as indicated by the graphs, the student's behaviors decreased when he was healthy, and increased when he was ill (*id.* at pp. 3-4). In addition, the student's mother felt that the student's new 1:1 assistant had not spent enough time with the student, and that placing the student in a BOCES program would be equivalent to a "life sentence" (*id.* at pp. 1-2). According to the meeting minutes, there was discussion that as the academic demands of first grade increased, the student's aggressive behaviors had also increased (*id.* at p. 2). The district indicated that even though the frequency of the student's aggressive behaviors decreased from the 2006-07 school year, the current level of the student's physical incidents was still unacceptable (*id.*). The student's mother felt that the district should conduct another FBA and bring back the BCBA, and she suggested modifying the student's program, including reworking the student's reward system, augmenting the training of the student's 1:1 teacher assistant, reducing the student's work load short-term, increasing the amount of his

counseling services, and determining how the class curriculum could be modified to meet the student's special education needs (id.; see also Joint Ex. 55).

The CSE convened on January 14, 2008 (Joint Exs. 36; 37). Meeting participants included the CSE chairperson/director of pupil services, the principal of the student's school, a school psychologist, a regular education teacher, a special education teacher, a speech therapist, a social worker, an OT service provider, a BOCES supervisor, the student's mother, and three advocates for the parent (Joint Ex. 37 at p. 18). Handwritten meeting notes generated by the district's school psychologist established that the CSE discussed the student's progress as well as his frustration and aggressive behavior (Joint Ex. 36 at pp. 3-4). The student's mother contended that the student's aggressive behavior was related to transitions and illness (id. at pp. 4-5, 12). The BOCES supervisor described a BOCES class at the district's elementary school, but the student's mother expressed concern that the student "would pick up behaviors" from other students there (id. at pp. 5-7). She also voiced other concerns, including that (1) the student's sensory diet was not implemented when the student's behavior turned negative, (2) the student's 1:1 assistant was not properly trained to recognize the warning signs of the student's escalating behavior, (3) over the use of a padded room at BOCES, and (4) the district's reward system was not working and that the student was not receiving enough counseling (id. at pp. 8, 15-16).

The January 14, 2008 CSE recommended a change in the student's placement from general education with consultant teacher services to a 6:1+1 BOCES special class, effective January 15, 2008 to May 13, 2008 (Joint Ex. 37 at p. 14). In addition, the CSE recommended that group counseling one time weekly for 30 minutes be added to the student's IEP (id. at p. 14). The amended IEP noted that the student's behavior, as indicated on behavioral charts, was slowly progressing; however there were still incidents of aggressive behavior toward staff that were of significant concern and which had caused bodily injury (id. at p. 5).

For several weeks following the January 14, 2008 CSE meeting, the student received home instruction (Joint Ex. 58 at p. 4). By letter to the student's BOCES special education teacher dated February 12, 2008, the student's mother requested that the student not be put in the classroom's "padded room" under any circumstances, citing the long-term effects on the student of past exposures to a room of that nature (Joint Ex. 39). On February 27, 2008, a BOCES supervisor responded, informing the student's mother that "we cannot promise or guarantee that we will not use the time-out room. That decision will be made as situations occur, and with the safety and order of the entire class in mind" (Tr. p. 290; Joint Ex. 57) (emphasis in original). On the same day, the student entered the recommended BOCES 6:1+1 special class housed in the district's elementary school (Joint Ex. 42 at p. 1).

On or about February 29, 2008, the parents, through counsel, filed a due process complaint notice (Joint Ex. 58). The parents alleged that they were deprived of an opportunity to participate in the January 14, 2008 CSE meeting because the CSE: (1) failed to inform the parents if BOCES observed or evaluated the student as being appropriate for the proposed placement; (2) failed to afford them an opportunity to observe or visit any proposed classroom, including the proposed "time out room," despite their numerous requests after the CSE meeting to do so; (3) failed to provide them with a class profile for the recommended placement; and (4) failed to make any recommendations regarding inclusion or mainstreaming the student, and

instead, deferred such decisions to the discretion of the BOCES classroom teacher (*id.* at p. 4). The parents also alleged that: (1) the student's sensory integration diet and BIP were not consistently delivered to him during December 2007, (2) the CSE failed to recommend "therapeutic listening therapy" as requested by the parents, (3) the CSE failed to update either the student's FBA or his BIP, (4) despite the fact that the student was attending the 6:1+1 BOCES special class, the parents had not received any information regarding the usage, policy, and procedures associated with the "time out room," which they explicitly rejected for use on their son, (5) during the time period that the student was out of school, home instruction was provided by a district employee who was not a certified special education teacher, (6) as of February 29, 2008, the parents had not been provided with any "new IEP developed from the January 14, 2008 CSE meeting," (7) although the January 14, 2008 IEP recommended a 1:1 assistant, no such assistant had been provided to the student since he entered the 6:1+1 BOCES special class, and (8) since he entered the 6:1+1 BOCES special class, the student had not received any ABA instruction (*id.*). The parents sought: (1) placement of the student in the district's inclusion classroom with a 1:1 assistant trained in sensory integration, (2) for district personnel working with the student to be trained in the delivery of sensory integration to the student, including the appropriate use and scheduling of his sensory integration diet, (3) for the district to provide a class profile for the student's current 6:1+1 BOCES special class to the parents, (4) for the district to update the student's FBA and BIP, including a positive reinforcement schedule delivered on a frequent basis with tangible rewards as motivators, (5) a modification of the January 14, 2008 IEP to include the use of study carrels and headphones for the student, and (6) a modification of the January 14, 2008 IEP to include ABA instruction by service providers trained in ABA instruction (*id.* at pp. 4-5).⁴

Between February 2008 and April 2008, BOCES conducted an FBA of the student (Joint Ex. 59). The FBA provided the following functional hypothesis: "When [the student] is asked to do a task that he deems to be unpleasant or perceives as too difficult that occurs in the context of academic's [sic], he becomes verbally and physically aggressive in order to escape or avoid the task" (*id.* at p. 4). The FBA proposed numerous preventative strategies, including providing the student with 1:1 adult supervision and scheduled sensory breaks, changing the student's physical setting, breaking up work, and offering the student options when choosing a reward (*id.*).

On April 2, 2008, a resolution session was conducted between the parties at which "some of the issues raised in the initial due process complaint were resolved" (Joint Ex. 49 at p. 5). On May 5, 2008, BOCES devised a revised BIP targeting the student's aggression, which included as consequences for negative behaviors "loss of privileges, loss of rewards, and a time-out (separate location from peers)" (Joint Ex. 60 at p. 1).

On May 29, 2008, the CSE convened for the student's annual review (Joint Ex. 46). Meeting participants included the CSE chairperson/director of pupil services, a school psychologist, a BOCES staff member, an OT provider staff member, a district physical education teacher, a district special education teacher, the student's mother, the parents' attorney, a parent

⁴ Although the May 11, 2007 IEP recommended that for the 2007-08 school year the student receive direct consultant teacher services, the student's mother testified that her understanding of "inclusion class" was a regular education class with a push-in special education teacher (Tr. pp. 538-39; Joint Ex. 14 at p. 15).

advocate, and the attorney for the district (*id.* at p. 15). The May 29, 2008 IEP recommended a 6:1+1 BOCES special class, with effective dates of May 30, 2008 to May 29, 2009, related services consisting of a 1:1 assistant, individual counseling once per week for 30 minutes and group counseling once per week for 30 minutes, individual OT three times per week for 30 minutes, individual PT twice per week for 30 minutes, individual speech-language therapy twice per week for 30 minutes and group speech-language therapy three times per week for 30 minutes, and parent counseling and training once per month for 30 minutes in a group setting (*id.* at p. 10). The IEP included program modifications consisting of a sensory integration diet, adult monitoring of the student's gluten-free diet, checking for understanding, and assisting the student with refocusing and redirection (*id.* at p. 11). Testing accommodations included directions repeated and frequent breaks (*id.* at p. 12). The IEP provided for regularly scheduled team meetings to monitor the student's progress (*id.* at p. 11). The May 2008 CSE recommended that the student be mainstreamed "in all special areas: music, art, library, and PE. Starting in September 2008, he will also be mainstreamed in Math. Further consideration for additional mainstreaming will occur based on his ability to maintain behavioral expectations in the typical classroom" (*id.*). The May 2008 CSE recommended the student for ESY services from July 7, 2008 to August 15, 2008 consisting of a 6:1+1 BOCES special class, individual speech-language therapy twice per week for 30 minutes and three times per week for 30 minutes in a group setting (*id.* at p. 13).⁵

On or about June 16, 2008, the parents, through counsel, filed a second due process complaint notice, which contained allegations relative to both the January 14, 2008 and May 29, 2008 IEPs (Joint Ex. 49). With regard to the January 14, 2008 IEP, the parents alleged that: (1) the student's sensory diet was not consistently or appropriately delivered, (2) the January 14, 2008 CSE failed to update either the student's FBA or BIP, and (3) the January 14, 2008 CSE did not make any recommendations regarding inclusion or mainstreaming the student, deferring instead to the discretion of the BOCES classroom teacher (*id.* at p. 5). With regard to the May 29, 2008 IEP, the parents alleged that: (1) the recommended 6:1+1 BOCES special class was too restrictive and therefore inappropriate, (2) the parents had not received any information from either the district or BOCES regarding the usage, policy, and procedures associated with the "time out room/chair," which they explicitly rejected for use with their son, and the use of physical restraint, (3) the IEP reduced the student's speech-language services from four individual and two group sessions per week to two individual and three group sessions per week, (4) the CSE did not recommend mainstreaming the student in science and social studies because class times conflicted with therapists' schedules, and (5) the recommended BOCES summer program was a segregated program, which deprived the student of the opportunity to interact with his non-disabled peers (*id.* at p. 6). The parents sought: (1) placement of the student in the district's inclusion classroom with a 1:1 assistant trained in sensory integration, (2) modification of the May 29, 2008 IEP to recommend ABA instruction by service providers trained in ABA instruction, (3) the elimination of the decrease in speech-language services, (4) that the district provide them with a class profile for the 6:1+1 BOCES special class recommended for fall 2008, (5) that the district and/or BOCES provide the parents with information regarding the usage,

⁵ The May 29, 2008 IEP indicated that the parents chose to send the student to a summer recreation program instead of the recommended BOCES class (Joint Ex. 46 at p. 13). The CSE determined that it would provide the student with a 1:1 assistant and related services at the recreation program (Tr. pp. 449-50; Joint Ex. 46 at p. 13).

policy, and procedures associated with a "time out room/chair" and the use of physical restraint, and (6) that the district provide them with special education itinerant teacher (SEIT) services for the student at the summer program identified by the parent at the May 29, 2008 CSE meeting (id.).

The district responded to the second due process complaint notice by letter dated June 16, 2008 (Joint Ex. 50). In its response, the district issued general denials of the allegations contained in the parents' due process complaint notice and took the position that the 6:1+1 BOCES special class recommended in the May 29, 2008 IEP was an appropriate placement for the student (id.).

An impartial hearing convened on June 19, 2008 and concluded on July 22, 2008, after three days of testimony. In his 25-page decision dated November 3, 2008, the impartial hearing officer applied the Daniel RR/Oberti⁶ test for determining whether the district recommended a program for the student in the LRE (IHO Decision at pp. 13-21). Pursuant to the Daniel RR/Oberti test, the impartial hearing officer first considered whether the student can be educated in a general education classroom with the use of supplemental aids and services (id. at pp. 14-19). He determined that the hearing record established that the district made reasonable efforts to accommodate the student in a general education first grade class (id. at pp. 15-16). However, after comparing the educational benefits available to the student in a general education class, delivered with the appropriate supplementary aids and services, to the benefits provided in a special education class, the impartial hearing officer held that the 6:1+1 BOCES special class was the appropriate placement for the student (id. at p. 17). Specifically, the impartial hearing officer found that the smaller class size would provide less distractions for the student and allow the student's teachers to address his behaviors (id.). The impartial hearing officer noted that the hearing record showed that the student's maladaptive behaviors could have a negative effect on the other students in the classroom (id. at p. 18). He further found that the student is deriving academic benefits in the 6:1+1 placement (id. at p. 19). Regarding the second prong of the Daniel RR/Oberti test, the impartial hearing officer concluded that the district had included the student in school programs with non-disabled students to the maximum extent appropriate (id. at pp. 20-21). He found that the district recommended that the student be mainstreamed for physical education, math, lunch and specials and rejected the parents' contention that the CSE inappropriately deferred to the student's teacher the responsibility to determine which subject areas to mainstream the student (id. at p. 20). The impartial hearing officer also rejected the parents' assertion that the CSE improperly reduced the student's speech services (id.). Accordingly, the impartial hearing officer concluded that the district, through its recommended program of a 6:1+1 BOCES placement, enabled the student to receive educational benefit in the LRE and dismissed the parents' due process complaint notice (id. at p. 21).

The parents appeal from the impartial hearing officer's decision, arguing that the impartial hearing officer erred in determining (1) that the district's recommended 6:1+1 BOCES special class placement provided a free appropriate public education (FAPE) to the student in the LRE, (2) that the CSE did not improperly defer to the BOCES classroom teacher the responsibility to determine the level of the student's mainstreaming, and (3) that the district's

⁶ Oberti v. Bd. of Educ., 995 F.2d 1204, 1213 (3d Cir. 1993), Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989).

recommended reduction in the student's speech-language services was appropriate. The parents request annulment of those portions of the impartial hearing officer's decision which determined that the 6:1+1 BOCES special class placement was appropriate, that the placement was the LRE, that the student was deriving academic benefit, that the student was mainstreamed to the maximum extent appropriate, that the CSE did not inappropriately delegate its authority to the BOCES classroom teacher, that the reduction in speech-language services provided to the student was appropriate, and discrediting the hearing testimony of the parents' expert witness. The parents further seek a determination that the district failed to offer a FAPE in the LRE and an order directing the district to convene a CSE to recommend placement of the student in a district inclusion class with a 1:1 teaching assistant trained in sensory integration with the related services that the student was receiving prior to the reduction in speech-language services prescribed in the May 29, 2008 IEP.

The district answers, contending that: (1) the petition should be dismissed for failure to state a claim upon which relief can be granted, (2) the 6:1+1 BOCES special class is reasonably calculated to enable the student to receive educational benefit and is the LRE, and (3) the impartial hearing officer correctly determined that the recommended reduction in speech-language therapy is appropriate.

As an initial matter, I note that neither party appeals those portions of the impartial hearing officer's November 3, 2008 decision which (1) declined to consider the parents' contentions regarding alleged deficiencies in the BOCES summer program as set forth in their June 16, 2008 due process complaint notice based upon their lack of relevance (IHO Decision at p. 6; see Joint Exhibit 49 at p. 6), and (2) directed the district to furnish the parents with copies of the student's class profile for the 2008-09 school year and of any written policy regarding the use of restraints (IHO Decision at p. 21). Therefore, I find that these portions of the impartial hearing officer's decision are final and binding on the parties (34 C.F.R. § 300.514; 8 NYCRR 200.5[k]; Application of a Student with a Disability, Appeal No. 08-107;⁷ Application of a Student with a Disability, Appeal No. 08-073; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

Next, I note that the dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school

⁷ The New York State Education Department's Office of State Review maintains a website at www.sro.nysed.gov. The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). The Individuals with Disabilities Education Act (IDEA) requires a CSE to review and if necessary revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A][i]; 34 C.F.R. § 300.324[b][1][i]; 8 NYCRR 200.4[f]), and each new IEP supersedes the prior IEP in addressing the student's needs (see Application of the Bd. of Educ., Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 06-060; Application of a Child with a Disability, Appeal No. 06-046; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-063). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). Exceptions to the mootness doctrine apply only in limited situations and are severely circumscribed (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]; Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

In the instant matter, the student's January 14, 2008 IEP governed the 2007-08 school year, and was superseded by the student's May 29, 2008 IEP, which governed the 2008-09 school year (compare Joint Ex. 37 at pp. 1, 14-15, with Joint Ex. 46 at pp. 1, 10-11; see Patskin, 583 F. Supp. 2d at 428-29; Application of the Bd. of Educ., Appeal No. 06-044 [finding that once a new IEP has been devised it supersedes the student's prior program from a former school year so a finding that the student was not provided a FAPE would have no actual impact on the parties]; Application of a Child with a Disability, Appeal No. 06-027; Application of the Bd. of Educ., Appeal No. 05-063; Application of a Child with a Disability, Appeal No. 05-021). Accordingly, I find that the January 14, 2008 IEP has been rendered moot and does not fall within the narrow exception for reviewing moot cases that are capable of repetition yet evading review. Consequently, my analysis will focus on the May 29, 2009 IEP.

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 (A.C. v. Bd. of Educ., 2008 WL 5505470, at *4 [2d Cir. Jan. 16, 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see 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).

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 a Student with a Disability, Appeal No. 08-138; Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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

At the time of the May 29, 2008 CSE meeting, the student had been attending the BOCES 6:1+1 special class for approximately three months. The May 29, 2008 IEP indicated that although the student was progressing "adequately" in reading, he evidenced regression in his nonsense word fluency, and it noted that his oral reading fluency scores placed him in a high risk category (Joint Ex. 46 at p. 2). The hearing record further indicates that regression was noted in some of the student's DIBELS scores (Tr. p. 264; Joint Exs. 46 at p. 2; 47 at p. 4). According to his BOCES special education teacher, the student was "pretty on target" with respect to math (Tr. p. 189). The student was frustrated by writing tasks (Joint Ex. 46 at p. 3). Overall, the student performed most academics at grade level (Tr. p. 219). The student's teacher opined that he "needs to have his academics administered in a small group setting where he can be least distracted and get the most adult support" and that the student requires academic instruction to be administered in short time frames (Joint Ex. 46 at p. 3). With regard to speech-language, the May 29, 2008 IEP revealed that the student had "shown mastery for offering a solution to a problem, using correct regular and irregular nouns in the therapy room, regular past tense verbs in the therapy room and initiating interaction with his peers in the therapy room" (*id.* at p. 2). The May 29, 2008 IEP indicated that the student continued to have some problems recalling presented information and responding to it in an appropriate verbal manner, and identified his expressive language skills as "the area of greatest weakness for him at this time" (*id.* at p. 3). In the realm of social development, the May 29, 2008 IEP reflected that the student had started to develop relationships with peers in the classroom (*id.*). With respect to motor development, the May 29, 2008 IEP apprised that the student presented with diminished sensory processing, along with difficulties with fine motor and visual motor integration abilities, but that he demonstrated improved writing skills (*id.* at p. 4). The student presented with muscle tone "at the low end of normal and functional muscle strength throughout his body," and the May 29, 2008 IEP noted improvements in his "tolerance to upper extremity weight bearing positions" and "trunk control" which had "positively impacted [the student's] form in the developmental positions during dynamic reach activities although compensations continue to be noted" (*id.*). With regard to management needs, the May 29, 2008 IEP maintained that the student required a 1:1 assistant to help him successfully manage his behaviors throughout the day and to implement the student's sensory diet, mark his behavior chart and complete his level sheet on his BIP (*id.* at p. 5). The May 29, 2008 IEP referenced incidents in which student "is disruptive and/or aggressive and his assistant needed to remove [the student] from the group, keep him safe (physically restrained) and prepare him to re-join the classroom activities" (*id.*). The May 29, 2008 IEP stated that the student needed to remain in a small class "so his impulsive and aggressive behaviors can be effectively managed. His FBA/BIP needs to continue to be implemented" (*id.*).

To address the student's academic needs, the May 29, 2008 CSE recommended the student's continued placement in the BOCES 6:1+1 special class with mainstreaming for

mathematics and specials (Joint Ex. 46 at pp. 10-11). The CSE also recommended providing the student with a 1:1 assistant for all academic classes and therapy sessions conducted within the school building (*id.*). According to the BOCES teacher, the focus of the 6:1+1 class was to work on students' behaviors and social skills so as to enable them to return to a general education classroom (Tr. p. 188). The teacher testified that within her classroom, she employed a research based reading program that addressed all of the student's deficit areas (Tr. p. 190).

To address the student's speech-language needs, the CSE recommended that the student receive group speech-language therapy three times per week and individual speech-language therapy twice per week (Joint Ex. 46 at p. 10). Although the May 29, 2008 IEP listed a therapy room as the designated location for speech-language services, it provided for a change in the location of services based on the student's needs, if necessary (*id.* at p. 11). The May 29, 2008 IEP also recommended that "As much as possible a push-in to the classroom model should be used to help with carryover," while acknowledging that "For some speech and language tasks there will be a need for a location outside the classroom" (*id.*).

To address the student's sensory processing, fine motor and visual motor deficits, the CSE recommended individual OT three times per week in a therapy room (Joint Ex. 46 at p. 10). A notation on the May 29, 2008 IEP indicated that OT service provision "should include 1-2 push-in sessions to integrate [the student's] sensory diet in order to promote increased participation in fine motor tasks within the academic setting" (*id.*). To address the student's gross motor needs, the CSE recommended that the student receive individual PT twice per week in a non-integrated setting (*id.* at p. 10). Individual counseling sessions once per week in a non-integrated setting and group counseling sessions once per week were recommended to address the student's social/emotional needs (*id.*). The hearing record indicates that BOCES employed a program-wide level system to manage classroom behavior and that staff were trained to deal with students in crisis using the Life Space Crisis Intervention (LSCI) model (Tr. pp. 197-98). The IEP included a once monthly session of parent counseling and training, along with a statement that an overview of LSCI training would be provided to the parents in September (Joint Ex. 46 at pp. 10, 11). A draft FBA and BIP were reviewed and modified by the May 29, 2008 CSE (Tr. p. 218).

The May 29, 2008 IEP also included several program modifications, including implementation of a sensory diet throughout the day, monitoring of the student's mealtimes to insure compliance with food restrictions, and assisting the student as necessary by checking for understanding and providing the student with refocusing and redirection (Joint Ex. 46 at p. 11). The IEP permitted the student to use headphones as needed to reduce noise, and recommended the use of a visual schedule using pictures or text to present information (*id.*). The IEP further provided for monthly team meetings to promote consistent carryover between home and school (*id.*). Testing accommodations included directions repeated "To ensure that [the student] understands the task" and frequent breaks to "Allow [the student to] snack during testing to improve self-organization and focus" (*id.* at p. 12). The IEP also contained study skills, reading, writing, speech-language, social/emotional/behavioral, and motor goals (*id.* at pp. 5-10).

The parents contend that the impartial hearing officer erred by determining that the CSE's reduction in the student's speech language services was appropriate (IHO Decision at p. 20). The

parents assert that the impartial hearing officer's decision is contrary to the law governing burden of proof and that it is the district's obligation to prove that the reduction was appropriate.

According to the CSE chairperson, the student's speech therapist recommended a reduction in speech-language therapy, noting that due to schedules and absences the student had been receiving speech therapy approximately five times per week, which allowed him to make sufficient progress (Tr. pp. 448-49). The CSE chairperson indicated that the speech therapist felt the student would continue to make progress if his therapy was reduced from six to five sessions per week (Tr. p. 449). According to the student's mother, at the May 2008 CSE meeting, the speech therapist reported that the student was making progress in speech sessions; however, that progress had not generalized to the classroom (Tr. p. 532). She reported that the student's speech therapist recommended a reduction in services (id.).

Meeting minutes indicate that the student's BOCES speech therapist participated in the May 2008 CSE meeting, at which time the CSE recommended a reduction in speech-language services (Joint Ex. 47 at p. 3). Meeting minutes further indicate that the issue of the student's attendance⁸ was raised and that student's mother was concerned about the decrease in speech, noting that the student had trouble generalizing (id.). The May 2008 IEP indicated that the student had mastered several skills in the therapy room and with regard to these same skills the student was demonstrating "great progress" in classroom group sessions, provided an adult was near him (Joint Ex. 46 at p. 2). The IEP further indicated that the student demonstrated a strong receptive vocabulary and good listening skills, but that he had problems recalling presented information and responding to it in an appropriate verbal manner (id. at p. 3). The IEP noted that although the student had demonstrated growth with respect to his expressive language skills, they were still his area of greatest weakness (id.). The student's January 14, 2008 IEP contained 16 speech-language goals (Joint Ex. 37 at pp. 8-11). The student's April 2008 IEP progress note indicated that between January and April 2008, the student achieved two of these goals and was making some progress or progressing satisfactorily toward the remainder of his speech-language goals (Joint Ex. 37 at pp. 2-5).

Although the parents asserted that the CSE chose to reduce the student's push-in services despite his difficulty generalizing, the student's May 2008 IEP indicates that the location of speech services could change based on the student's needs and "as much as possible a push-in to the classroom model should be used to help with carryover" (Joint Ex. 46 at p. 11). The parents contend that the functional hypotheses from the student's September 2007 and November 2007 BIPs indicate that the student's behavior problems occurred when he had difficulty accessing the words to express his feelings (see Joint Exs. 18 at p. 1; 27 at p. 1). The student's consultant teacher for first grade testified that during the time she had him as a student, the student's verbal skills improved significantly and the student was able to share "more accurate feelings more often" (Tr. p. 130). However, she noted that in "the heat of the moment" the student had difficulty expressing himself verbally (id.). A subsequent behavioral assessment conducted by BOCES between February and April 2008 suggested that the student became aggressive when he was asked to do a task that he deemed unpleasant or perceived as too difficult within the context of academics (Joint Ex. 59 at p. 4).

⁸ According to the May 29, 2008 CSE meeting minutes the student's teacher reported that the student had been in attendance 66% of the time since entering the BOCES class (Joint Ex. 47 at p. 5).

Based upon the foregoing, I find that the district sustained its burden to demonstrate that the reduction in speech-language services was appropriate. The hearing record demonstrates that the CSE appropriately considered the student's speech-language needs and modified his special education program to meet his needs.

In summary, I find that the hearing record demonstrated that the district considered the student's unique special education needs in developing the May 29, 2008 IEP, and that the CSE recommended a program that was reasonably calculated to confer educational benefit upon the student. I will now consider whether the district provided its recommended program in the LRE.

A student's recommended program must be provided in the 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). 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 112, 120-21; Oberti, 995 F.2d at 1215; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 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 placements 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]).

The Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). Determining whether a student with a disability can be educated satisfactorily in a regular class with

supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

In applying the two-prong test to the instant case, I must first consider whether the student can be satisfactorily educated in the regular classroom with the benefit of supplemental aids and services.

With respect to the first factor, the impartial hearing officer determined that the district "made reasonable efforts to accommodate [the student] in the general education first grade class" (IHO Decision at p. 15). In so doing, he noted that the student was assigned a 1:1 teaching assistant, that the student's academics were modified to address the student's areas of difficulty, that a BIP was developed with a token reward system that was revised at the parents' request, that the student received 1:1 instruction when his behavior required it, and that the student was presented with a sensory diet and headphones (*id.*). After careful review, I find that the impartial hearing officer's determination on this issue is supported by the hearing record.

In determining the second factor, the educational benefits available to the student in a general education class with appropriate supplementary aids and services, as compared to the benefits provided in a special education class, it is not necessary to establish that the student will learn at the same rate, or master as much of the regular education curriculum as his or her disabled peers (Daniel R.R., 874 F.2d at 1044). The relevant question is whether a student can achieve the goals of his or her IEP within a general education program, with the assistance of supplementary aids or services (Mavis, 839 F. Supp. at 982 n.25; see Application of a Child with a Disability, Appeal No. 06-136; Application of a Child with a Disability, Appeal No. 05-010; Application of a Child with a Disability, Appeal No. 03-027; Application of a Child with a Disability, Appeal No. 03-009; Application of the Bd. of Educ., Appeal No. 02-081; Application of a Child with a Disability, Appeal No. 93-4). The fact that a student with a disability might make greater academic progress in a special education class may not warrant excluding the student from a general education program (Oberti, 995 F.2d at 1213).

In the case at bar, the impartial hearing officer did not address this factor as articulated above. The hearing record demonstrates that in January 2008, the student was making some academic progress in his general education class with the education supports identified above. The student's progress notes contained in the hearing record indicated that through the January 2008 quarter, the student achieved one of his IEP goals and was making "some progress" (SP) or "progressing satisfactorily" on 21 of the 40 remaining annual IEP goals (Joint Ex. 45; see also Tr. pp. 269-70). Additionally, 15 of the 41 annual goals listed on the 2007-08 progress note were marked "SC" (see comments); however, the comments were not included in the document admitted into evidence as part of the hearing record (*id.*). Two of the student's behavioral goals were not rated (Joint Ex. 45 at pp. 5, 6). On the student's November 2007 report card, his teacher

contrasted his variable academic performance between 1:1 or small group settings (in which he was "capable of counting by 10's, consistently naming the majority of letter sounds, and recognizing most of the Kindergarten high frequency words regularly" and classroom settings ("in which he did not perform as well" in "areas which are used as a standard for report card grading") (Joint Ex. 44 at p. 2). The student's January 2008 report card revealed that while he was either approaching or meeting State standards with respect to numerous reading, writing and math skills, the student was demonstrating less progress with respect to listening and speaking skills (*id.* at p. 1). The student's teacher commented that academically, the student was making good progress at the beginning of the second quarter, but characterized his progress throughout the balance of the quarter as "very inconsistent for various reasons" which the teacher did not specify (*id.* at p. 2). His teacher added that the student had "learned many good decoding strategies to help blend and segment words," and described his math problem solving skills as "strong this quarter" (*id.*). His teacher further advised that some of the student's assessments (DIBELS, for example) "remained on an uphill trend while other classroom assessments and activities were few and far in-between due to [his] not being in school" (*id.*; see also Joint Ex. 31 at p. 79). His teacher observed that halfway through the quarter the student became easily frustrated with academic work (Joint Ex. 44 at p. 2). Although the January 14, 2008 IEP reported that the student's behavior, as indicated on behavioral charts, was "slowly progressing," it also noted that the student continued to engage in "incidents of aggressive behavior toward staff that are of significant concern and have caused bodily injury" (Joint Ex. 37 at p. 5).

Regarding the student's placement in the 6:1+1 class, the student's BOCES teacher testified that the student was making academic progress and that his behavior had improved (Tr. pp. 189-90, 211, 212-13, 298). The student's IEP progress notes indicated that the student achieved 4 of 41 annual goals between January and April 2008 (Joint Ex. 45). Additionally, the progress note indicated that the student was making some progress or progressing satisfactorily toward 32 goals (Joint Ex. 45). Four of the goals directed the reader to "see comments," but again the comments were not included on the document (Joint Ex. 45). The student's BOCES teacher testified that she did not complete an April report card for the student because she was unfamiliar with the form used by the previous teacher, the student started midway through the marking period, and she was not able to report on all of the skills listed on the district's report card (Tr. pp. 270-71). The teacher indicated that she intended to complete a June report card for the student; however, if a June report card was completed it was not entered into evidence as part of the hearing record (Tr. p. 271). Evidence adduced at the impartial hearing supports the parents' contention that the student's DIBELS scores declined after entering the 6:1+1 class (Tr. pp. 167-70, 263-64, 524; Joint Exs. 46 at p. 2; 47 at p. 4). The student's mother reported that the student's academic performance with regard to spelling had declined in the special class setting and the student's BOCES teacher confirmed that the student had done poorly on his spelling tests (Tr. pp. 255, 523-24, 531-32).

In sum, I find that the hearing record is insufficient to adequately compare the educational benefits of general and special education for the student. While there is some evidence indicating that the student was receiving some educational benefit in both settings, the hearing record is missing narrative information from progress reports for the period of time that the student attended a general education class and lacks reports cards from the student's 6:1+1 placement. Given this lack of information from the progress notes, I am unable to determine the

extent to which the student is able to achieve his IEP goals in the general education environment and therefore I am unable to appropriately compare the educational benefits of the student's general education class versus the 6:1+1 special class.

In determining the third factor, the possible negative effects of the inclusion of the student on the education of the other students in the class, where a student is so disruptive in a general education classroom that he significantly impairs the education of other students, then the regular education placement is not appropriate (see Oberti, 995 F.2d at 1217-18; Application of a Child with a Disability, Appeal No. 06-132). The CSE must also consider the unique benefits, academic and otherwise, which a student may receive by remaining in regular classes, e.g., language and role modeling with no disabled peers (Greer v. Rome City Sch. Dist., 950 F.2d 688 [11th Cir. 1991]).

The hearing record indicates that in the general education classroom, the student engaged in disruptive and aggressive behavior that included verbal and physical aggression toward staff and peers (see Joint Exs. 22; 48).⁹ In October 2007, a new column for "aggressive pushing" was added to the student's behavioral chart as he was often observed "shoving his peers out of his way" (Joint Ex. 22). In December 2007, the student threw his shoe, striking another student in the arm (Tr. p. 88; Joint Ex. 48 at p. 20). When asked if the student's behavior interfered with the instruction of other students, the special education teacher for the district testified that other students would occasionally become upset when the student was upset (Tr. pp. 107-08). She noted; however, that the student's peers were accustomed to his behaviors and knew the adults were there to help him (Tr. p. 108). An incident report for the period of September 2007 through January 2008 reflects that the majority of the student's behaviors were directed toward adults, rather than his classmates (Joint Ex. 29; see Joint Ex. 30). At the time that the CSE developed the January 2008 IEP, the CSE noted that the student's behavior, as indicated on his behavior charts, was slowly progressing (Joint Ex. 37 at p. 5). Although the hearing record indicates that there was some aggression toward peers and disruption of other students in the class, it does not adequately indicate whether the student was significantly impairing the education of other students to warrant removal from the general education environment to a special class.

In summary, while I find that pursuant to the first factor the district made reasonable efforts to accommodate the student in the general education environment, the hearing record is insufficient to appropriately weigh the remaining factors. Thus, I am unable to conclude based on the hearing record whether education in a general education class, with the use of supplemental aids and services, can be achieved satisfactorily for the student (see Application of the Bd. of Educ., Appeal No. 08-126; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 01-003). I note that eight months have passed since the May 2008 CSE meeting recommending placement of the student in a BOCES 6:1+1 special class. During that time, the parties should have observed the student's behavior in his summer program, which was not a special education program, and also in his self-contained class and in mainstream settings. The parties should also have determined the extent to which illness and/or increased academically challenging work affects the student's behavior, and ascertained whether the student is able to progress academically in the BOCES 6:1+1 special

⁹ The hearing record indicates that two district staff members were absent due to injuries that resulted from working with the student (Tr. pp. 18, 157-58, 316, 331-32).

class. Accordingly, I will remand this matter to the CSE to compare the educational benefits that the student could receive in a general education setting as opposed to a special education classroom and to consider the extent to which the student might disrupt the education of his nondisabled peers.

Finally, I note a CSE must consider various alternative placements along a continuum ranging from the least restrictive to the most restrictive (see Application of a Student with a Disability, Appeal No. 08-102; Application of a Child with a Disability, Appeal No. 07-015; Application of a Child with a Disability, Appeal No. 99-7; see also 34 C.F.R. § 300.115; 8 NYCRR 200.6). In the instant appeal, the hearing record contains conflicting information regarding the placement options considered by the May 29, 2008 CSE. While the May 29, 2008 IEP indicated that the CSE considered a general education program with direct consultant teacher services and a non-integrated BOCES class, (Joint Ex. 46 at p. 12), the minutes for the May 29, 2008 CSE meeting include a checklist which indicated that the CSE considered an integrated special class within the district and a BOCES special class-segregated (Joint Ex. 47 at p. 2). The checklist indicated that the CSE rejected the option of placing the student in an integrated special class within the district; however, the narrative section of the minutes provides no indication that this or any of the options which were reported to be considered and rejected by the CSE were actually discussed at the May 29, 2008 CSE meeting. There is no other evidence in the hearing record, including any testimony by either party, to demonstrate that the CSE discussed alternative placements for the student. I note that the "continuum of services identifies different service delivery models to provide specially designed instruction to a student with a disability."¹⁰ Upon remand, I encourage the CSE to consider the range of options available in recommending a placement for the student.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated November 3, 2008 is annulled; and

IT IS FURTHER ORDERED that the district's CSE shall reconvene within 30 calendar days to review the student's placement consistent with this decision.

Dated: **Albany, New York**
 February 6, 2009

FRANK MUNOZ
STATE REVIEW OFFICER

¹⁰ See Office of Vocational and Educational Services for Individuals with Disabilities (VESID), "Continuum of Special Education Services for School-Age Students with Disabilities," (April 2008) available at <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf> .