



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-071

Application of the [REDACTED] DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Karyn R. Thompson, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Aaron School and for the costs of privately obtained services for the 2006-07 and 2007-08 school years. The parents cross-appeal from the impartial hearing officer's lack of a determination on the issue of the student's pendency placement. The appeal must be sustained in part. The cross-appeal must be sustained in part.

At the time that the impartial hearing began on July 2, 2008, the student had completed fourth grade at the Aaron School in a special education setting comprised of 10 students, a certified special education teacher, and an assistant teacher (Tr. pp. 31, 42-43, 172-73; Parent Ex. D at p. 1). The Aaron School is a private school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). Pursuant to his July 25, 2007 individualized education program (IEP) for the 2007-08 school year, the student was recommended to receive related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) within one of the district's self contained 12:1+1 classrooms in a community school (Parent Ex. D at pp. 1, 14, 15). The student's eligibility for special education

programs and services as a student with a speech or language impairment is not in dispute in this appeal (34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]; see Tr. pp. 17-18).¹

The hearing record reflects that the student has been receiving private speech-language services for the past seven years leading up to the time of the impartial hearing (Tr. pp. 121-22) and that the student has attended the Aaron School for the past five years (Tr. p. 30; Parent Ex. G at p. 1). Although the hearing record does not indicate the date, at some point prior to July 19, 2006, the student received a diagnosis of a pervasive developmental disorder-not otherwise specified (PDD-NOS) (Tr. p. 32; Parent Exs. C at p. 11; D at p. 13). Although there were no formal assessments introduced into evidence, the hearing record reflects that the student exhibits deficits of cognitive inflexibility; anxiety; receptive, expressive, narrative, and pragmatic language; sensory processing; self regulation of his arousal level; fine motor coordination; graphomotor skills; and that he presents with muscle weakness of his upper body and trunk instability (Parent Exs. E at p. 1; F at pp. 1-3; G at p. 1).

On July 19, 2006, the Committee on Special Education (CSE) met to review the student's eligibility for special education services and to create an IEP for the 2006-07 school year, when the student would be entering third grade (Parent Ex. C). Attendees at the CSE meeting were the school psychologist who also acted as the district representative, a school social worker, a district special education teacher, and an additional parent member (id. at p. 2). The student's mother and a special education teacher from the Aaron School participated by telephone (id.). The CSE recommended that the student be placed in a 12:1+1 special education class within one of its community schools and that the student receive the following related services: OT twice per week for 30 minutes per session, one session taking place in a 1:1 setting and the other session taking place in a 2:1 setting; speech-language therapy twice per week in a 3:1 setting for 30 minutes per session; and PT once per week in a 1:1 setting for 30 minutes per session (id. at pp. 1, 13).

The student attended the Aaron School for the 2006-07 school year in a classroom with ten to twelve students and two teachers (Tr. pp. 30, 32, 257; Parent Exs. G at p. 1; H at p. 1).² The hearing record reflects that while at the Aaron School during the 2006-07 school year, the student received related services consisting of OT, one pull-out session per week of speech-language therapy in a dyad, and one push-in social skills session per week (Tr. pp. 187, 211).³ The hearing record also reflects that the student received privately obtained related services during the 2006-07 school year that included one 60-minute speech-language therapy session per week and applied behavioral analysis (ABA) services consisting of one two-hour individual

¹ In their due process complaint notice, the parents asserted that the district failed to classify their son as a student with autism; however, the impartial hearing officer declined to rule on this issue and this issue was not raised on appeal (Parent Ex. A at p. 3; IHO Decision at p. 3).

² The student also attended the Aaron School during the 2005-06 school year. On February 17, 2006, an impartial hearing officer rendered a decision that the Aaron School and additional related services were appropriate for the student for the 2005-06 school year (Parent Ex. B). This decision was not appealed by the district.

³ The hearing record does not specify the frequency or duration of the student's OT services at the Aaron School during the 2006-07 year.

session per week and two 90-minute individual sessions in a group with a 3:3 student to teacher ratio (Tr. pp. 122, 256, 257, 270, 271).

On July 25, 2007, the CSE convened to review the student's continued eligibility for special education services and to create an IEP for the 2007-08 school year, when the student would be entering fourth grade (Parent Ex. D). Attendees at the CSE meeting were the student's mother, a district representative, a district regular education teacher, a school psychologist, a school social worker, a district special education teacher, an additional parent member, and a special education teacher from the Aaron School by telephone (*id.* at p. 2). The CSE recommended that the student be placed in a 12:1+1 special education class with pull-out related services including one 30-minute individual and one 30-minute 2:1 OT sessions per week; two 30-minute 3:1 speech-language therapy sessions per week; and one 30-minute individual PT session per week (*id.* at pp. 1, 15). The IEP noted that administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) on January 12, 2007, revealed that the student achieved scores in the low average to average range in perceptual reasoning, working memory, and processing speed, and a score in the superior range in verbal comprehension (*id.* at p. 4). The IEP also noted the results of a January 2007 administration of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH), which indicated that the student's reading, writing, and math skills were all at or above age and grade level expectations (*id.* at p. 3). The IEP also noted that the Aaron School staff reported that the student was inflexible, had a low frustration tolerance, "inconsistent" moods, and occasional over confidence, all of which negatively affected his interactions with peers and teachers, as well as his ability to complete academic tasks; however, his behavior could be adequately addressed by the special education teachers (*id.* at p. 5).

The hearing record also reflects that the student attended the Aaron School for the 2007-08 school year (Tr. p. 156; Parent Ex. K at p. 1). The student was in a class of 11 students, with a head teacher and an assistant teacher (Parent Ex. G at p. 1). The student received related services at the Aaron School including two 30-minute pull-out speech-language therapy sessions per week with a peer, a 30-minute social skills group conducted by a speech-language therapist in the classroom once per week, one 30-minute individual and one 30-minute OT session with a peer, and one 30-minute "Alert" group per week that was conducted by an occupational therapist (Tr. p. 211; Parent Ex. E at p. 1). The hearing record indicates that the student also received private related services during the 2007-08 school year, including one 60-minute speech-language therapy session per week, one 45-minute social skills group per week and two 45-minute remedial reading and comprehension tutoring sessions per week (Tr. pp. 61, 92, 122).

The student's participation and progress in the Aaron School program during the 2007-08 school year were summarized in a February 2008 mid-year report, a May 2008 speech-language progress report, and a May 2008 OT report (Parent Exs. E; F; G). The detailed reports reflected that the student participated enthusiastically, had responded well to the support provided to him and that he had made significant progress in the classroom and in therapy settings (*see* Parent Exs. E at pp. 1-3; F at pp. 1-4; G at pp. 1-5).

The student's spring 2008 report card included a rubric that the student's teacher utilized to rate the student's levels of progress in the areas of social development, language in the

classroom, calendar concepts, reading, writing, math, and study skills (Parent Ex. J at pp. 1-18). The student's performance in all of these areas was rated to be in the top two levels of performance: "Independently Mastered" (student has mastered the skill or concept and uses it on a consistent basis without teacher assistance), or "In Progress" (student has learned the skill or concept, but needs consistent practice and review to retain and utilize it consistently) (*id.*).

By letter dated May 14, 2008, the parents filed a due process complaint notice requesting an impartial hearing alleging that the student was denied a free appropriate public education (FAPE).⁴ on both procedural and substantive grounds and seeking, among other things, reimbursement for tuition at the Aaron School for the 2006-07 and 2007-08 school years, and for various additional special education services provided to their son after school (Parent Ex. A at pp. 1-6).

The impartial hearing was held over four days, starting July 2, 2008, and ending on January 22, 2009. In a decision dated May 18, 2009, the impartial hearing officer found that: (1) the district conceded that it failed to offer the student a FAPE for both the 2006-07 and 2007-08 school years; (2) the parents met their burden in showing that the Aaron School was appropriate for the student for the 2006-07 and 2007-08 school years; (3) the parents met their burden in showing that all of the privately obtained services were appropriate for the student for the 2006-07 and 2007-08 school years; (4) the parents did not prove; however, that the privately obtained services were required to be provided on a 12-month basis; and (5) equitable considerations favored the parents (IHO Decision at pp. 3, 9-11). The impartial hearing officer ordered the district to reimburse the parents for: (1) their costs at the Aaron School for both the 2006-07 and 2007-08 school years; (2) the privately obtained speech-language services for the periods of September 2006 to June 2007, and from September 2007 to June 2008; (3) the privately obtained ABA services for the period of September 2006 to June 2007; (4) the privately obtained reading services for the period of September 2007 to June 2008; and (5) the privately obtained social skills services for the period of September 2007 to June 2008 (*id.* at pp. 11-12).⁵

The district appeals asserting that the impartial hearing officer issued her decision late and did not cite to any portions of the transcript in support of her determinations in violation of State regulations. The district also asserts that the Aaron School is a "for profit" school and, as such, the Individuals with Disabilities Education Act (IDEA) bars reimbursement to the parents for their unilateral placement of the student at that school. The district asserts that the impartial hearing officer erred when she found that the parents met their burden in showing that the Aaron

⁴ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;
and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]; *see also* 34 C.F.R. § 300.17).

⁵ While the impartial hearing officer's decision ordered the district to reimburse the parents for payments made to the providers listed in the order "for the 2006-07 and 2007-08 school years"(IHO Decision at p. 12), it is clear from the text of her decision, as well as from the hearing record that certain providers only provided services for one of the school years, as opposed to both school years.

School was appropriate, asserting, among other things, that the Aaron School did not provide needed related services, that the Aaron School did not provide mainstreaming opportunities with non-disabled peers, and that the privately obtained non-Aaron School services received by the student were not required. The district further contends that the parents did not raise their request for reimbursement of the social skills group or the tutoring services in their due process complaint notice. The district requests that a State Review Officer reverse the impartial hearing officer's award of reimbursement for the Aaron School and the parents' privately obtained services for both the 2006-07 and 2007-08 school years. The district does not appeal the impartial hearing officer's determination that that the student was not offered a FAPE for the 2006-07 and 2007-08 school years and that the equities do not preclude a reimbursement award to the parents.

In their answer, the parents assert that both parties agreed to joint extensions during the impartial hearing. The parents also contend that the district did not raise the "for profit" defense below, and as such, that defense is improperly before a State Review Officer, and that they properly requested reimbursement for all of the student's privately obtained services in their due process complaint notice. The parents further assert that the impartial hearing officer correctly determined that they met their burden in demonstrating that the Aaron School and the privately obtained non-Aaron School services received by their son were appropriate. The parents cross-appeal the lack of a determination by the impartial hearing officer as to the student's pendency placement, and the subsequent lack of an order by the impartial hearing officer directing the district to fund the Aaron School as the student's pendency placement. The parents attach to their answer a copy of a memorandum of law dated September 26, 2008, regarding the issue of pendency that they assert was timely submitted to the impartial hearing officer. The parents request that a State Review Officer issue an order regarding the student's pendency placement. The parents do not cross-appeal that portion of the impartial hearing officer's decision which found that the privately obtained services provided to their son were not required on a 12-month basis.

In its answer to the parents' cross-appeal, the district asserts that the parents are not entitled to an order requiring the district to fund the student's pendency placement because the parents "abandoned" their claim for pendency when they did not continue to raise the issue at hearing dates subsequent to the filing of their brief on the issue. The district further asserts that the parents' brief did not address the issue of the student's pendency placement. In the alternative, the district argues that the parents delayed litigation by not filing their due process complaint notice until May 2008 for the 2006-07 and 2007-08 school years. Lastly, the district asserts that the parents' request for pendency should be denied because the impartial hearing officer delayed in issuing her decision. The district requests that a State Review Officer sustain its petition and dismiss the parents' cross-appeal in its entirety.

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 board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The 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 law 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).

The district conceded at the impartial hearing that it did not offer the student a FAPE for the 2006-07 and the 2007-08 school years and the impartial hearing officer found that a FAPE was not offered based upon the district's concession (Tr. pp. 5, 231, 276; IHO Decision at p. 10). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). The district did not appeal the impartial hearing officer's finding that a FAPE was not offered. Therefore, the only issues before me in this case are whether the district properly raised its argument that the IDEA does not allow for tuition reimbursement for unilateral parental placements at a "for profit" private school, whether the unilateral placement of the student at the Aaron School and the private education services obtained by the parents were appropriate for the student's needs for the 2006-07 and 2007-08 school years, and a determination as to pendency.

The district argues that the parents have failed to state a claim for which relief can be granted because tuition reimbursement is not an available remedy when a student is unilaterally enrolled in a for-profit school. In their answer, the parents assert that the district's for-profit defense was improperly interposed for the first time on appeal. In its answer to the cross-appeal, the district did not respond the parents' assertion that this affirmative defense was improperly interposed on appeal. The hearing record reveals that the district did not challenge the due process complaint notice as insufficient or raise its for-profit defense below, and there is no testimony or documentary evidence in the hearing record that is relevant to this issue. Accordingly, I decline to address this issue, in part because it was not raised below and is not properly before me (see Educ. Law § 4404[2]; 34 C.F.R. § 300.508[d][1]; 8 NYCRR 200.5[i][3], 279.12[a]). Having determined that the district cannot avail itself of this affirmative defense, I now move to the district's assertion that the parents failed to met their burden in demonstrating

that both the Aaron School and the after school private services were appropriate for the student for the 2006-07 and 2007-08 school years.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 471 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every

special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

For purposes of a tuition reimbursement analysis, each school year is treated separately; therefore, I will begin by addressing the appropriateness of the Aaron School and the private services obtained for the student during the 2006-07 school year (see Mrs. C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Board of Educ., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]).

The student's July 19, 2006 IEP reflected that, according to teacher estimates, the student's academic instructional levels ranged from a 1.5 grade level to a 3.0 grade level (Parent Ex. C at p. 13). The IEP reflected that the student often needed additional teacher support with comprehension, extra time to process information, and that with regard to the student's social/emotional needs, the student required continued support when he exhibited inflexible and perseverative behaviors (id. at pp. 3, 4). The 2006-07 IEP reflected that the student's academic management needs included avoiding distracting stimuli, implementing self-monitoring strategies, and providing non-verbal, "private signal cues" to stay on task (id. at p. 3). Although the health and physical development section of the student's July 2006 IEP reflected no needs in those areas, the IEP included recommendations for OT and PT services in addition to speech-language therapy (id. at pp. 5, 13).

The hearing record does not include any documentary evidence regarding how the Aaron School identified or addressed the student's needs during the 2006-07 school year and provided instruction specifically designed to meet his unique needs. The only testimony directly related to services provided by the Aaron School to the student during the 2006-07 school year was provided by the Aaron School speech-language pathologist. Testimony by the Aaron School speech-language pathologist for the 2006-07 school year identified the main focus of the student's speech-language therapy for the 2006-07 school year, the frequency of the services she provided the student during the 2006-07 school year, and that the student had made progress during the two years she worked with him; however, the hearing record does not indicate what growth took place specifically during the 2006-07 school year nor does it identify how the student's other unique needs were met (Tr. pp. 211, 212, 214). Although, the director of the Aaron School testified as to the student's overall progress and the school's overall structure, she did not provide testimony about how the instruction at the Aaron School was specifically designed to meet the student's unique needs. Additionally, although testimony by the student's 2007-08 Aaron School occupational therapist indicated that based on information she was provided by the student's previous occupational therapist in both conversation and in a report, she believed the student needed OT services during the 2006-07 school year, the hearing record

does not include the referenced report or testimony describing the details of these needs or how the occupational therapist addressed those needs during the 2006-07 school year (Tr. pp. 187-188). The hearing record lacks sufficient evidence to show the appropriateness of the overall program of specialized instruction and services at Aaron school and how that instruction met this student's unique needs.

In light of the fact that the hearing record does not contain assessments or evaluative information regarding the student's needs, or documentary evidence regarding services received or progress made during the 2006-07 school year at Aaron School, and absent testimony which would describe the student's needs and how the Aaron School program was specifically designed to address his unique needs during the 2006-07 school year, I find that the parents have not met their burden in demonstrating that the Aaron School was an appropriate placement for their son for the 2006-07 school year (see, Application of a Child with a Disability, Appeal No. 07-079; Application of the Board of Educ., Appeal No. 09-055; Application of the Board of Educ., Appeal No. 03-010).

I now turn to whether the parents have met their burden in showing that the non-Aaron School privately obtained services for their son for the 2006-07 school year were appropriate. I first note that the impartial hearing officer determined that although the additional privately obtained services were provided on a 12-month basis, the student only required them on a 10-month basis and awarded reimbursement for that period. The parents did not appeal that portion of the impartial hearing officer's decision, and as such, that portion of the decision is final and binding (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

With regard to the 2006-07 school year additional private speech-language services, the hearing record contains no documentary evidence describing the student's speech-language needs or how they were addressed by the non-Aaron school private speech-language pathologist. Additionally, the hearing testimony reflects that the non-Aaron school private speech-language pathologist provided speech-language services of one hour per week during both the 2006-07 and the 2007-08 school years, and her testimony regarding the services she provided did not differentiate between the two school years (see Tr. pp. 122, 123, 127, 128, 130, 131). Although testimony by the non-Aaron school speech-language pathologist indicated that she felt that the student "need[ed] above and beyond" what he received at the Aaron School (Tr. pp. 125, 126), neither her testimony nor the hearing record indicates that the additional private speech-language services were such services as were necessary to permit the student to benefit from instruction at Aaron school (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

With regard to the non-Aaron School ABA services provided to the student during the 2006-07 school year, although the hearing record does not contain any documentary evidence regarding these services, testimony by the ABA provider indicated that the services she provided allowed the student to participate in the school environment. The ABA therapist testified that the primary area that she addressed with the student was "how to learn in a group," which included how to attend to another student by turning and facing in order to acquire the information being provided by that student, to clarify information using phrases such as "can you say that again" and "I need help," and to seek assistance within the group when he became distracted and missed something instead of "just sit[ting] there" (Tr. pp. 258-59). She also worked on the student's

inflexibility, rigidity, concrete thinking, and his anxiety related to working with and being in a room with other students, which was manifested by his becoming overly angry, anxious, and "all consumed with everyone else following the rules or breaking the rules and ...ending up missing a lot of information during that time, during any kind of teaching, if this happened" (Tr. p. 260). She testified that she worked on getting the student to accept and listen to the ideas of others instead of perseverating on his own ideas, maintaining topics of conversation both socially and within the context of a lesson, and on "going with the flow of others and with a teacher, with [her] directions" instead of completing a task before all of the directions were given (Tr. p. 261). She further testified that she worked with the student on initiating appropriate comments with others, identification of feelings and emotions, including identifying what they look like on someone's face, as well as looking at situational cues that would make someone feel a certain way and how to react in those situations through role playing and practicing various situations (Tr. p. 262). The ABA therapist testified that these deficits were "definitely inhibiting his learning, his independence in school, at home, in the community and especially in his learning," and that after working on these skills with her, "he was able to answer a lot more and participate a lot more in his class" and there was "definitely clear progress in most of these, in pretty much all these areas" (Tr. pp. 263, 265-66).

The hearing record reveals that the ABA therapist testified that she stopped seeing the student just before the 2007-08 school year started because "he had met all of his goals and it was time for him to really demonstrate those skills on his own in a school" (Tr. p. 270). Based on the above description of the student's needs, how the private ABA therapist addressed those needs, and the progress she indicated the student had made, I find that the parents have met their burden in showing that the after school ABA services were necessary to permit the student to benefit from instruction at Aaron school (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65) and that such services were appropriate for the student for the 2006-07 school year.

Having determined the appropriateness of the additional privately obtained services for the 2006-07 school year, I will now address whether the parents have met their burden in demonstrating that Aaron School and the additional privately obtained services were appropriate for the 2007-08 school year.

The student's 2007-08 IEP reflected that the student was functioning in the average or above average range in all academic areas (Parent Ex. D at p. 3). The July 25, 2007 IEP reflected that a January 12, 2007 administration of the WISC-IV yielded a full scale IQ score in the average range with a percentile rank of 53 (id.). The IEP further reflected that a January 2, 2007 administration of the WJ-III ACH indicated that the student's reading, writing, and math skills were all at or above age and grade level expectations (id.). The student's 2007-08 IEP indicated that his social/emotional needs included a tendency toward inflexibility, low frustration tolerance, "inconsistent" mood, and occasional over-confidence, all of which negatively affected his interactions with peers, teachers, and his ability to complete academic tasks (id. at p. 5). The IEP reflected that the student had received a diagnosis of PDD-NOS, had delays in fine and gross motor skills, and speech-language deficits, and reflected a recommendation for related services including OT, PT, and speech-language therapy (id. at pp. 3,6,13, 15).

As reflected in the hearing record, the student's teachers and related service providers at the Aaron School identified the student's needs and indicated how they addressed each need in a February 2008 mid-year report, a May 2008 speech-language progress report, and a May 2008 OT progress report (Parent Exs. E; F; G). For example the February 2008 mid-year report indicated that the student exhibited significant cognitive inflexibility and anxiety that affected his participation and performance in the classroom (Parent Ex. G at p. 1). To address these needs, the mid-year report indicated that the Aaron school staff worked collaboratively to carry out interventions consistently throughout the school day, including but not limited to the use of a "flexibility chart" to heighten the student's awareness of his level of flexibility, by providing him with strategies that he could use to increase his flexibility, and by preparing him ahead of time for situations that required more flexibility (id.). A variety of strategies were utilized to ease the student's anxiety such as verbal and written directions, teacher check-ins to provide reassurance, and reminders to use problem solving strategies (id. at pp. 1-2). The mid-year report further reflected that the Aaron school addressed the student's rigidity in social settings during "free choice," "park time," and lunch by working with him to learn new games and to play with different friends (id.).

The mid-year report reflected that the student benefited from the multisensory approach of the "Saxon" math curriculum and from having new concepts modeled and broken down, and that the student's handwriting skills were addressed using the "Handwriting Without Tears" writing program, which the mid-year report indicated supported the student's need for structured, sequenced, multisensory learning (id.). The mid-year report further reflected that the student was able to neatly and accurately form all of the letters introduced thus far utilizing this program (id.). With regard to science and social studies, the mid-year report did not reflect these subjects as areas of need as the student demonstrated a high level of interest, strong participation in answering questions, and providing information and ability to present research to his class and parents (id.).

The May 2008 speech-language progress report reflected that the Aaron School provided the student with two 30-minute speech-language therapy sessions per week with a peer and a weekly 30-minute speech-language pathologist directed a social skills group in the classroom (Parent Ex. E at p. 1). The report indicated that the focus of the student's speech-language therapy was on receptive, expressive, narrative, and pragmatic language (id.). The Aaron school speech-language pathologist addressed, among other things, the student's difficulty with comprehension of ambiguous or abstract language by prompting him to independently use receptive language processing strategies such as verbal rehearsal, asking for repetition or clarification, visualizing and rephrasing, and she assisted him in using summarizing, editing, and eliminating strategies (id.). The report further reflected that the student practiced interpreting and analyzing ambiguous language using fictional stories, advertisement, humorous cartoon and expository text, and that he showed steady progress (id.).

With regard to expressive language, the report indicated that the student's speech-language pathologist addressed improving the student's language organization and the sophistication of his sentences using supports such as asking leading questions, noting key words or ideas, and providing prompts such as "first," "next," "last," and "then," as well as paragraph outlines, semantic webs, narrative chains, and story maps (Parent Ex. E at p. 2). The student

reportedly improved in language organization, in his ability to expand sentences, and in his use of more sophisticated sentences in his oral narratives (id.).

With regard to pragmatic language, the report reflected that the student exhibited needs in problem solving, verbal reasoning, and conversational skills, which were addressed through the explicit teaching of skills, strategies such as a critical thinking strategy, and through role playing (Parent Ex. E at p. 2). The report reflected that the student had developed and maintained meaningful peer relationships, had shown excellent progress in his ability to initiate and maintain a variety of topics, and to use follow-up questions and comments to remain engaged and to gather information (id.). According to the report, the student demonstrated "good" progress in his ability to independently identify the cause of problems and generate solutions during structured lessons, but continued to need support to solve social and academic problems that occurred throughout the school day (id.).

The student's speech-language pathologist at the Aaron School, testified that the student had progressed during the 2007-08 school year from requiring explicit teaching of basic conversational routines to being able to initiate and maintain conversations consistently with familiar partners, generalize many of the social skills worked on, and use language strategies more independently (Tr. p. 214).

The May 2008 OT progress report reflected that the Aaron School provided the student with OT services of two 30-minute sessions per week, once individually and once with a peer, and one weekly 30-minute "Alert" group⁶ led by an occupational therapist in the classroom (Parent Ex. F at p. 1). The OT report reflected that the student had needs in sensory processing and regulation, fine motor coordination, graphomotor skills, gross motor skills, ability to work cooperatively within a group or "student skills" and self care skills (id. at pp. 1-4).

With regard to the student's sensory processing and regulation, the OT report indicated that the student's arousal level "fluctuate[d] throughout the school day and impact[ed] his performance in the classroom and his ability to attend and to control his impulses" (Parent Ex. F at p. 1). To address this need, the occupational therapist utilized the "Alert" program, which helped the student recognize, describe, and change his arousal level to a more appropriate level and also provided the student with specific sensory activities which were determined to be best suited to meet his individual regulatory needs (id.). The report indicated that the student was able to sustain an appropriate arousal level with the use of breaks and redirection; however, he had difficulty applying and generalizing the concepts outside of the group (id.). With regard to motor planning, the student reportedly was better able to plan his body's movements after receiving sensory input and establishing a plan of action (id. at p. 2).

The OT progress report indicated that the student's fine motor coordination and graphomotor skills were addressed by, among other things, providing the student with a mechanical pencil (to gain feedback on how much pressure he was putting on the pencil), "Theraputty" to provide his joints with the proprioceptive input necessary for adequate force

⁶ The hearing record reflects that the "Alert" group is adapted from the "How Does Your Engine Run" program and is used to assist the student in regulating his arousal level or his level of alertness (Tr. pp. 189-190; Parent Ex. F at p. 1).

regulation when writing, and the "Handwriting Without Tears" program for both cursive and print handwriting (Parent Ex. F at p. 2). The report reflected that the student participated in a weekly whole class handwriting group led by the occupational therapist and that at the time the report was written, the student required supervision to self-correct, but was working on increasing his independence in editing his handwriting (id. at p. 3).

With regard to gross motor functioning, the OT report reflected that the student participated in a variety of upper body strengthening and postural control activities and that the student had made some progress (Parent Ex. F at p. 3). The report indicated that to address his deficit in crossing his midline, the student also participated in "Brain Gym" exercises to promote bilateral integration and his ability to use his right hand for tasks on the left side of his body (id.).

The OT progress report also indicated that the occupational therapist addressed the student's "student skills"⁷ or ability to work cooperatively within a group utilizing a "Flexibility Scale" and that the student no longer needed the level of support that he required at the beginning of the school year (Parent Ex. F at p. 3). The OT report further reflected that the student's needs in self-care skills were addressed in a variety of tasks which required multiple steps (id. at p. 4). The student reportedly was able to verbalize the steps, but had difficulty due to weak intrinsic muscles (id.).

Testimony by the student's Aaron School occupational therapist during the 2007-08 school year indicated that she learned of the student's needs by meeting with the student's previous occupational therapist, as well as through an in-depth report of the student's deficits prepared by the previous occupational therapist (Tr. p. 188). Her testimony was consistent with the May 2008 OT progress report regarding the student's areas of need and how she addressed his needs (Tr. p. 191). The occupational therapist also testified that the student was able to acquire self regulatory skills during the 2007-08 school year (Tr. p. 190). She also testified that the student had made progress in his activities of daily living (ADL) skills including mastering tying his shoes, and had made definite strides in his ability to be flexible with peers in play (Tr. p. 192).

As demonstrated above, the hearing record shows that for the 2007-08 school year, the Aaron School met the student's unique needs as identified in reports from the Aaron School, in testimony by the Aaron School teacher and therapists, and in his 2007-08 IEP. The hearing record supports that the Aaron School provided specially designed instruction to address the student's unique needs, including his speech-language needs, social interaction needs, ability to function in the academic environment, sensory regulation, and fine and gross motor skills. As noted above, the hearing record also supports that the student progressed in these areas during the 2007-08 school year.

Having found that the parents met their burden in showing that the Aaron School was an appropriate placement for their son for the 2007-08 school year, I now turn to the issue of

⁷ The occupational therapist testified that she focused on the student's flexibility, which she referred to as "basically his student skills" (Tr. p. 191).

whether the privately obtained non-Aaron School services were appropriate for the student for the 2007-08 school year.⁸

The hearing record reflects that in addition to receiving related services at the Aaron School, the student also received private after school services during the 2007-08 school year, including two 45-minute individual sessions per week with a remedial reading tutor, one 45-minute social skills session in a group of five per week provided by a clinical social worker, and one 60-minute individual speech-language therapy session per week (Tr. pp. 61, 62, 87, 92, 122, 127).⁹ The hearing record does not contain any documentary evidence regarding these private services.

Testimony by the student's private remedial reading tutor indicated that the student had problems in comprehension and that she worked with him on inferential skills, getting the main idea, some writing skills, and oral discussion (Tr. pp. 62, 63). However, the hearing record does not support that the student had significant needs in this area that would warrant additional private services in order for him to permit him to benefit from instruction at the Aaron School. The student's 2007-08 IEP indicated that as measured by a January 2, 2007 administration of the WJ-III ACH, the student's reading and writing skills, including passage comprehension, were in the average to above average range (Parent Ex. D at p. 3). The reading tutor testified that she did "think he needs a one to one to get the utmost from him" (Tr. p. 64). However, the hearing record reflects that the student was making meaningful progress with the services provided at the Aaron School. The student's 2007-08 mid-year report from the Aaron School indicated that the student was reading on the fourth grade level and his spring 2008 report card indicated that his "strong comprehension skills continued to build through each novel [they] read (Parent Exs. G at p. 2; J at p. 8). Therefore, I conclude that the hearing record does not support the student's need for private remedial reading services during the 2007-08 school year.

With regard to the privately obtained social skills group services that the student received during the 2007-08 school year, the hearing record reflects that during the 2006-07 school year, the private ABA therapist addressed the student's social skills twice per week for 1 ½ hours with two other children (Tr. pp. 256-57, 240, 271). However, the student's mother testified that the private ABA therapist could "no longer see the student" after the 2006-07 school year ended and therefore, she looked for someone who could provide a social skills group to replace the ABA therapist for the 2007-08 school year (Tr. pp. 238, 240). Notably, testimony by the private ABA therapist indicated that the student no longer needed her services for the 2007-08 school year. The private ABA therapist testified that the student had met all of his goals as of August 2007

⁸ I again note that the impartial hearing officer only awarded reimbursement for the additional private services obtained during the 2007-08 school year on a 10-month basis (IHO Decision at p. 11). The parents do not appeal that portion of the impartial hearing officer's decision, and as such, that portion of the decision is final and binding (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

⁹ The district, in its petition, alleges that the parents did not raise the issue of reimbursement for the privately obtained social skills and reading tutor services in their due process complaint notice; however, the parents' counsel requested reimbursement for such services at the impartial hearing and the district did not object to this request (Tr. pp. 19-20). Moreover, the social skills provider and remedial reading tutor both testified during the impartial hearing without objection (Tr. pp. 61, 87).

and that "it was time for [the student] to really demonstrate those skills on his own in a school" (Tr. pp. 269-70).

Additionally, the hearing record reflects that the privately obtained services provided by the 2007-08 social skills therapist were not required in order for the student to make educational progress or to benefit from instruction at the Aaron School. Testimony by the 2007-08 private social skills therapist indicated that she provided the student with the opportunity to "maximize" and "generalize" his skills (Tr. pp. 98-99, 106, 107). Although the 2007-08 private social skills therapist testified that the social skills group provided by the Aaron School is "a very different kind of social skill group" than what she provided, the hearing record indicates that the private social skills therapist addressed skills similar to those addressed in the social skills group provided by the Aaron School and that the student had been making progress there (compare Tr. p. 89, with Tr. p. 218, and Tr. p. 95, with Tr. p. 214). Testimony by the 2007-08 private social skills therapist indicated that she had never been in touch with the student's social skills group leader at the school (Tr. p. 102). For the above reasons, I conclude that the hearing record does not support the student's need for private non-Aaron School social skills group therapy that would warrant an award of reimbursement to the parents for that service (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

With regard to the student's 2007-08 private speech-language therapy, the hearing record does not contain documentary evidence regarding how this service addressed the student's needs or if the student required speech-language services beyond those he received at Aaron School. As noted above, the testimony provided by the student's private speech-language pathologist is not specific to the 2007-08 year (see Tr. pp. 122, 123, 127-28, 130-31). I find that the hearing record does not support that the private non-Aaron School speech-language services were necessary to permit the student to benefit from instruction in his Aaron School program during the 2007-08 school year (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

Based on the above, I find that the parents have not met their burden in demonstrating that the privately obtained social skills, remedial reading, and speech-language services for the 2007-08 school year were appropriate.

Having decided the issues relating to the district's appeal, I will now address the parents' cross-appeal. The parents cross-appeal that the impartial hearing officer declined to make a determination as to the student's pendency placement. The parents request that a State Review Officer issue an order of pendency, commencing the date of their due process complaint notice (May 14, 2008) until such time as a final decision in this matter has been reached. The district asserts that the parents are not entitled to an award of pendency payments.

The 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 board of education 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]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see Student X, 2008 WL 4890440, at * 20; 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 Student with a Disability, Appeal No. 08-107; 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 may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; 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).

The hearing record in this case demonstrates that the parents are only seeking reimbursement for the student's pendency placement at the Aaron School and for the additional privately obtained services he received starting from the date of the filing of their due process

complaint notice, May 14, 2008, going forward until a final determination has been reached in this matter (Tr. p. 141; Parent Ex. A; Parent Br. at p. 2).

In this case, the parents have met their burden in demonstrating that the Aaron School was an appropriate placement for their son for the 2007-08 school year; therefore, the parents will receive reimbursement for the period of May 14, 2008 thru June 30, 2008 at the Aaron School for the student's placement there. Additionally, under pendency, the district was responsible for tuition at the Aaron School from May 14, 2008, the date of the parents' due process complaint notice. With regard to the parents' claim for pendency with respect to the Aaron School tuition and the privately obtained services their son received for the period beginning May 14, 2008, as discussed above, a prior unappealed impartial hearing officer's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; 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). In this case, the student's pendency placement was established by final order when the district did not appeal the February 17, 2006 impartial hearing officer's decision concerning the student's 2005-06 school year, which awarded not only tuition reimbursement for the Aaron School for the 2005-06 school year, but also awarded reimbursement for additional privately obtained services (Parent Ex. B at pp. 12-13).^{10, 11} Therefore, the parents are, as a matter of law, entitled to pendency payments for the Aaron School tuition and the additional privately obtained services ordered in the February 17, 2006 impartial hearing officer's order from the date the due process complaint notice was filed on May 14, 2008 and continuing until all proceedings in this matter are concluded or the parties otherwise reach an agreement.

Lastly, I find that district's argument that the parents' "abandoned" their pendency claim because they did not raise it at impartial hearing dates subsequent to the submission of their brief on the subject is without merit. Pendency has the effect of an automatic injunction (Zvi D., 694 F.2d at 906; see Wagner, 335 F.3d at 301; Drinker, 78 F.3d at 864) and I caution the district to ensure compliance with the pendency obligations under 20 U.S.C. § 1415 [j] and Education Law § 4404(4) (see Application of the Dep't of Educ., Appeal No. 08-104).

I have considered the parties' remaining contentions and find that they are without merit or that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated May 18, 2009 is hereby annulled to the extent that it ordered tuition reimbursement for the Aaron School for the

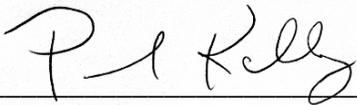
¹⁰ See fn 2, supra.

¹¹ I note that the hearing record does not contain any evidence that the February 17, 2006 impartial hearing officer's decision ordered that the additional privately obtained services be awarded on a 12-month basis.

2006-07 school year, reimbursement for privately obtained speech-language therapy for the 2006-07 and 2007-08 school years, and reimbursement for privately obtained social skills therapy and reading services for the 2007-08 school year; and

IT IS FURTHER ORDERED that, if it has not done so already, the district shall reimburse the parents pursuant to pendency consistent with this decision.

Dated: **Albany, New York**
 September 11, 2009



PAUL F. KELLY
STATE REVIEW OFFICER