



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-074

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

[REDACTED]

Appearances:

Susan Lugar Associates, Inc., attorneys for petitioners, Lawrence D. Weinberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Tracy Siligmuller, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Aaron School for the 2009-10 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending kindergarten at the Aaron School, where he received instruction in social skills, as well as occupational therapy (OT), speech-language therapy, and counseling (Tr. pp. 139, 188, 214; Parent Ex. K at p. 1). The Aaron School is a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with an other health impairment (OHI) is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The student demonstrates generally average to superior cognitive abilities with subtest scores in the low average range in vocabulary and comprehension (Parent Ex. E at pp. 2-3, 7; see Tr. pp. 325-26). According to teacher observation, he also demonstrates average to above average academic skills (Parent Exs. B at p. 3; see Tr. pp. 141-42). The student exhibits difficulties with sensory regulation, attention, pragmatic language skills, social/emotional functioning, and personal/domestic living skills (Tr. pp. 140-42, 276, 325; Parent Exs. E at pp. 1-2, 4-5, 7-8; I at pp. 1-2; J at p. 1; K at pp. 1, 2).

During the 2008-09 school year, the student attended a general education pre-kindergarten class for 19 hours a week in a class of 22 students or less and more than one adult (Tr. pp. 34, 211, 260, 268, 300). The student received special education itinerant teacher (SEIT) services for 15 hours per week, as well as one-to-one assistance for an additional four hours per week (Tr. pp. 211-13). The student also received OT and speech-language therapy, both two times per week (Tr. pp. 211-12; Parent Ex. I at p. 1). According to the parents, the student demonstrated difficulty with transitions, frustration tolerance, following directions, and impulsivity during pre-kindergarten (Tr. p. 212).

The student's occupational therapist prepared an OT progress report on January 5, 2009 (Parent Ex. I at p. 1). In the report, the occupational therapist indicated that the student had received OT two times per week for 45 minutes since summer 2007 and that the sessions primarily addressed the student's sensory regulatory behaviors (id.). According to the occupational therapist, the student's lack of self-regulation negatively affected "his ability to effectively participate in his daily environments," and he struggled to follow the OT routine due to "significant regulatory behaviors" (id.). The occupational therapist also noted that the student's "sensory profile suggest[ed] he [wa]s a child with a high activity level and low arousal" and that he exhibited difficulty processing multisensory information, which negatively affected his ability to maintain his attention (id.). The occupational therapist indicated that the student "attempt[ed] to self-regulate by controlling his environment and [could] become oppositional and uncooperative within a fleeting moment" (id.). The occupational therapist also reported that "in the past [the student] would respond best when provided with simple verbal direction, limit setting, visual cues, intermittent physical cues, and frequent sensory supports" (id.). She indicated that "[o]nce [the student] was given structured movement, heavy work and deep pressure input, he was better able to attend to gross motor and fine motor tasks with increased organization and sustained performance" (id.). According to the occupational therapist, the student continued to improve his ability to self-regulate but was "unable to effectively use strategies to calm and organize himself with independence" (id.). The OT progress report included a recommendation for OT three times per week for 30 minutes (id. at p. 2).

On March 24, 2009, the Committee on Special Education (CSE) convened to develop the student's individualized education program (IEP) for the 2009-10 school year (Parent Ex. B at p. 1). Attendees at the March 2009 CSE meeting included a district school psychologist (who also acted as the district representative), the parents, a district regular education teacher, a district social worker, a district special education teacher, a district occupational therapist, the student's SEIT, and the student's pre-kindergarten teacher (id. at p. 2; see Tr. p. 24).¹

The student's present levels of academic performance in the March 2009 IEP indicated that the student "[read] well above grade level" and "ha[d] good rote math skills" (Parent Ex. B at p. 3). The IEP described the student's receptive and expressive language as age appropriate, but indicated that his receptive language skills were "below level in informal group situations" (id.). The IEP also indicated that based on teacher observation, the student's reading, math, and writing skills were at the pre-kindergarten through first grade level (id.). With regard to the present levels of social/emotional performance, the March 2009 IEP indicated that the student

¹ The school psychologist who attended the March 2009 CSE meeting testified that the meeting lasted "probably" an hour or more (Tr. p. 24). The parent testified that the meeting lasted "maybe 30 to 40 minutes" (Tr. p. 231).

was "friendly" but did "not respect the boundaries of others," had "a great deal of difficulty" with transitions, became easily frustrated, frequently grabbed food and toys away from others, and could "tantrum if he d[id] not get his way or if he ha[d] to stop doing what he [wa]s engaged in" (id. at p. 5). Additionally, the March 2009 IEP indicated that the student had difficulties with attention and self-regulation and that his behavior required "highly intensive supervision" (id. at pp. 3, 5-6).

The March 2009 IEP contained eight annual goals and six short-term objectives related to the student's needs in the areas of self-regulation, work habits, social skills, attention, transition, and class participation (Parent Ex. B at pp. 7-11). Recommended testing accommodations included extended time and special location (id. at p. 14). The March 2009 IEP also recommended modifications or resources to address the student's individual academic and speech-language needs, his social and emotional needs, and his health and physical development needs (id. at pp. 3-6).

The March 2009 CSE recommended that the student be placed in an integrated co-teaching (ICT) classroom for kindergarten with a crisis management paraprofessional who would be shared with two other students (Parent Ex. B at pp. 1, 12-14, 16).² The hearing record reflects that although the March 2009 CSE "seriously considered" a 12:1+1 special class for the student due to "the amount of supervision [the student] need[ed]," the CSE ultimately recommended placement in an ICT classroom because the student had "good readiness skills," "seem[ed] to respond relatively well to 1:1 attention," and the ICT was the least restrictive environment (LRE) (Parent Ex. B at p. 13; see Tr. pp. 32, 47, 216-17, 231-33;). Further, the March 2009 CSE concluded that if the student was not successful in the ICT classroom by the middle of the school year, a 12:1+1 class should be recommended for the remainder of the 2009-10 school year (see Parent Ex. B at p. 13).

Additionally, the March 2009 CSE recommended that the student receive the following related services: counseling, one time per week individually and one time per week in a group of three, both for 30 minutes; OT, one time per week individually and one time per week in a group of three, both for 30 minutes; and speech-language therapy, two times per week in a group of up to three students for 30 minutes (Dist. Ex. B at pp. 1, 14, 16).

A behavior intervention plan (BIP) attached to the March 2009 IEP indicated that the student displayed behaviors that interfered with learning, which included a lack of consistent adherence to classroom rules and routines, grabbing food and school supplies from other

² "Integrated co-teaching services means the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see http://www.vesid.nysed.gov/specialed/publications/policy/schoolage_continuum.pdf). I note that the parties have also used the term "collaborative team teaching" (CTT) to describe the student's recommended program for the 2009-10 school year (see Tr. pp. 216, 340; Parent Ex. B at pp. 1, 13). For consistency within this decision, I will use the term "ICT classroom" when referring to the district's recommended program.

students, turning off lights, pulling things from the table, and destroying property (Parent Ex. B at p. 15). Additionally, the BIP indicated that the student "tantrums throughout the day when he does not get his way or has to stop doing what he wants to do," "can arch his back and become immobile," and "can scream and whine" (id.). The BIP identified strategies and supports to address the student's interfering behaviors including having an adult "guide him" to initiate activities, to reduce frustration, and to decrease the opportunity for him to take items from other students (id.). The BIP also indicated that the student required structure and explicit rules regarding class behavior as well as "an area to calm himself, with a book or headphones/music when upset" (id.). The BIP further indicated that the student should be provided with specific suggestions regarding how to improve his behavior and that the student "benefit[ed] from deep pressure and heavy work to regulate himself" (id.).

In April 2009, the parents privately obtained a psychological evaluation of the student, which resulted in a psychological evaluation report dated May 15, 2009 (Parent Ex. E at p. 1). An administration of the Wechsler Preschool and Primary Scale of Intelligence—Third Edition (WPPSI-III) yielded a full scale IQ (percentile rank) of 121 (92), a performance IQ of 123 (94), a verbal IQ of 90 (25), and a processing speed index of 110 (75) (id. at p. 7). The private psychologist reported that during testing, the student was "very active and distractible," and therefore, she provided him with prizes during the testing and removed potentially distracting objects (id. at p. 2). The private psychologist reported that the student's testing performance contained notable variability between the performance IQ, the processing speed index, and the verbal IQ scale (id.). The student's performance IQ, which measured visual reasoning, was in the very superior range (id.). The student achieved scores in the high average range in the area of processing speed, which measured the student's ability to scan, discriminate, and copy rote visual material (id.). However, the student's performance on the verbal scale, which measured verbal reasoning, was in the lower end of the average range, and reflected the student's low average performance in vocabulary and comprehension (id.).

The private psychologist used the Vineland Adaptive Behavior Scales—Second Edition (Vineland II) and the Achenbach Child Behavior Checklist (CBC) to assess the student's adaptive behavior and social/emotional functioning (Parent Ex. E at p. 1). Results of the Vineland II—completed by the student's mother—assessed the student in the following domains: communication (adequate range); daily living skills (moderately low range); socialization (adequate range); and motor skills (adequate range) (id. at p. 4). Results of the CBC revealed scores within normal limits on the sleep problems scale, the internalizing problems index, and the aggressive behavior scale (id. at p. 8). Of note, the student's score fell within the "clinical range" on the attention problems scale, which reflected that the student "very often" demonstrated difficulty with concentration, sitting still, and shifting attention according to the information provided by the student's mother (id. at p. 4).

The private psychologist opined that the student's "processing problems, especially those [in the area of verbal processing], put [the student] at risk for developing a disability in literacy skills once he reach[ed] the elementary grades" (Parent Ex. E at p. 5). The private psychologist also stated in the evaluation report that notwithstanding his intelligence, behavioral observations indicated that the student had "great difficulty staying on task without constant individual oversight" (id.). In addition to "attention problems," the private psychologist characterized the student's adaptive functioning as "problematic in other respects" and referenced the student's

"low range" rating in the "personal" sub-domain and "moderately low range" ratings in the domestic sub-domain, the receptive (communication) sub-domain, and the coping skills sub-domain of the Vineland II (id.). She also indicated that the student's "difficulty sustaining attention, his impulsivity, and his language and related processing problems put him at risk of behavioral difficulties" (id.). The private psychologist "stress[ed] that during testing, [the student] presented as a sociable [student] who enjoy[ed] pleasing others" and that it was "highly probable" that the student's "limitations in adaptive functioning [were] due in large part to his multiple processing problems, especially in the areas of speech-language and attention" (id.). She also opined that "[d]ifficulties staying focused, understanding what others say and using his words would heighten the likelihood that [the student would] have difficulty expressing frustration and coping with stressors in an age appropriate way" (id.).

The private psychologist recommended that the student attend a "school that [was] geared to students with at least average cognitive ability who face[d] learning and adaptive challenges" similar to the student's abilities and needs (Parent Ex. E at p. 5). She recommended that the student attend a small class with no more than 12 students and that the student's class have a low student-teacher ratio that should not exceed one staff member to six students (id.). Among other things, the private psychologist also recommended a multisensory approach to instruction, a classroom led by trained staff, instruction in social communication, and collaboration between the teachers and related service providers (id.). She also recommended that instruction be provided in an organized environment with clear expectations and opportunities for experiential learning (id. at p. 6).

The hearing record reflects that the parents did not provide a copy of the private psychological evaluation report to the CSE or ask the CSE to reconvene to review and consider the private psychological evaluation report after the parents received the report (Tr. pp. 251-52).

On May 11, 2009, the parents executed an enrollment contract for the student to attend the Aaron School for the 2009-10 school year (Parent Ex. G at p. 1). On the same date, the parents paid a non-refundable deposit to the Aaron School pursuant to the enrollment contract (Parent Exs. G at p. 1; H at p. 4). The parents made additional payments to the Aaron School on May 15, August 7, and November 23, 2009 (Parent Ex. H at p. 1).

On May 26, 2009, the district issued a notice to the parents identifying the specific public school for the student's placement (Parent Ex. C at p. 1). On June 8, 2009, the parents and a parent advocate visited the district's recommended school (Parent Ex. D at p. 1).

In a letter dated June 15, 2009 to the district, the parents advised that they were rejecting the district's recommended school because they found it to be inappropriate for a variety of reasons, but that they "would be happy to consider" any other programs or placements recommended by the CSE (Parent Ex. D at pp. 1-2). The parents further advised the district that they had entered into a contract with the Aaron School for the student's enrollment for the 2009-10 school year and that they had paid a nonrefundable deposit "to ensure a placement" for the student in the event that the district failed to offer the student "an appropriate program/placement" (id. at p. 1). The parents further advised that if the district did not recommend an appropriate program or placement for the student for the 2009-10 school year,

they intended to send the student to the Aaron School and seek reimbursement for the student's tuition costs at public expense (id.).

The district subsequently issued a second notice to the parents dated June 17, 2009, which recommended a different public school for the student's placement (Parent Ex. C at p. 2). On June 24, 2009, the student's father and a parent advocate visited the district's recommended school (Parent Ex. D at p. 6).

In a letter dated June 26, 2009, the parents advised the district that based on a visit to the school and meeting with the school's parent coordinator, they could not accept the district's recommended placement for a number of reasons (Parent Ex. D at pp. 6-7). The parents indicated that they would "continue to look at" any recommended programs or placements to determine whether they were appropriate to meet their son's needs, but that "if an appropriate placement was not found for the student in a timely manner," they would have "no choice" but to send the student to the Aaron School for the 2009-10 school year and would seek reimbursement for the tuition costs at public expense (id. at p. 7).

The district issued a third notice to the parents dated July 9, 2009, which recommended a third public school for the student's placement approximately two blocks from the parents' house (Parent Ex. C at p. 3; see Tr. p. 222). According to the student's father, he did not visit the recommended school because he had previously been to the school and was familiar with it, and furthermore, at that time, it was summer and there were no classes in session to observe; however, the student's father spoke with the recommended school's parent coordinator by telephone (Tr. pp. 225-26, 239-240).

In a letter dated July 15, 2009, the parents advised the district, again, of the executed enrollment contract with the Aaron School for the 2009-10 school year and that they had paid a non-refundable deposit "to ensure a placement" for the student in the event that the district did not offer the student "an appropriate program/placement" (Parent Ex. D at p. 9). Among other things, the parents also advised the district that they had received the district's July 9, 2009 notice and that based on a telephone conversation with the parent coordinator at the recommended school, they could not accept the recommended placement for a number of reasons (id. at pp. 9-10). In particular, the parents alleged the following: the class size was "too large," the school was "too large and quite noisy," the student to teacher ratio was not appropriate, the teaching methodology was not appropriate as the student required a program that was language-based and multisensory, and the other students in the class "most likely will not have similar needs to" the student (id.). The parents also wrote that they had "already considered and rejected" two other schools recommended by the district, but that they would "still be happy to consider any other program/placement" recommended by the district if "offered in a timely manner" (id. at p. 10). The parents also indicated that "if an appropriate program/placement" were not found for the student for the 2009-10 school year, they intended "to send [the student] to the Aaron School and seek reimbursement at public expense" (id.). The parents requested that busing be arranged if the student attended the Aaron School (id.).

The parents filed a due process complaint notice dated September 17, 2009, requesting an impartial hearing (Parent Ex. A at p. 1). The parents asserted that they provided the March 2009 CSE with independent evaluations, but that the CSE failed to consider them and that the March

2009 CSE relied on the independent evaluations in place of its own testing (id. at p. 2). The parents also asserted that the March 2009 IEP was inappropriate and failed to offer the student a free appropriate public education (FAPE) for the following reasons: the annual goals and short-term objectives did not reflect all of the student's educational, social, and emotional needs, and were not developed at the March 2009 CSE meeting, which denied the parents an opportunity to meaningfully participate in the development of the IEP; the CSE did not provide the parents with a copy of the March 2009 IEP at the March 2009 CSE meeting; the March 2009 CSE failed to conduct a functional behavioral assessment (FBA); and, the BIP did not adequately address the student's behavioral difficulties (id. at p. 3). The parents further asserted that the March 2009 CSE improperly engaged in predetermination of the student's program recommendations, and further, that the level of related services in the March 2009 IEP were not appropriate for the student (id.).

In addition, the parents asserted that the March 2009 CSE failed to recommend an appropriate program for the student in a timely fashion. The parents further alleged that the recommended program was not appropriate due to the size of the classroom, the student-to-teacher ratio, the teaching methodology, the size of the school building, the behavior management plan in the classroom, and because the student required "highly intensive supervision" and a therapeutic program (Parent Ex. A at p. 3). Additionally, the parents alleged that they were denied meaningful participation in the placement process because the March 2009 CSE did not recommend a specific placement for the student at the meeting (id.). The parents also asserted that they were denied meaningful participation in the review process because the March 2009 CSE ignored the concerns voiced by the parents at the meeting (id.). The parents further asserted that the March 2009 CSE "failed to properly consider the programs available within the Department of Education pursuant to the Continuum of Services" by failing to consider a nonpublic school placement (id.). Additionally, the parents asserted that the March 2009 CSE "failed to offer an appropriate placement" for the student because the three placement recommendations offered were not appropriate, the parents had advised the CSE why the offered placements were not appropriate, the parents had notified the CSE of their intention to unilaterally place the student at the Aaron School and seek tuition reimbursement at public expense, and the parents received no further offers or communications from the CSE after rejecting the third recommended placement (id. at pp. 3-5). The parents further asserted that the March 2009 CSE failed to insure that there was a valid IEP and an appropriate placement for the student prior to the start of the school year, contending that the district was required to place the student by August 15, 2009, and thus, denied the student a FAPE for the 2009-10 school year (id. at p. 4).

As relief, the parents requested that the impartial hearing officer find that the March 2009 CSE failed to offer the student a FAPE on both procedural and substantive grounds, that the parents' unilateral placement at the Aaron School was appropriate for the student, and that the parents fully cooperated with the CSE and in no way impeded the CSE from offering the student a FAPE (Parent Ex. A at p. 5). The parents sought, among other things, tuition reimbursement for the Aaron School for the 2009-10 school year, and reimbursement for the costs of evaluations, transportation and related services (id. at p. 6).

The impartial hearing began on February 25, 2010 and concluded on May 13, 2010, after three days of proceedings (Tr. pp. 1, 126, 290, 364-65). The impartial hearing officer rendered a

decision dated July 16, 2010, which denied the parents' request for reimbursement for the costs of the private psychological evaluation, concluding that the parents cannot be reimbursed for an evaluation that was never submitted to the CSE for its consideration (IHO Decision at pp. 8-9). The impartial hearing officer also denied the parents' request for tuition reimbursement at the Aaron School for the 2009-10 school year (id.).

With respect to the parents' request for tuition reimbursement, the impartial hearing officer concluded that the district met its burden to establish that the March 2009 IEP offered the student a FAPE for the 2009-10 school year (IHO Decision at p. 7). With respect to the appropriateness of the recommended ICT classroom with a shared crisis management paraprofessional, the impartial hearing officer found that the district presented several witnesses who testified that the recommended program "could meet the [student's] educational needs and offer[ed] him an opportunity for an educational benefit" (id.). More specifically, the impartial hearing officer concluded that the district's school psychologist and guidance counselor testified that the ICT program was appropriate for the student (id.). The impartial hearing officer also concluded that "[n]one of the parent[s]' witnesses had any familiarity with [the recommended] program and thus were unable to credibly state that the [student] could not receive an educational benefit" from that program (id.). Further, the impartial hearing officer indicated that the special education teacher at the recommended school testified that the student "would have fit into her classroom" (id.).

The impartial hearing officer also noted that although the district's school psychologist and the private psychologist (who conducted the student's May 2009 psychological evaluation) disagreed about whether the size of the recommended ICT classroom would meet the student's needs, the private psychologist had not observed the student, had not spoken to the student's teacher, and she had not conducted an educational evaluation of the student (IHO Decision at p. 7). The impartial hearing officer opined that if the private psychologist had conducted an educational evaluation, she "would have found that he [was] extremely strong academically" (id.). In addition, the impartial hearing officer noted that on "all of [the private psychologist's] adaptive behavior assessments," the student's scores fell within the "adequate or moderate ranges" and therefore, supported the "opinion offered by [the district's school psychologist] that [the student's] behaviors were not so severe that they could not be addressed" in the recommended placement (id. at pp. 7-8). Finally, the impartial hearing officer indicated that although the student's teacher at the Aaron School testified that the student would not be able to "reach his full potential" in a class with 23 students and a crisis management paraprofessional, she noted that the Individuals with Disabilities Education Act (IDEA) did not require the district to offer a program "that will offer the [student] an opportunity to reach his full potential (id. at p. 8).

The impartial hearing officer also found that based upon the testimony of the special education teacher of the proposed class, the recommended placement used a multisensory instructional approach, which was consistent with the recommendations contained in the privately obtained psychological evaluation report (IHO Decision at p. 8). The impartial hearing officer further concluded that "every expert" stated that the student could benefit from exposure to typically developing students in the recommended ICT classroom (id.).

The impartial hearing officer indicated that since the district's recommended placement in an ICT classroom with a shared crisis management paraprofessional offered the student a FAPE for the 2009-10 school year, it was not necessary for her to address the adequacy of the parents' unilateral placement or equitable considerations (IHO Decision at p. 8). However, the impartial hearing officer indicated that, under the circumstances, the parents' failure to visit the third public school offered and their payment of a non-refundable "fee" to the Aaron School before receiving a notice of placement from the district "d[id not tip the equities in [the parents'] favor" (id.).

The parents appeal, contending that the impartial hearing officer erred in concluding that the district offered the student a FAPE. In particular, the parents contend that the "IEP and CSE meeting have numerous procedural and substantive defects" (Pet. ¶ 28). Specifically, the parents assert that (1) the March 2009 IEP failed to contain objective testing or data, (2) the district failed to prepare a "Turning Five Summary Report," (3) the March 2009 IEP did not contain academic goals, and (4) the regular and special education teachers at the March 2009 CSE meeting were not teachers who could have taught the student. In support of their first assertion, the parents argue that the district cannot sustain its burden to establish that it offered the student a FAPE because the IEP is "entirely devoid of objective evidence" (Pet. ¶ 29). In particular, the parents contend that the district developed the student's March 2009 IEP without conducting any testing and without any testing data available—or without "any testing it had available"—noting that the IEP fails to contain any "objective data" and instead, relies upon nonobjective, teacher assessments of the student's reading and mathematics levels (Pet. ¶ 30). The parents assert that the district's failure to evaluate the student constitutes a denial of a FAPE.

With respect to the CSE's recommendation to place the student in an ICT classroom with a crisis management paraprofessional, the parents contend that the program contained too many students; the student would have received less support than he received in his pre-kindergarten placement, where the student "struggled;" and the crisis management paraprofessional would have decreased the student's level of independence (see Pet. ¶¶ 34-37, 41). The parents also contend that the recommended placement did not offer the student sufficient support for his sensory needs. In addition, the parents argue that the July 9, 2009 notice offering the third recommended placement was late.

Next, the parents contend that the student's placement at the Aaron School was appropriate because the evidence indicates that the student received instruction tailored to meet his needs. The parents additionally contend that the student made progress at the Aaron School and note that case law requires that "the preference" for instruction in the LRE must be "balanced" against the requirement that each student with a disability receive an appropriate education. With respect to equitable considerations, the parents allege that they cooperated with the district by visiting the proposed placement recommendations and that the payment of the nonrefundable deposit to the Aaron School before they received the first notice of recommended placement did not rise to the level of inequitable conduct that would otherwise warrant either a reduction of or a denial of tuition reimbursement. The parents seek to reverse the impartial hearing officer's decision and request an order directing the district to reimburse the parents for the costs of the student's tuition at the Aaron School for the 2009-10 school year.

In its answer, the district contends that the impartial hearing officer properly concluded that it offered the student a FAPE for the 2009-10 school year. Specifically addressing the

parents' appeal, the district asserts that certain allegations in the petition for review were not raised below in the parents' due process complaint notice, and therefore, the parents are precluded from raising the following allegations on appeal: the IEP failed to "contain any objective data or testing," the IEP failed to contain academic goals, the district failed to prepare a "Turning Five Summary Report," the district failed to evaluate the student, the CSE was improperly composed, the placement recommended in the July 9, 2009 notice did not offer sufficient support for the student's sensory needs, and that the placement recommended in the July 9, 2009 notice was late (Answer ¶ 57). Alternatively, the district argues that a number of the abovementioned allegations are without merit. The district additionally asserts that the recommended ICT classroom with a crisis management paraprofessional, related services, and the public school recommended in the district's July 9, 2009 notice would have provided the student with an educational benefit.

With respect to the appropriateness of the student's unilateral placement, the district contends that the Aaron School is too restrictive because the student does not have exposure to typically developing peers. The district also alleges that the Aaron School does not provide the student with related services appropriate to meet his individual needs, that the hearing record does not contain sufficient evidence describing the details of the related services that the student receives at the Aaron School, and that the hearing record does not contain sufficient evidence that the student made progress at the Aaron School. Finally, with respect to equitable considerations, the district contends that the impartial hearing officer properly found that equities weighed against the parents based upon: (1) the parents' testimony that they moved to their neighborhood in order for the student to attend the public school that was ultimately offered to the student in the July 9, 2009 notice, (2) the parents' failure to visit the school recommended by the district's July 9, 2009 notice, and (3) the parents' payment of the non-refundable "fee" to the Aaron School prior to the receipt of any final notice of recommendation. The district seeks to uphold the impartial hearing officer's decision in its entirety and to dismiss the parents' appeal.

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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of

educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by

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

I will now turn to the parents' appeal. Among other things, the parents assert that (1) the March 2009 IEP failed to contain objective testing or data, (2) the district failed to prepare a "Turning Five Summary Report," (3) the March 2009 IEP did not contain academic goals, and (4) the regular and special education teachers at the March 2009 CSE meeting were not teachers who could have taught the student. The parents also contend that the recommended placement did not offer the student sufficient support for his sensory needs and that the July 9, 2009 notice offering the recommended placement was late. The district argues that these allegations should not be considered on appeal because they were not raised in the parents' due process complaint notice. Except for the allegations regarding the lack of academic goals and the timeliness of the July 9, 2009 placement recommendation, I agree with the district's arguments.

It is well settled that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. §1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). A review of the parents' September 17, 2009 due process complaint notice indicates that the issues identified above, (except for the lack of academic goals and the timeliness of the July 9, 2009 placement recommendation), were not properly raised below (see Parent Ex. A at pp. 1-6). While the hearing record contains some testimony relating to one or more of these issues at the impartial hearing, the hearing record does not, however, show that the district agreed to expand the scope of the impartial hearing to include any of these issues. Additionally, the hearing record does not reflect that the impartial hearing officer authorized the amendment of the parents' September 17, 2009 due process complaint notice to include any of these issues. Therefore, these contentions, which are raised for the first time on appeal, are outside the scope of my review and therefore, I will not consider them (see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 09-112).

With respect to the parents' assertion that the placement recommended in the district's July 9, 2009 notice was "late," the hearing record does not support this conclusion. The IDEA requires a district to have an IEP in effect for each student with a disability at the beginning of each school year (20 U.S.C. § 1414[d][2][a]; 34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]). A district's delay in recommending a placement "does not violate the IDEA so long as [the district] still has time to find an appropriate placement for the beginning of the school year in

September" (M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256 at *9-*10 [S.D.N.Y. Aug. 27, 2010]; Tarlowe, 2008 WL 2736027 at *6, quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]; see Application of a Student with a Disability, Appeal No. 08-088). In this case, there is no dispute that the March 2009 CSE met to develop an IEP for the student for the 10-month school year beginning in September 2009 (see Parent Ex. B at p. 2). The district's July 9, 2009 notice offering a third public school placement provided the parents with sufficient notice to visit the proposed school and to enroll the student prior to the first day of classes in the 2009-10 school year, which commenced in September 2009. There is no evidence in the hearing record that the receipt of the July 9, 2009 notice impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or 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]; see M.P.G., 2010 WL 3398256 at *9-*10; Tarlowe, 2008 WL 2736027 at *6). Therefore, I decline to find that the district failed to offer the student a FAPE on the basis that its July 9, 2009 notice was not timely (see M.P.G., 2010 WL 3398256 at *9-*10; Tarlowe, 2010 WL 2736027 at * 6).³

Next, the parents contend that the student's March 2009 IEP was inadequate because it failed to contain academic annual goals. However, the March 2009 IEP indicated that the student had average to above average academic skills, which the parents do not dispute (Parent Ex. B at p. 3). Further, the school psychologist testified that academics were not an area of need for the student, and therefore, academic annual goals were not a necessary component of the student's IEP (Tr. p. 42). In such circumstances, there was no reason for the March 2009 IEP to include academic annual goals (see A.H. v. Dep't of Educ., 2010 WL 3242234 at *3-*4 [2d Cir. Aug. 16, 2010]; Application of a Student with a Disability, Appeal No. 08-064).⁴ In addition, I note that the special education teacher testified that she would address the student's academic needs as if he were a general education student without academic goals (see Tr. p. 112). Accordingly, I decline to find the March 2009 IEP was inadequate on the basis that it lacked academic annual goals.

The parents further contend that that the ICT classroom with a crisis management paraprofessional was not appropriate for the student because the classroom contained too many students; the student would have received less support than he received in his pre-kindergarten placement, where the student "struggled;" and the crisis management paraprofessional would have decreased the student's level of independence. Upon review of the hearing record and as

³ In addition, the Second Circuit has established that "'educational placement' refers to the general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the 'bricks and mortars' of the specific school" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII], 34 C.F.R. § 320[a][7], 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20). Further, the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veasey, 37 IDELR 10 [OSEP 2001]).

⁴ Federal regulation provides that an IEP must include "measurable annual goals, including academic and functional goals designed to . . . [m]eet the child's needs that result from the child's disability" (see 34 C.F.R. § 300.320[a][2][i][A]).

discussed below, I agree with the impartial hearing officer's conclusion that the ICT classroom with the assignment of a shared crisis management paraprofessional was an appropriate placement for the student and offered the student a FAPE in the LRE for the 2009-10 school year.

First, the March 2009 IEP accurately reports the student's present levels of performance and identifies the student's individual needs (see Parent Ex. B at pp. 3-7). The student's present levels of academic achievement indicated that the student had pre-kindergarten listening comprehension, writing, and problem solving skills, as well as pre-kindergarten to kindergarten reading comprehension and computation skills, and first grade decoding skills (id. at p. 3). The March 2009 IEP indicated that the student had "many academic skills and read well above grade level" (id.). In addition, the March 2009 IEP indicated that the student had "good rote math skills," and age appropriate expressive and receptive language skills, but below level receptive language skills during informal conversations (id.). The March 2009 IEP further indicated that the student displayed "an extremely short attention span and lack[ed] sustained focus in groups" (id.). Additionally, the March 2009 IEP indicated that the student's mild-to-moderate impairment in pragmatic language negatively affected his ability "to become a competent social communicator" (id.). The IEP also indicated that the student had difficulty maintaining his attention, displayed decreased eye contact during interactions, and displayed temper tantrums during non-preferred activities (id.). To address the student's academic management needs, the CSE recommended small group instruction, individual instruction, preferential seating, movement breaks, short/clear directives, cueing, previewing especially during new routines and transitions, and use of a timer to provide visual/auditory representation of time allotment for specific tasks (id.).

With regard to social/emotional development, the March 2009 IEP indicated that the student "loves books, music and movement" and "seeks out adults for attention" (Parent Ex. B at p. 5). The March 2009 IEP also indicated that the student had difficulty with transitions, became easily frustrated, frequently grabbed food and toys away from others, and "can tantrum if he does not get his way or if he has to stop doing what he is engaged in" (id.). The student's March 2009 IEP further indicated that he demonstrated weak social and pragmatic language skills, had minimal eye contact, and had difficulty with maintaining his attention unless engaged in a preferred activity (id.). The March 2009 IEP also indicated that the student's behavior required "highly intense supervision" (id.). According to the March 2009 IEP, the student's "behavior and feelings" were often inappropriately intense under normal circumstances (id.). The student did not maintain "typical interpersonal relationships with peers and teachers in class" (id.).

With regard to the student's social/emotional management needs, the March 2009 IEP indicated that the student required structure and the assistance of a crisis management paraprofessional to assist him during tantrums and to initiate, maintain, and complete tasks (Parent Ex. B at p. 5). Additionally, the March 2009 IEP indicated that the student should be provided with guidance both individually and in a group as needed and that he required "very specific instruction in social rules and classroom rules" (id.). The March 2009 IEP further indicated that the student should be provided with only two choices of tasks due to his difficulty maintaining attention to a task (id.).

With regard to the present levels of health and physical development, the March 2009 IEP indicated that the student "ha[d] a high activity level and low arousal" and that "he inefficiently seeks stimulation from his environment making his actions appear disorganized and impulsive" (Parent Ex. B at p. 6). According to the March 2009 IEP, he had difficulty processing multisensory information which negatively affected the student's ability to maintain his attention and address the details of a task (id.). Additionally, the student attempted "to self-regulate by controlling his environment and [could] become oppositional and uncooperative within a fleeting minute" (id.). The student's March 2009 IEP indicated that he exhibited "many symptoms" of an attention deficit hyperactivity disorder (id.). The March 2009 IEP also indicated that the student's health and physical management needs included "structured movement, heavy work and deep pressure input to increase his organization and sustained performance" (id.). A BIP attached to the March 2009 IEP was completed to address the student's behavior and provided for the implementation of interventions designed to meet the student's individual needs (see id. at p. 15).

Further, the March 2009 IEP contained eight annual goals and six short-term objectives with respect to the student's needs in the areas of self-regulation, work habits, social skills, attention, transitions, and class participation (Parent Ex. B at pp. 7-11). The district's school psychologist at the March 2009 CSE meeting testified that at the time they were written, the annual goals in the March 2009 IEP were appropriate for the student (Tr. p. 33). In addition, the hearing record demonstrates that the annual goals and short-term objectives are consistent with the description of the student's present levels of performance and appropriately recommended self-calming methods, visualization, deep breathing, direct instruction of social rules, work habits, sensory regulation, and class participation (Parent Ex. B at pp. 7-11). Additionally, the annual goals and short-term objectives addressed the student's needs with respect to attention, ability to transition, social flexibility, writing, pragmatic/social language skills, and eye contact (id.).

To provide an educational environment to address the student's special education needs and to advance toward attaining the annual goals and short-term objectives in the March 2009 IEP, the March 2009 CSE recommended an ICT classroom with a shared crisis management paraprofessional and related services of counseling, speech-language therapy, and OT (see Tr. pp. 29-30, 38-39, Parent Ex. B at pp. 1, 14, 16). With respect to the ICT classroom, the district's school psychologist testified that "everything is done" in either small groups or individually, and she indicated that at no time would the student be instructed in a group larger than 12 students (Tr. pp. 29, 52-53). Prior to recommending the ICT classroom with a shared crisis management paraprofessional and related services, the hearing record demonstrates that the March 2009 CSE considered whether to recommend the student for a 12:1+1 special class (Tr. p. 32; Parent Ex. B at p. 13). Furthermore, the March 2009 CSE concluded that should the recommended program not be successful for the student, it would be appropriate for the student to be placed in a 12:1+1 special class at that time (Parent Ex. B at p. 13).

The special education teacher of the proposed ICT classroom further testified that both she and the regular education teacher provided instruction in the classroom (Tr. p. 89). She described the ICT classroom as having 24 students, who ranged in age between four and six years old (Tr. pp. 90-91, 108). At that time, the ICT classroom included nine special education students in the class, who had classifications of a speech or language impairment, an OHI, or a

traumatic brain injury (Tr. p. 108). In addition, the recommended ICT classroom had its own restroom and could access the school's private kindergarten play yard (Tr. pp. 56-57, 64). The hearing record reflects that the crisis management paraprofessional and related services recommended by the March 2009 CSE would have been provided at the recommended school (Tr. pp. 27, 30, 31, 50, 63-64, 66-67, 70). The guidance counselor/coordinator of special education at the recommended school testified that the ICT classroom could "absolutely" have provided the student with the types of special education services recommended in the student's March 2009 IEP (Tr. p. 68).

The district's school psychologist testified that the March 2009 CSE recommended several supports as part of the March 2009 IEP to address the student's behavior including individual counseling—which included cognitive behavioral techniques—and group counseling to assist the student with social problem solving and social skills (Tr. p. 28). The district's school psychologist also stated that a shared crisis management paraprofessional was recommended in the March 2009 IEP to assist the student with self-regulation, behavior, and frustration tolerance as well as to assist the student as needed during tantrum behavior (Tr. p. 29). The district's school psychologist further testified that a crisis management paraprofessional was also recommended because the student would be in a "larger kindergarten," but she hoped that the crisis management paraprofessional would not be needed "in the long term" (*id.*). In addition, the district's school psychologist testified that the crisis management paraprofessional would accompany the student during his lunch period (Tr. pp. 39, 55). Thus, the hearing record indicates that the shared crisis management paraprofessional would be available to the student as required by his needs, which does not support the parents' contention that this service would "make [the student] less independent" (*see* Tr. pp. 31, 38, 55, 99).

The guidance counselor/coordinator of special education at the recommended school testified that related services were provided to the students in the ICT classroom on a push-in or pull-out basis depending on a student's needs and in conjunction with the district's IEP (Tr. p. 67). The guidance counselor/coordinator of special education at the recommended school also testified that the ICT teachers had ongoing consultation with the paraprofessionals and related service providers (Tr. p. 68).

According to the district's school psychologist, who was assigned to the recommended school, the ICT special education teacher structured the classroom in conjunction with the regular education teacher to allow for individual and small group instruction, which included cueing and previewing to assist the students in learning the classroom routine (Tr. p. 29). Noting the student's overall average to superior cognitive abilities, the school psychologist stated that the ICT classroom offered many academically challenging activities, as well as art and dance programs (Tr. p. 30). She further testified that "[t]he [ICT] class ha[d] the resources to help kids who have special needs while maintaining academic excellence, and [that she] thought it was the right program" (*id.*). In addition, she noted that the recommended ICT classroom would allow the student to interact with his nondisabled peers (Tr. p. 47). Further, according to the school psychologist, the special education teacher of the proposed ICT classroom would have provided the student individual and small group instruction based on the student's needs (Tr. p. 52).

The special education teacher of the proposed ICT classroom described a typical day in the class, which consisted of a "morning meeting" to review the schedule, followed by a

movement break, and then a shared reading lesson followed by another break (Tr. p. 92). The students would then engage in a math lesson, followed by a break, and then lunch time (id.). After the lunch period, the students had "quiet time" followed by writing instruction and then snack and choice time (Tr. pp. 92-93).

The special education teacher of the proposed ICT classroom stated that she consulted with the class' regular education teacher on a daily basis regarding the needs and annual goals of the students (Tr. p. 93). In addition, both she and regular education teacher engaged in direct instruction to assist the students to meet their annual goals (Tr. p. 94). The special education teacher further testified that one of her duties was to make sure that every student's goals would be met (Tr. p. 93). She also testified that her goal was to make sure that she "reached" the students' goals, and further, that during the class day; she implemented the students' annual goals (Tr. pp. 94, 97).

Noting the student's annual goals and needs, the special education teacher of the proposed ICT classroom indicated that appropriate strategies would have been implemented for the student and would have included modeling, social stories, use of the classroom's "quiet corner" for relaxation, needed "breaks," and the use of timers to assist the student with time management skills (Tr. pp. 95, 115, 120-21). She would also use peer modeling ("buddying students up") and a timer system to address the student's attention needs (Tr. pp. 102, 116). In reference to the student's interests identified on the March 2009 IEP, the special education teacher stated that there were opportunities for movement, reading, and music within the ICT classroom (Tr. p. 95). The special education teacher also indicated that the teachers in the recommended ICT classroom used multisensory teaching methods appropriate to meet the students' needs (Tr. pp. 96, 114).

The guidance counselor/special education coordinator at the recommended school testified that the student could "appropriately," "clearly," and "most definitely" be served in the recommended ICT classroom at the recommended school (Tr. p. 76). Further, the special education teacher of the proposed ICT classroom testified that the proposed CSE recommendations were appropriate for the student (Tr. p. 97). Additionally, the district's school psychologist at the recommended school testified that the potential placement of the student at the recommended school was an appropriate one (see Tr. pp. 26-30) and that she knew "the [the school] could support [the student]" and thought that the student could "make it" with the recommended supports at the recommended school (Tr. pp. 45-46). With respect to the restrictiveness of the proposed program, the school psychologist testified that the student would benefit from the role models that typically developing students would provide in the ICT classroom, that the student should "have the option to be with typically developing peers," and that the ICT classroom was "absolutely" the LRE for the student (Tr. pp. 47, 59).

With respect to the instructional services and resources provided to the student at the recommended school and the student's difficulty in his general education pre-kindergarten class, the district's school psychologist had observed the student in the pre-kindergarten class. Among other things, she testified that the student had "a general problem with tantruming in that setting," that the pre-kindergarten program was not "helping" the student "get over" his deficits, that the program did not have a "good grasp" of the student's needs and how to assist him, that a lot of his behaviors had not been addressed correctly in the pre-kindergarten program, and that the student was not provided with full time special education support in the general education

pre-kindergarten class because his classroom SEIT services were part time (Tr. pp. 32, 35-37, 59).

Further, as indicated above, the hearing record shows that the ICT classroom at the recommended school would have provided the student with a level of instruction appropriate for his needs. The recommended school would have provided the student with special education services during the entirety of his school day (see Parent Ex. B at pp. 1, 12). Moreover, as discussed above, the student would have received individual or group instruction as dictated by his needs from a certified special education teacher and a regular education teacher in instructional groups no larger than 12 students (see Tr. pp. 29, 52-53). The student would also have been provided with a shared crisis management professional to assist him when needed (see Tr. pp. 31, 38, 55, 99; Parent Ex. B at pp. 5, 15). The special education teacher at the recommended school would have used appropriate strategies for the student during the school day and would have worked with him on implementing his annual goals (see Tr. pp. 92, 95, 97, 102, 106, 115, 120-21). Further, the March 2009 IEP included a BIP to address the student's behavior during school that interfered with instruction and learning (see Parent Ex. B at p. 15). The hearing record also shows that the related services recommended on the March 2009 IEP would have been implemented in the recommended class (Tr. pp. 27, 30, 50, 66-67, 68, 70).

Based on the foregoing, the hearing record demonstrates that the March 2009 CSE's recommended placement in an ICT classroom with a crisis management paraprofessional and the provision of counseling, speech-language therapy, and OT services, was an appropriate recommendation for the student. Moreover, the hearing record also demonstrates that the March 2009 CSE's recommended special education program and services were reasonably calculated to confer educational benefits to the student in the LRE. Having determined that the district offered the student a FAPE, I need not reach the issue of whether the Aaron School is an appropriate placement for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

THE APPEAL IS DISMISSED.

Dated: Albany, New York
October 12, 2010

FRANK MUÑOZ /s/
FRANK MUÑOZ
STATE REVIEW OFFICER