



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-003

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:

Legal Services of New York City - Bronx, attorneys for petitioners, Nelson Mar, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmuller, Esq. and Vida M. Alvy, 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 Rebecca School for the 2009-10 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending an ungraded class at the Rebecca School (Tr. pp. 17, 25; Parent Ex. B at p. 1). The student was unilaterally placed at the Rebecca School at the beginning of the 2008-09 school year, and continued there for the 2009-10 school year (Tr. pp. 12, 25). The Rebecca School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7; see also Tr. p. 26). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Background

The student's educational history was previously discussed in Application of a Student with a Disability, Appeal No. 10-035 (2010 Decision), which remanded the matter to the impartial hearing officer for further development of the hearing record. The parties' familiarity with the facts underlying the 2010 Decision is presumed and will not be repeated here in detail.

Briefly, the district's committee on special education (CSE) convened on June 9, 2009 to develop the student's individualized education program (IEP) for the 2009-10 school year (Dist. Ex. 1).¹ The resultant IEP continued the student's classification as a student with autism and recommended placement in a 6:1+1 special class within a special school, with related services including two weekly 30-minute sessions of individual physical therapy (PT) and three weekly 30-minute sessions of individual speech-language therapy, as well as adapted physical education and special transportation (*id.* at pp. 1, 12).

Due to their dissatisfaction with the district's recommended IEP, in a letter dated July 15, 2009, the parents notified the district of their intention to unilaterally place the student at the Rebecca School for the 2009-10 school year and seek reimbursement from the district for the tuition and costs (Parent Ex. A). In a due process complaint notice dated November 4, 2009, the parents requested an impartial hearing, asserting, among other things, that the district failed to develop an appropriate IEP for the student for the 2009-10 school year; that the district failed to properly document the student's current academic functioning through formal testing; that the district failed to appropriately address the student's behavior management needs; that the district failed to create annual goals to address the student's "severe behavior management needs;" that the district failed to create a behavioral intervention plan to address the student's behavior; and that the district failed to offer the student an appropriate placement for the student for the 2009-10 school year (Parent Ex. B at p. 1).

After conducting an impartial hearing, but rejecting the district's request to call certain witnesses, the impartial hearing officer issued a decision dated March 23, 2010 in which she determined that the district had offered the student a free appropriate public education (FAPE) and consequently denied the parents' request for reimbursement for tuition at the Rebecca School for the 2009-10 school year (IHO Decision 1). Upon appeal by the parents, IHO Decision 1 was annulled and the matter was remanded to the impartial hearing officer for the limited purpose of allowing additional testimony related to the district's recommended placement for the student for the 2009-10 school year (2010 Decision).

Upon remand, the impartial hearing reconvened on August 4, 2010, and concluded on September 16, 2010 after two days of additional testimony. In a decision dated November 17, 2010, the impartial hearing officer determined that the district's recommended placement was appropriate for the student, and that the district could provide the recommended services to the student (IHO Decision 2 at p. 7). The impartial hearing officer also determined that there was no evidence that the student required occupational therapy (OT) services (*id.* at p. 8). In finding that the district's recommended placement was appropriate, the impartial hearing officer noted that the parents did not object to the recommended placement during the CSE meeting, and that their actions suggested that they were seeking to veto the assigned district site where the student would receive services (*id.* at p. 7).

The parents appeal, asserting that the impartial hearing officer erred in concluding that the services offered by the district were appropriate to meet the student's needs.

¹ Pages 4, 5, 10 and 11 of the June 2009 IEP indicated that the "date of conference" was June 8, 2009 (Dist. Ex. 1 at pp. 4-5, 10-11).

The parents assert that the impartial hearing officer's decision should be reversed because she was either biased or incompetent. Specifically, the parents assert that, even after the impartial hearing officer's March 2010 decision was annulled and remanded because she reached conclusions not based on the evidence and had "improperly failed to address the parents' claims properly raised below pertaining to the student's OT needs" (citing 2010 Decision), she again failed to properly address the parents' concerns regarding OT and merely recited the district's contention that he did not require OT. Also, the parents assert that the impartial hearing officer failed, again, to discuss the numerous documents or lengthy testimony regarding the student's need for OT, nor did she provide an explanation as to why she gave greater weight to the district's witnesses who had limited interaction with the student, versus the testimony of the Rebecca School witnesses who worked with the student for two academic years. Further, the parents contend that the impartial hearing officer's bias and/or incompetence is also demonstrated by her continued claim that the parents did not notify the district of their disapproval of the recommended placement, despite "a specific admonishment" that the evidence did not support such a conclusion (citing 2010 Decision).

The parents also assert that the impartial hearing officer should have concluded that evidence showed that the district failed to properly address the student's OT needs, even though the parent requested an OT evaluation.² The parents argue that since the request for an OT evaluation was made at the June 2009 CSE meeting, the district should have inferred that the parents objected to a lack of OT services and related annual goals and short-term objectives in the student's June 2009 IEP. The parents contend that although the CSE agreed to an OT evaluation at the June 2009 meeting, the evaluation was not completed prior to the start of the 2009-10 school year and the district failed to verify the completion of the evaluation until January 2010. According to the parents, the district should have known that the student required an OT evaluation prior to the June 2009 CSE meeting, based on an April 2009 Rebecca School progress report, and therefore failed to evaluate the student within the 60-day period set forth in State Regulations (citing 8 NYCRR 200.4[b][1]). The parents also assert that the student's father visited the school assigned by the district and that he did not believe the student would make progress if he attended the proposed school. Specifically, the parents allege that the school building to which the district assigned the student was not safe, and it did not have the requisite related services that the student required, and that the school did not provide OT services to those students already assigned to the school, who required OT services according to their IEPs.

As for the appropriateness of the Rebecca School, the parents assert that the district does not dispute the appropriateness of the Rebecca School, since it relied on the school's progress report in creating much of the student's 2009-10 IEP. The parents also assert that the evidence

² In concluding that the district recommended appropriate services, the impartial hearing officer did not address in her decision the parents allegations that the district failed to properly document the student's current academic functioning through formal academic testing, or to create annual goals related to the student's behavioral management needs or develop a behavioral intervention plan (IHO Decision at pp. 7-8; see Parent Ex. B at p. 1). 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 NYCRR200.5[j][5][v]). In this case, the parent did not appeal the impartial hearing officer's decision not to address these issues. Therefore, these issues are not properly before me and I decline to address them.

and testimony show that the Rebecca School is appropriate because the student has made progress there. Specifically, the parents assert that the student was placed in an 8:1+3 class, and received OT, PT, speech-language therapy, adapted physical education, and counseling, which helped the student make progress in overall academic functioning, social/emotional functioning, and speech-language.

With regard to equitable considerations, the parents argue that the district presented no evidence to suggest that they acted unreasonably, and further contend that they cooperated fully with the district. They also assert that the hearing record demonstrates that the district's actions were not procedurally or substantively compliant with the Individuals with Disabilities Education Act (IDEA) and State regulations.

In its answer, the district asserts that: (a) the parents have incurred no out of pocket expenses, and therefore are not entitled to direct payments to the Rebecca School; (b) the impartial hearing officer's decision comports with the regulations, and further, she was not biased; (c) it offered the student a FAPE for the 2009-10 school year; (d) the Rebecca School is not an appropriate placement for the student; and (e) equitable considerations do not favor an award of tuition reimbursement.

Applicable Standards

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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; 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).

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 (see Application of the Bd. of Educ., Appeal No. 08-016).

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).

Discussion

Hearing Officer Bias/Incompetence

I will first address the parents' contention that the impartial hearing officer was either biased or incompetent in making her determinations. The parents assert that the impartial hearing officer repeated many of the same errors in her decision regarding the current matter that she did in IHO Decision 1. Specifically the parents contend that the impartial hearing officer did not render or write her decision in accordance with appropriate legal standards, and her finding that the student did not require OT services was a parroted, conclusory statement made by the district's staff. The parents further contend that the impartial hearing officer failed to discuss documents or lengthy testimony submitted into evidence regarding the student's need for OT.

I have reviewed the hearing record in this matter, and find that both parties were accorded a reasonable opportunity to be heard and that I find that the impartial hearing was conducted in a manner that was consistent with the requirements of due process (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]; see, e.g., Tr. pp. 294-296, 318-19, 357-63).

I also note that although the impartial hearing officer's written decision was sparse in explaining her rationale for the conclusions she reached, she articulated the applicable legal standards upon which she relied (IHO Decision at pp. 6-7). Furthermore, I find that, for the reasons described below, there is no basis to modify the conclusion that the district offered the student a FAPE for the 2009-10 school year. Consequently I decline, in this instance, to annul the impartial hearing officer's determination on the basis of incompetence and/or bias. However, I also note that this case was previously remanded by another State Review Officer, due in part to a decision that failed to comport with an appropriate standard legal practice (see 8 NYCRR 200.1[x][4][v]), and that now, her second decision in this matter, which was reached after four days of impartial hearing, contains an analysis of the entire case consisting of three sentences which refer in conclusory fashion to the hearing record. It is difficult to envision the analysis with any less detail but which would still minimally comport with appropriate standard legal

practice for written decisions and, accordingly, I strongly encourage the impartial hearing officer to consider including some additional relevant details in her analysis in any future decisions.

Occupational Therapy

Next, I will consider the parents' claims that the district failed to conduct an OT evaluation for consideration by the CSE and that the student's June 2009 IEP did not adequately describe the student's needs in the area of OT.

Attendees at the June 2009 CSE meeting included a special education teacher/related service provider who also acted as a district representative, the parents, a district school psychologist, a social worker/translator, an additional parent member, and both a Rebecca School special education teacher and an attorney for the parents participated by telephone (Dist. Ex. 1 at p. 2).³ The June 2009 CSE considered the April 2009 Rebecca School multidisciplinary progress report update, the district's June 2009 observation, and the student's previous IEPs (Tr. p. 121).

The hearing record reflects that the student received OT services at the Rebecca School to address "his sensory needs, his regulation strategies, his regulation throughout the day, also fine motor skills, such as handwriting" (Tr. p. 240). The hearing record further reflects that the student's individual OT sessions focused on endurance, sensory integration, and expanding on ideas using pretend play (Dist. Ex. 4 at p. 4). In the April 2009 Rebecca School Progress Report, the student's Rebecca School occupational therapist reported that the student required adult support to socially problem-solve with adults and peers and that he became dysregulated, forceful, and aggressive when adults would not participate in his games (*id.* at p. 7). The occupational therapist further reported that the student was unable to "calm himself down" when he became dysregulated and often needed to be removed from the classroom (*id.*). The occupational therapist opined that to assist the student to become independent in his ability to self-regulate, the student could be provided with a choice between two self-regulatory coping mechanisms such as jumping on the trampoline or doing wall pushes, prior to him becoming aggressive (*id.*).

The Rebecca School progress report noted that the student received one 30-minute session of individual OT per week, one 30-minute session of OT per week with a peer from another class, and two 30-minute group sessions of OT per week (Dist. Ex. 4 at p. 3). The progress report also noted that the student had demonstrated progress in fine motor strength and coordination as well as complex motor planning tasks (*id.* at pp. 8-9). The student's Rebecca School OT goals addressed sensory processing and regulation to allow for social interaction, as well as motor planning and sequencing to allow for participation in fine and gross motor activities (*id.* at pp. 7-8).

The hearing record indicates that during the June 2009 meeting, the parents requested that the CSE conduct an OT evaluation of the student (Tr. pp. 126-27). According to the district's school psychologist, the parents requested the OT evaluation based on their concerns regarding the student's self-regulation abilities; however, the school psychologist opined that the student's

³ The student was present for the June 2009 CSE meeting, but did not participate (Dist. Ex. 6 at p. 1).

fine motor skills appeared intact based on the student's drawing ability (Tr. p. 127). In response to the parents' request, the district's school psychologist testified that the day after the June 2009 CSE meeting she contracted with an evaluator for an OT evaluation of the student (*id.*). In January 2010, the district's school psychologist contacted the contracted evaluator by e-mail regarding the status of the student's OT evaluation (Tr. p. 142). According to the district's school psychologist, the contracted evaluator had made several attempts by telephone to arrange for the evaluation of the student, but the parents were "unresponsive" and, therefore, the evaluator did not conduct the OT evaluation (*id.*). Although it was not inappropriate for the district to agree to arrange an OT evaluation after the CSE meeting (see, e.g., L.K. v. Department of Educ., 2011 WL 127063, *8 [E.D.N.Y. Jan. 13, 2011] [noting that it is counterproductive to discourage districts from working cooperatively with parents by agreeing to provide for additional evaluations of a student]; L.R. v. Manheim Township Sch. Dist., 540 F. Supp. 2d 603, 617 [E.D. PA, 2008] [finding that an evaluation conducted after an IEP was created that showed that the student's language deficit was more serious than was previously known does not mean that the IEP was based on insufficiently comprehensive evaluations]), the hearing record does not support the conclusion that the CSE failed to consider adequate evaluative information regarding the student's sensory or fine motor needs.

As indicated above, the hearing record reflects that the Rebecca School occupational therapist addressed the student's needs in the areas of sensory processing and regulation, as well as his motor planning and fine and gross motor skills (Dist. Ex. 4 at p. 8). According to the district school psychologist, OT services could potentially address self-regulation or could "simply address fine motor skills" (Tr. p. 139).

The hearing record shows that within the district's 6:1+1 special class the student's self-regulation needs as identified on his June 2009 IEP could have been addressed by a special education teacher (Tr. pp. 386, 393-95). According to testimony elicited from a special education teacher in a district 6:1+1 special class, students were provided access to sensory materials such as sand, rice, water, and shaving cream to address their self-regulation needs in the classroom (Tr. pp. 394-95). To address students' attending and self-regulation needs, similar to the needs exhibited by this student, students in the district's 6:1+1 special class were also provided with breaks, opportunities to walk with the classroom paraprofessional, and modeling of appropriate behavior (Tr. pp. 393-95).

The hearing record also shows that in addition to addressing sensory regulation needs in the 6:1+1 special class, the special education teacher described how she is able to provide writing instruction based on a student's individual instructional level including allowing students to independently write sentences and providing hand-over-hand assistance in writing letters (Tr. p. 386). Students in the 6:1+1 special class also had access to a physical therapist, an occupational therapist, and a guidance counselor (Tr. p. 395). I note further that the June 2009 IEP provided the student with two 30-minute sessions of individual PT to address the his needs in the areas of strength, stamina, and endurance as indicated by his annual goal (Dist. Ex. 1 at p. 9).

I find that the hearing record shows that the district was not required to address the student's sensory and self-regulation needs through OT services, because the June 2009 IEP appropriately identified and addressed these needs by providing the student with access to

sensory materials and body breaks, as well as visual cues and verbal prompts (Dist. Ex. 1 at pp. 3-4). Moreover, I find that the student's self-regulation needs were to be further addressed by a special education teacher within the district's 6:1+1 special class as indicated on his June 2009 IEP (id.).

In addition, I find that the evidence shows that the student did not demonstrate fine motor needs which required OT services (Tr. p. 127; Dist. Ex. 5). The hearing record demonstrates that the student had shown progress in his fine motor strength and coordination and that by April 2009 he required minimal assistance to button and zipper on a dressing board (Dist. Ex. 4 at p. 8). Although the student exhibited more difficulty and required moderate assistance with opening and closing clothing fasteners when on his own body; the April 2009 progress report noted that it was anticipated that the student would meet this fine motor goal (id.). According to the hearing record, the student was able to draw characters from cartoons with meticulous detail, he had made progress in demonstrating a dynamic tripod grasp with minimal tactile cuing during classroom writing activities, and it was anticipated he would meet this graphomotor goal as well (id. at pp. 4, 8; see Dist. Ex. 5; Tr. p. 127).

Although the parents argue that the student's progress report from the Rebecca School detailed his receipt of OT services at the Rebecca School and should have put the district on notice that the student may require OT services, there is no evidence that the June 2009 CSE failed to consider the progress report when developing the student's IEP and, moreover, "the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent" (see M.H. v. New York City Dept. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]). Accordingly, in light of the evidence discussed above, I find that the evidence in the hearing record does not support the parents' claim that the district failed to offer the student a FAPE due to an inadequate evaluation of the student, an inadequate description of the student's sensory needs in the June 2009 IEP, or a failure to recommend OT services on the student's June 2009 IEP.

Adequacy of the Assigned School

Having determined that the district's IEP was not inappropriate due to a lack of OT services, I will now address whether the district's assigned school was inappropriate such that, as the parents contend, the student would have been prevented from receiving educational benefit at that site due to security and safety concerns.

The hearing record shows that the parents did not file an amended due process complaint notice and raise this issue for the first time on appeal, and that the issue was not reasonably identified in their original due process complaint notice (see Parent Ex. B) or in either of the impartial hearing officer decisions (see IHO Decisions 1, 2). The only time, on remand, that this issue was mentioned was during the testimony of the student's father on the last day of the impartial hearing (Tr. pp. 471-72). Even assuming, for the sake of argument, that the issue had been properly raised, I note that the issue is speculative insofar as the parents did not accept the recommendations of the CSE or the program offered by the district and, furthermore, I note that the record, in its entirety, does not support the conclusion that, had the student attended the

assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefit (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

Having found that the district offered the student a FAPE, I need not reach the issue of whether the private educational services obtained by the parents were appropriate for the student and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 1, 2011**



**JUSTYN P. BATES
STATE REVIEW OFFICER**