



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-022

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

Appearances:

Donoghue, Thomas, Auslander & Drohan, LLP, attorneys for petitioner, James P. Drohan, Esq., of counsel

Law Office of Patricia S. Phelan, Esq., attorney for respondent

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Community School for the 2010-11 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was enrolled in third grade at the Community School, an out-of-State private school which has been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. pp. 132, 660, 1268, 1575; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and related services as a student with an other health impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

Background

The student's early history reflects that due to developmental delays, at age two the student began receiving speech-language therapy through the Early Intervention Program (EIP) (Tr. p. 605; Parent Ex. L at p. 1). As behavior problems emerged the student was enrolled in a center-based special education class where he received play therapy, as well as speech-language

and occupational therapies (Tr. pp. 609-10, 611-12; Parent Ex. L at p. 1). The student's parents were also provided with parent training (Tr. p. 613; Parent Ex. L at p. 1). Subsequently the student received special education and related services through the district's Committee on Preschool Special Education (CPSE) and continued to do so until he transitioned to kindergarten (Tr. pp. 605-06, 610-11, 615-16).

On March 26, 2007, the Committee on Special Education (CSE) met for the student's initial eligibility determination meeting (Joint Ex. 29 at p. 1). CSE meeting minutes indicated that the student presented with average cognitive skills and had acquired basic readiness skills (id. at p. 4). However, the minutes also indicated that the student demonstrated articulation deficits and a delay in fine motor skills (id.). The minutes further noted that the student was distractible and had difficulty with transitions (id.). The CSE determined the student eligible for special education programs and related services as a student with an other health impairment and recommended that for kindergarten he attend a general education class and receive one hour per week of direct consultant teacher services, along with related services of speech-language and occupational therapies (id. at p. 1). A notation on the student's individualized education program (IEP) indicated that as follow-up the CSE would meet for a 10 week review in November 2007 (id. at pp. 4, 5).^{1,2}

During the 2007-08 school year, the student attended the program recommended by the CSE at the district's elementary school (Tr. p. 620; Parent Ex. L).³

As planned in March 2007, the CSE reconvened on November 29, 2007 to conduct a review of the student's program (Joint Ex. 5 at p. 1). The present levels of performance on the November 29, 2007 IEP indicated that the student had made a "relatively smooth transition" to the kindergarten program and progress in his ability to follow class routines and participate in group activities (id. at p. 3). However, the November 2007 IEP also indicated that the student's actions were self-directed and that he strongly resisted the direction of teachers (id.). As reflected in the CSE meeting minutes, the student's mother expressed concern regarding the student's speech difficulties and presented the CSE with a neurological report and requested an increase in the student's speech-language therapy (Joint Ex. 5 at p. 5; see Parent Ex. L).^{4, 5} CSE

¹ The CPSE met on May 23, 2007 and determined that the student was eligible to receive speech-language therapy and occupational therapy (OT) services during the extended school year (ESY) (Joint Ex. 7 at p. 4). The CPSE reconvened on July 11, 2007 and determined that the student was also eligible for an 8:1+1 preschool special class for the extended school year (Tr. pp. 606-07; Joint Ex. 6 at pp. 2, 5).

² In a letter to the district dated August 22, 2007, the parents indicated that they were not in agreement with the services being offered to the student and requested an independent educational evaluation to determine an accurate classification for the student (Parent Ex. C; see Tr. p. 618).

³ The recommended general education kindergarten program met for approximately two and a half hours per day (Tr. pp. 1820, 1947-48).

⁴ Although the student's teachers reported that the student was "doing nicely" in the district's program and "on his way toward meeting his goals," the parents reported to the neurologist that the student's "current classroom situation is not working," noting that the student was struggling with learning and continued to have difficulty functioning in the classroom, and that the curriculum was not meeting the student's needs (Parent Ex. L at p. 1).

meeting minutes indicated that the student was due for a reevaluation and that the parent's request was put on hold until testing was completed and reviewed (Joint Ex. 5 at p. 5).

Subsequently, the CSE reconvened on January 28, 2008 for a reevaluation review (Joint Ex. 4). The student's present levels of performance were revised to reflect the results of the evaluations reviewed by the January 2008 CSE (Joint Ex. 4 at pp. 3-6; see Parent Exs. M; KK).⁶ Following discussion, the January 2008 CSE continued the student's classification of a student with an other health impairment and continued to recommend placement in a general education kindergarten class with daily consultant teacher services (Joint Ex. 4 at pp. 1, 5). In addition, the CSE recommended continuation of the student's speech-language therapy and an increase in his occupational therapy (OT) services to twice weekly (id.). The CSE also recommended that counseling one time per week be added to the student's IEP (id.). According to the CSE meeting minutes, the student's mother expressed concern regarding the level of service the student was receiving, as well as her belief that the student required a more restrictive environment, preferably a small special class (id. at p. 5). Possible special class placements were discussed and the CSE determined that the school psychologist and special education teacher would visit a special class at a different district elementary school to determine if it was a more appropriate placement for the student (Tr. p. 1945; Joint Ex. 4 at p. 5). The CSE agreed to reconvene to discuss the student's program for the remainder of the school year (Joint Ex. 4 at p. 5).

In January 2008, the student was evaluated privately by a psychiatrist who, after observing the student and interviewing his parents, provided the student with the following diagnoses: ADHD, Combined Type; Oppositional Defiant Disorder (ODD); and Pervasive Developmental Disorder, not otherwise specified (PDD-NOS) (Parent Ex. N).⁷ In a February 2008 letter to the school psychologist, the student's private psychiatrist opined that the student "may benefit" from modifications and services at school including small class size, decreased student-to-teacher ratio, a 1:1 aide, social skills training, school counseling, a 12-month program, and placement in a classroom that focused on addressing the specific needs of children with PDD-NOS (id.).^{8, 9} Subsequently, in a March 29, 2009 letter to the school psychologist, the

⁵ The neurologist concluded that the student had "significant neurological impairment with fine motor weaknesses and a severe communication disorder including articulation difficulties, auditory processing weakness, and attention deficit hyperactivity disorder" (Parent Ex. L at p. 3). He stated that there was no evidence that the student had an "autistic" spectrum disorder (id.). The neurologist opined that the student would be most appropriately served in a "communication disordered classroom which would be a small size, enriched language communication full-time program, with individual speech therapy a minimum of three times per week, and occupational therapy individually at least three times a week" (id.).

⁶ The neurologist reiterated his November 2007 educational recommendations for the student in a note dated January 15, 2008 (Parent Ex. M).

⁷ Based on the parents' request, the school psychologist referred the parents to a private psychiatrist (Tr. p. 1776).

⁸ The student began taking medication for ADHD in February 2008 (see Tr. p. 622; Joint Ex. 48 at p. 5).

⁹ The psychiatrist referred the parents to a parent advocate who they contacted on March 25, 2008 (Joint Ex. 48).

student's private psychiatrist recommended that the student's classification be changed from a student with an other health impairment to a student with autism (Joint Ex. 48 at p. 25).

The CSE reconvened on April 7, 2008 (Joint Ex. 3 at p. 5). According to meeting minutes, the CSE discussed changing the description of student's eligibility for special education to autism but determined that the classification of other health impairment was "more appropriate" (*id.*). Meeting minutes also indicated that the student had made slow but steady progress over the course of the school year, that he had strengthened his study skills and increased his ability to interact with peers and adults, and that the student was generally more compliant (*id.*). As reflected in the meeting minutes, the student continued to display deficits in memory, fine motor development, attention, and interpersonal skills (*id.* at pp. 5-6). For the 2008-09 school year (first grade), the CSE recommended increasing the student's consultant teacher services and speech-language therapy while continuing OT (*id.* at p. 6). The student's mother expressed concern that the recommended consultant teacher support was insufficient for the student and indicated that she was looking for a more restrictive, special class program (*id.*). The CSE meeting was tabled to allow the student's mother to visit programs (*id.* at pp. 5, 6).¹⁰

The CSE reconvened on May 21, 2008 (Joint Ex. 3 at pp. 1, 5).¹¹ According to CSE meeting minutes the student continued to make progress in readiness skills and class participation (*id.* at p. 5). The CSE recommended that for the 2008-09 school year the student be classified as having an other health impairment and advance to a first grade general education class with increased consultant teacher support (*id.*). Specifically, the CSE recommended that the student receive direct consultant teacher services 10 hours per week in a general education class, along with speech-language therapy three times per week, OT two times per week, and counseling one time per week (*id.* at p. 1). In addition, the CSE found the student eligible for extended school year (ESY) services (*id.* at p. 2). According to meeting minutes, the student's mother disagreed with the CSE recommendation and preferred that the student be placed in a special class for all academic subjects (*id.* at p. 5). The parent was advised of her due process rights (*id.*). The following day the student's mother sent a letter to the CSE chairperson requesting to meet again regarding the student's placement for the 2008-09 school year, or in the alternative to arrange for mediation (Parent Ex. LL).¹²

At the request of the parents, the CSE reconvened on June 18, 2008 (Parent Ex. MM at p. 5). According to CSE meeting minutes, the student's gains, improved confidence, and social

¹⁰ The parents' advocate attended the April 7, 2008 CSE meeting (Tr. p. 1258). According to the advocate, the parents were "offered" three options for the student for first grade: a self-contained class in a district elementary school, continuation in the inclusion (consultant teacher) model, or retention in kindergarten (Joint Ex. 48 at p. 6; *see* Tr. pp. 633, 1259). The student's mother and the student's psychiatrist visited the self-contained elementary school class and determined that it was an appropriate placement for the student (Tr. pp. 635-36, 1260-61).

¹¹ The May 21, 2008 IEP indicated that the student was prescribed medication "to address behavioral and attending issues" (Dist. Ex. 3 at p. 1).

¹² The student's mother reported that she attended the May 21, 2008 CSE meeting alone, as she had been told at the previous meeting that she could choose from the three options noted above (Tr. pp. 637-38; *see* Tr. p. 1261). The district reportedly believed that the students in the special class preferred by the parents were functioning at a significantly lower level than the student (Tr. pp. 1260, 1262, 1286).

skills were reviewed (id.). The parents ultimately agreed with the CSE's recommendation for placement in a general education class with consultant teacher services for the 2008-09 school year (id.). The IEP indicated that the CSE would reconvene after eight weeks to review the student's progress in the recommended program (id.).

A June 25, 2008 IEP progress report indicated that during the 2007-08 school year the student had achieved one of thirteen IEP goals and was progressing satisfactorily toward most of the other goals (Parent Ex. D).

On January 22, 2009 a subcommittee of the CSE met to review the student's progress with the consultant teacher model (Joint Ex. 2 at p. 5). The present levels of performance on the student's IEP were updated to reflect that the student had shown growth in all areas of development and was able to follow classroom routines and engage in lessons and activities with moderate support (id. at p. 3). In reading, the IEP indicated that the student had mastered most letters and sounds of the alphabet and had developed a small sight word vocabulary, although he continued to have difficulty blending sounds and recognizing high frequency words within text (id.). In math, the IEP indicated that the student was able to identify numbers to fifty and had established a more secure number sense, but that he required more assistance when presented with word problems (id.). The IEP noted that the student became agitated with writing tasks; specifically that he exhibited resistance and required a great deal of 1:1 conferencing to initiate such tasks (id.). According to the IEP, the student's speech-language therapy sessions focused on articulation, following directions, vocabulary development, and pronoun usage (id.). The student required refocusing and redirection throughout therapy sessions and benefited from auditory information being presented in small amounts (id.). The IEP indicated that although the student continued to make gains in his graphomotor, visual motor, and motor coordination skills, he still required cueing for line formations (id. at p. 4). As reflected by the IEP, the student had become more social and less impulsive (id.). The IEP stated that once the student believed he was not capable of completing a task he tended to shut down and that the student's perception that he would not do well interfered with his actual performance (id.). The CSE meeting minutes indicated that the student continued to require teacher support and work presented in small groups (id. at p. 5). In addition, the minutes stated that at times the student's frustration and confidence interfered with his ability to work independently and initiate tasks (id.). The student's IEP services remained the same (id. at p. 1).

At the recommendation of the student's treating psychiatrist, the parents sought a private evaluation to confirm or disconfirm a diagnosis of autism (Joint Exs. 40 at p. 3; see Parent Ex. O at p. 1).¹³ The evaluation of the student took place over several months and included a pediatric neurodevelopmental evaluation (Parent Ex. O), a psychoeducational evaluation (Joint Ex. 16), a school report (Joint Ex. 36), a speech-language evaluation (Joint Ex. 22), and a context based developmental assessment (Parent Ex. S). The evaluation culminated in a March 11, 2009 team conference summary which detailed the student's academic and social needs and provided the parents with diagnoses and educational recommendations for the student (Joint Ex. 20).

¹³ In September 2008, the parents initiated the process of obtaining a private evaluation of the student, which was ultimately paid for by the district (Joint Exs. 40; 41; 42; see Tr. pp. 737, 1235; Parent Exs. G; H).

The team conference summary indicated that across all evaluations the student presented as a related child with very significant speech-language deficits, along with articulation difficulties which affected his communication (Joint Ex. 20 at p. 7). The evaluation team noted that the student was "sometimes oppositional, often anxious, sometimes distractible and inattentive, and sometimes experienced marked difficulty in reciprocal interaction and play" (id.). The team described the student as a "great bargainer" who actively negotiated in favor of his own agenda (id.). However, team members also noted that the student could shut down, especially when he was anxious (id. at p. 8). According to the team, in situations in which the student was comfortable he did not present as an autistic child (id.). The team reported that the student required support in reading and writing (id. at p. 7).

The evaluation team offered the following diagnoses of the student: mixed receptive/expressive language disorder, phonological disorder (severe impact on functioning), attention deficit/hyperactivity disorder-combined, oppositional defiant disorder, and anxiety disorder NOS (Joint Ex. 20 at p. 8). According to the team, the results of the Autism Diagnostic Observation Schedule (ADOS) placed the student in the non-autistic range (id.). The team noted that the student demonstrated sensory problems and problems related to social skills, and that the student was at risk for a reading disability (id.). The team suggested that the student's reading and writing difficulties should be addressed using a multisensory approach and that provision should be made for the student to develop his good math skills (id.). The team opined that the student was likely to be overwhelmed in anything other than a small class and that an integrated class which included the regular number of students or slightly fewer was not appropriate for the student at that time (id.). Team members opined that it might be difficult to meet the student's needs in the district and that an out-of-district or private setting may need to be sought (id.). To address the student's educational needs, the evaluation team recommended that the student be placed in a small (no more than 12), self-contained class for students with significant language, learning, and behavioral issues, with normal intelligence and motivation to learn; a functional behavioral analysis (FBA) to address the student's behavioral issues; speech-language therapy five times per week; the continuation of counseling and OT; social skills support; accommodations for assessment; and continued medication treatment with a psychiatrist (id. at pp. 8-9). The results of the team conference were reviewed with the parents on March 26, 2009 (Joint Ex. 43).

In or around April 2009, the district began providing the student with building level reading services, the goal of which was to strengthen the student's fundamental knowledge of basic reading concepts (Joint Ex. 12 at p. 1). The instruction was scheduled to take place four days per week for thirty-five minutes per session in a group of two (id.).

A series of annual review summaries and progress reports were completed by district staff in April 2009 (Joint Exs. 9; 21; 23; Parent Ex. OO). The student's regular education teacher reported that the student's progress during first grade had been inconsistent and fluctuated (Parent Ex. OO). She described the student as "very" impulsive and anxious, and noted that he demonstrated compulsive/obsessive behaviors (id.). She further noted that when overwhelmed or confused, the student would often become oppositional and defiant (id.). The teacher opined that the student's emotional and social issues impacted the quality of his academic success (id.). With respect to academics, the teacher reported that the student demonstrated great difficulty in

all areas of language (id.). She indicated that the student had not mastered many of the sound patterns and vowels necessary to decode text and that the student's vocabulary was weak and he could not independently write a fluent sentence (id.). The teacher characterized the student as "extremely" agitated and uncomfortable during the language block (id.). In contrast, the teacher reported that the student had made outstanding progress in math and had developed an excellent sense of numbers and their value (id.). She stated that the student had mastered grade level and above grade level math concepts and that he found "great joy working in this discipline" (id.). The teacher concluded that the student would continue to need support and differentiated instruction in language, reading, and writing (id.).¹⁴ The student's special education teacher recommended that he be provided with ESY services (Parent Ex. P).

The student's related service providers detailed his performance in speech-language therapy, OT, and counseling (Joint Exs. 9; 21; 23). The student's speech-language therapist reported that the student had shown slow but steady progress in the areas of articulation and speech intelligibility (Joint Exs. 23 at pp. 1-2). The speech-language therapist identified writing as being the greatest challenge for the student (id. at p. 1). According to the speech-language pathologist, the student's expressive language continued to be delayed (id. at p. 2). The student's occupational therapist reported that although the student made significant progress in graphomotor skills, his skills continued to remain delayed in comparison to those of his peers (Joint Ex. 9 at pp. 1, 2). She also noted delays in the student's motor coordination and detailed the student's difficulty following therapy routines and his tendency to "bargain" to do less work (id. at p. 2). With respect to counseling, the school psychologist reported that the student enjoyed participating in counseling sessions but did not like to talk about areas of difficulty (Joint Ex. 21 at p. 1). The psychologist noted that the student became easily frustrated when he did not get his own way and would "shut down" (id.). She further noted that the student appeared "quite anxious" about academics and did not always respond to encouragement or praise (id.). According to the psychologist, the student continued to seek out attention from adults while his interactions with peers were more limited (id.). The psychologist reported that the student often misperceived situations and that his anxiety interfered with his ability to have positive peer interactions (id.).

At the request of the CSE, in May and June 2009 the district conducted cognitive and educational assessments of the student (Joint Ex. 19; Parent Ex. T). Administration of the Wechsler Intelligence Scales for Children-Fourth Edition (WISC-IV) by the school psychologist yielded a full scale IQ in the average range (Joint Ex. 19 at p. 2). According to the psychologist, the student's performance on the WISC-IV reflected his strong verbal skills (id. at p. 3). The psychologist reported that the student's verbal abstract reasoning, social judgment, and ability to name words or concepts after being given clues were each average or above (id.). She noted that the student had difficulty on a task requiring the use of information taught in school, indicating that the student was not retaining all of the material he was exposed to (id.). The psychologist

¹⁴ The teacher originally wrote that the student would "require a setting that immerses him in language" and indicated that the student needed "instruction in a program that teaches to his disability for future success" (Parent Ex. SS). She opined that such an environment might reduce the anxiety that the student experienced all day long (id.). At the request of her supervisors, the teacher changed the wording of her report to reflect that the student would "continue to need support and differentiated instruction in language, reading and writing" (Parent Ex. OO; see Tr. pp. 400-10; Joint Ex. 30 at pp 4-5).

reported that the student's performance on nonverbal tasks was within the average range, but not as well developed as his verbal skills, and that the student tended to be more hesitant on the nonverbal tasks (id.). The psychologist noted that working memory was an area of relative weakness for the student (id.). She indicated that the student had the greatest difficulty listening to arithmetic word problems and mentally calculating answers (id.). She reported that the student appeared more distracted during this task and had difficulty holding on to the information and that repetition did not help him when completing this task (id.). The student's processing speed was average (id.).

The student's special education teacher administered the Process Assessment of the Learner Test Battery for Reading and Writing to the student (Parent Ex. T). Based on the student's performance, the special education teacher reported that the student demonstrated both strengths and weaknesses in his processing of linguistic information (id. at p. 4). According to the special education teacher, the student demonstrated understanding of phonemes and rimes, but experienced difficulty with visual recall, scanning, and discrimination (id.). The teacher opined that the student appeared to have difficulty processing excessive amounts of visual information which impacted negatively on his overall reading and writing development (id.).

In or around May 2009, the parents visited the Community School (Joint Ex. 48 at p. 7). By letter dated May 10, 2009, addressed "to Whom it May Concern," the student's private psychiatrist indicated that due to the student's multiple disabilities, the student needed to be in a small, structured class with peers that would not negatively influence his behavior (Joint Ex. 17). She further indicated that the students in the class should be of normal intelligence (id.). The psychiatrist reported that the student was anxious during the day and while doing homework, but not while at home or in the community, which suggested that the student's anxiety was related to his school experience (id.).

In June 2009, the district conducted an assessment of the student's reading skills (Joint Ex. 12). The district's reading specialist indicated that through the use of the Wilson Foundations Program the student had made gains in the targeted areas of instruction including automaticity in recalling letter sounds, correctly ordering letters alphabetically, and reciting a sequence of letters (id. at pp. 1-2). However, the ability to use correct motor patterns for letter formation remained difficult for the student (id. at pp. 2-3). The reading specialist opined that although the student could be distracted by certain aspects of the Wilson Foundations Program, overall he was a good candidate for the program (id. at p. 3). She indicated that the predictability of the program and its sequential introduction and repetition of skills was beneficial to the student's learning style and self-confidence (id.). The reading specialist stated that the success that the student experienced with the program could be enhanced by extending the number of days of instruction using the program and the amount of time per day (id.).

The CSE met on June 22, 2009 for a reevaluation/annual review of the student (Joint Ex. 18 at p. 1). CSE meeting minutes indicated that the student had made "a great deal of progress" in all areas, with the exception of reading, where he had difficulty making connections, and writing, where the student was characterized as "reluctant" (id. at p. 5). According to the meeting minutes, the student was functioning above grade level in mathematics and had made progress toward his IEP goals in speech-language therapy, OT, and counseling (Joint Ex. 18 at p.

5; see Parent Exhibit NN). In addition, the student had made "notable gains" in the language-based, multisensory reading program (Joint Ex. 18 at p. 5). The CSE meeting minutes reflected that the student's greatest areas of growth had been in social skills and that the student was now able to interact appropriately with peers and maintain friendships (id.). According to the meeting minutes, the student's anxiety and internal distractibility interfered with the student's ability to remember strategies that he had been taught (id.). The CSE recommended that for second grade the student attend a general education class and receive 10 hours per week of direct consultant teacher services and thirty minutes per week of indirect consultant teacher services and that he attend a forty-five minute 8:1 special class for reading daily (id. at pp. 1, 5). In addition, the CSE recommended that the student receive speech-language therapy two times per week in a dyad and one time per week in a group, OT two times per week in a group, and counseling one time per week in a group (id.). The CSE also found the student eligible for ESY services (id. at p. 5). The parents disagreed with the CSE's recommendation and unilaterally placed the student at the Community School for the 2009-10 school year (Tr. pp. 687-88).

The student's June 2009 report card from the district indicated that he was "meeting grade level standards" or "on the way to meeting grade level standards" in all areas except for reading and writing (Parent Ex. E; see Parent Ex. PP). The student's end-of-year IEP progress report indicated that he had achieved four of seventeen IEP goals during the 2008-09 school year and that he was making some progress or progressing satisfactorily towards the remaining goals (Tr. pp. 239-40; Parent Ex. NN).

The student entered the Community School in September 2009 (Tr. pp. 1587-88). At that time the student's reading and spelling skills were assessed using the Wilson Assessment of Decoding and Encoding (WADE) (Parent Ex. R). Administration of the WADE yielded the following scores: total sounds 22.5% correct, total words 2% correct, and total spelling (without spell checker) 1% correct (Parent Ex. R).

In January 2010, district staff visited and observed the student at the Community School (Joint Ex. 13).

On February 23, 2010, the parents paid \$10,000 to the Community School to hold a spot for the student for the 2010-11 school year (Tr. pp. 719-20; Parent Exs AA; EE).

The student's program and performance at the Community School were described in a March 2010 educational progress report (Joint Ex. 11). The report indicated that due to attending issues the student benefited from the highly structured learning environment with small group instruction and individual attention on a consistent basis (id. at p. 1). The student also benefited from new information being presented in small steps and explained and repeated, due to processing difficulties (id.). The report indicated that the student frustrated easily and required continual teacher support and encouragement (id.). As detailed in the report, the student's reading instruction at the Community School was provided in a three student group and focused on developing word attack skills, expanding sight word vocabulary, developing vocabulary knowledge, and strengthening comprehension skills (id.). In addition, the report indicated that the student was tutored individually twice weekly using the Wilson Reading System (Joint Ex. 11 at p. 1; see Joint Ex. 14 at p. 8). According to the report, although the student was able to

identify and recall all of the consonant, short vowel, and digraph sounds, and some of the welded sounds, he had difficulty blending the sounds together to read words (Joint Ex. 11 at p. 2). The report stated that the use of visual reminders and kinesthetic activities were beneficial to the student (id.). The report detailed additional strategies used to develop the student's sight word vocabulary and oral reading fluency (Joint Ex. 11 at p. 1; see Joint Ex. 14 at p. 8). The report indicated that the student responded best to instruction when the class followed a structured and consistent daily routine and that he had difficulty adjusting to changes in the routine (Joint Ex. 11 at p. 1). The report also indicated that the student was highly motivated by setting goals (id. at pp. 1-2). With respect to written expression, the report indicated that the student had not yet developed encoding skills that would allow him to express his ideas fluently (Joint Ex. 11 at p. 2; see Joint Ex. 14 at p. 13). However, with the help of a word bank, picture prompts, and individual teacher attention, the student was able to write two to three basic sentences describing a picture (Joint Ex. 11 at p. 1). The report indicated that the student did not automatically apply punctuation to the writing process and the readability of his writing was affected by spelling errors (id. at p. 2). As measured by the Wide Range Achievement Test, the student's spelling skills were reported to be at a 2.2 grade level (id.). The report characterized math as an area of relative strength for the student and noted that he benefited from reminders to regroup when subtracting and by having word problems read to him (Joint Ex. 11 at p. 2; see Joint Ex. 14 at p. 7). The report stated that the student participated in a math class of four students and noted that teacher intervention remained necessary to remind the student to slow down and ask for help (Joint Ex. 11 at p. 2). The report described the student as "motivated" and as persevering in all academic areas (id.). The report noted that the student responded well to a school wide behavior system and was beginning to demonstrate more age appropriate social behaviors (id.). The report further indicated that the student participated in weekly social skills groups led by the school psychologist (id.). The report concluded that that the 2009-10 school year had been a positive year for the student (id.). In summary, the report stated that the student benefited from small instructional classes, individualized attention, specialized teaching strategies, speech-language therapy, and teacher support to help him succeed in the school environment (id.).

The student's Community School speech-language progress report indicated that he was a motivated participant in class discussion and that with the help of cueing to remain on topic, enjoyed sharing experiences (Joint Ex. 10).¹⁵ According to the report, the student was working on targeting responses to questions, phonological processing and irregular past tense, vocabulary building, word retrieval, listening skills, and figurative language (id.). The report stated that the student was showing greater awareness of correct articulation but had not yet integrated the sounds into his speech (id.). The report indicated that with respect to pragmatics, the student required ongoing reinforcement stressing turn taking and reading social cues during activities that required following instruction (id.). The student often required repetition and clarification (id.). The speech-language pathologist recommended that the student continue to receive speech language therapy services two times per week in a small group setting (id.).

An April 2010 progress report from the Community School outlined the student's progress during the 2009-10 school year (Joint Ex. 14). The report indicated that the student's

¹⁵ Progress reports from the Community School, completed in spring 2010, indicated that the student was receiving speech-language therapy twice weekly in a small group setting (Joint Ex. 11 at p. 2; see Joint Ex. 14 at p. 3).

behavior did not seriously interfere with instruction and could be addressed by the classroom teacher (*id.* at p. 2). Several of the student's teachers cited attending difficulties as a reason for the student not meeting his program goals (*id.* at pp. 5, 9, 12).

In April 2010, the student's reading teacher at the Community School readministered the WADE to the student (Tr. pp. 1418, 1455). The student's performance yielded the following results: sounds 34% correct, total words (reading) 11% correct, sight words 24% correct, total spelling (without spell checker) 5% correct (Parent Ex. X). The report indicated that the last subtest taught was 1.3 (*id.*). The student's mastery scores for reading were reported as follows: real words 60%, nonsense words 76%, sight words 82% and total words 74% (*id.*). The student's mastery scores for spelling were reported as follows: words 75%, sentences 0%, sight words 50% and total spelling 56% (*id.*)

The CSE met on June 4, 2010 for the student's annual review, but a review of the student's progress and determination of a program for the 2010-11 school year was postponed due to additional information requested by the CSE (Joint Ex. 1 at p. 5). However, the student was approved for continued ESY services (*id.*).

The CSE reconvened on June 14, 2010 (Joint Ex. 15). Fifteen individuals participated in the CSE meeting, including the CSE chairperson; the district's director of special services, who also served as the CSE co-chairperson; a school psychologist; an occupational therapist; a physical therapist; a reading teacher; a regular education teacher; a special education teacher; the administrator, principal, special education teacher, and reading teacher from the Community School; and the student's mother (*id.* at p. 6). In addition, attorneys for both the student's family and the school district were present (*id.*). The present levels of performance on the student's IEP were updated to reflect information provided by the Community School (Joint Ex. 15 at pp. 4-6; *see* Joint Exs. 10, 11, 14). Meeting minutes indicated that the student had made some "noted" progress in reading, spelling, and sight word identification and that math continued to be a strength for the student (Joint Ex. 15 at p. 6). Meeting minutes further indicated that the student had become a more confident and cooperative learner and that he continued to benefit from the same daily routine (*id.*). The IEP reflected the student's gains in speech-language therapy and OT, while also noting that the student continued to demonstrate deficits in articulation and motor planning delays (*id.*). The CSE noted the student's progress and continued to recommend the student for a placement in the district for the 2010-11 school year (*id.*). More specifically, the CSE recommended that the student be placed in a general education class for third grade and receive two hours per week of direct and one hour per week of indirect consultant teacher services (*id.* at p. 1). In addition, the CSE recommended that the student attend a 15:1 special class for language arts and reading for 90 minutes per day, a 2:1 supplemental reading instruction class (Wilson) for 40 minutes per day, and receive related services of speech language therapy three times per week, OT two times per week, and a weekly counseling consultation (*id.* at p. 2). The IEP indicated that an FBA and positive behavior intervention plan would be developed at the beginning of the school year (*id.* at p. 3). In addition, the IEP afforded the student the following program modifications/accommodations: refocusing and redirection, and time for breaks, if needed (*id.*). The IEP also included the following testing accommodations: special location, extended time (1.5), and tests read (except for reading comprehension tests) (*id.*). According to the IEP, the CSE considered placement in a special class for all academic areas but

determined that this placement would be overly restrictive and that the student's needs could be met in a less restrictive environment (id. at p. 7). Meeting minutes indicated that the student's mother disagreed with the CSE recommendations and that her attorney informed the district that the parents would be unilaterally placing the student at the Community School (id. at p. 6).^{16, 17}

In a letter to the district dated June 18, 2010, the parents requested the opportunity to visit the program recommended by the CSE "in an effort to understand how it might be able to meet [the student's] individual needs" (Parent Ex. K). On June 26, 2010, the student's mother visited the recommended program and voiced her concerns regarding the program's ability to meet the student's needs (Joint Ex. 26). Among other things, the student's mother indicated that the number of students in the general education class would be an issue for her son and that the student would be bored in math because he was at a fourth grade level (Joint Ex. 26; Parent Exs. FF; II).

In June 2010, the Community School issued a progress report for the student, much of which was similar to the student's earlier progress report (compare Parent Ex. Y, with Joint Ex. 14). The new report indicated that the student had benefited from behavior programs that had been created to help him become more organized and attentive in academic classes and social situations (Parent Ex. Y at p. 2). The report also noted significant improvement in the student's maturity (id.). According to the report, the student had shown progress in both receptive and expressive language skills and was more consistently on task and better able to follow directions (id. at p. 4). In math, the report indicated that the student had made steady progress but that teacher intervention remained necessary to remind the student to apply strategies that had been taught (id. at p. 7). The report noted that the student relied on mental math to solve most problems, often resulting in wrong answers (id.). The report indicated that in reading the student was working on step 1.4 of Wilson (id. at p. 8).

In August 2010, the student's parents sought an updated assessment of the student's educational functioning from the psychologist who had evaluated the student in January 2009 (Parent Ex. JJ). The psychologist reported that the student presented as "an anxious, fidgety boy who was sometimes resistant" (id. at p. 2). She noted that the student required frequent encouragement and redirection to task, even in a 1:1 setting, and also noted that the student was motivated to do well (id.). The psychologist reported that the student attained the following standard scores (and grade equivalents) on the Woodcock Johnson III - Tests of Achievement: (WJ III ACH) letter word identification 84 (1.9), reading fluency 75 (1.1), passage comprehension 84 (1.8), word attack 93 (2.2), spelling 77 (1.5), writing samples 72 (1.4), calculation 99 (3.0), and applied problems 114 (4.2) (Parent Ex. JJ at pp. 2, 4). The student's grade at the time of the update was 2.9 (id. at p. 2). The psychologist reported that the student's observed and reported behavior continued to be consistent with ADHD, ODD, and anxiety disorder NOS and that the student also met the criteria for a reading disorder (Parent Ex. Y at p.

¹⁶ The student's parent prepared a statement prior to the student's June 2010 CSE meeting requesting that the district "embrace" the Community School as the student's IEP placement (Joint Ex. 25).

¹⁷ In an e-mail to the district's attorney dated June 15, 2010, the parents' attorney reiterated the parents' intention to place the student at the Community School, at public expense, for the 2010-11 school year (Parent Ex. J).

3). The psychologist questioned the student's ability to succeed in a general education class and recommended that the student remain in his current placement at the Community School (*id.*).

Due Process Complaint Notice

In a due process complaint notice dated August 11, 2010, the parents requested an impartial hearing and asserted that the student's 2010-11 IEP was not reasonably calculated to provide the student with educational progress (Joint Ex. 24 at pp. 1, 6). Assertions by the parents included, among other things, CSE predetermination, that the CSE did not reach a consensus, that the CSE members did not have sufficient knowledge of the student, and denial of the parents' meaningful participation in the student's placement decision, based upon the lack of opportunity given to the parents to observe the placement or review a class profile before the district's recommendation (*id.* at pp. 2, 4, 6). The parents further asserted problems with the assigned class at the district school including, among other things, that the larger class size would result in an increase in the student's anxiety and regression, that the district did not address the concern that the student would experience heightened anxiety in a larger class size; and the parents further questioned whether the placement constituted an actual program or was just a "façade" (*id.* at pp. 5, 6). In addition, the parents asserted that, as written, the IEP placement was not designed to provide the student with the small group instruction that he needed to make progress, that although the IEP included daily 1:1 Wilson instruction for forty minutes, given the larger class size and lack of staff training in reading instruction, there was almost no opportunity for the student to generalize the instruction, and that 90 minutes of Orton-Gillingham rather than "word attack" would be confusing to the student (*id.* at pp. 2, 4-5)

In addition, the parents asserted that the Community School was appropriate for the student because of small class size, intensive instruction throughout the day by trained and experienced staff, frequent small group and at times 1:1 instruction, the progress made by the student academically, socially and behaviorally, and counseling services provided within the program, negating the need for pull-out sessions (Joint Ex. 24 at pp. 6-7).

As relief, the parents sought, among other things, an order directing the CSE to develop an IEP recommending that the student be placed for the 2010-11 school year at the Community School, or in the alternative, an order that the CSE recommend the student's placement in a New York State approved, out-of-State, self-contained private day school for students with learning disabilities, providing instruction in a small class size, or in the alternative, an order directing the district to reimburse the parents for the cost of tuition at the Community School for the 2010-11 school year (Joint Ex. 24 at p. 7).¹⁸

Impartial Hearing Officer Decision

An impartial hearing was convened on October 19, 2010 and concluded on December 14, 2010, after nine days of testimony (Tr. pp. 1-1961). In a January 27, 2011 decision,¹⁹ the

¹⁸ On September 2, 2010, the parents signed a contract, enrolling the student in the Community School for the 2010-11 school year (Parent Ex. BB).

¹⁹ The date on the decision, January 27, 2010, appears to be a typographical error (*see* IHO Decision at p. 20).

impartial hearing officer concluded that the district complied with the procedural requirements of the Individuals with Disabilities Education Act (IDEA), finding that the parents extensively participated in development of the student's June 2010 IEP (IHO Decision at p. 10). Regarding the parents' assertion that they were not given a class profile and did not have an opportunity to visit the proposed program in the assigned school, the impartial hearing officer found that the IDEA does not require the district to provide parents with the opportunity to visit the site of a proposed placement before a CSE recommendation, and moreover, that when the parents requested such an opportunity after the CSE meeting in this case, they were allowed to visit the assigned school (*id.*). In addition, the impartial hearing officer found that there was no obligation to provide a class profile under the IDEA, especially since the class had not yet been composed (*id.*).

As to alleged substantive violations, the impartial hearing officer found that the issue was whether the student could benefit from an integrated general education setting in the district, or whether the student required a small class size (IHO Decision at p. 11). Although the impartial hearing officer found that the district developed a program offering specialized education and related services with well qualified service providers, that evaluations identifying the student's needs were available, and that the CSE worked to establish appropriate annual goals and short-term objectives related to the student's needs, the impartial hearing officer concluded that the district failed to explain why it did not follow professional opinions recommending a small class (*id.* at p. 15). Regarding least restrictive environment (LRE), the impartial hearing officer indicated that he was not convinced that the student would benefit from an integrated classroom (*id.*).

The impartial hearing officer specifically found that the June 14, 2010 IEP did not address the student's transition needs between classes; the impact of pulling the student out of an academic class, writer's workshop, recess or physical education; the student's need for consistency and routine; the student's expected difficulty in a large class setting; management of the student's distractibility in a large class setting; and the student's anxiety and need for immediate reassurance (IHO Decision at pp. 14-15).

The impartial hearing officer determined that the Community School was appropriate and that the student's June 2010 IEP supported such a finding, based upon indications that the student made gains in reading, that sight-word approach was a strength, that oral reading fluency improved, and that math continued to be a strength (IHO Decision at p. 16). The impartial hearing officer concluded that the student made solid academic gains, developed reading skills, improved his self-esteem, and fostered meaningful friendship at the private school (*id.* at p. 18).

As to equitable considerations, the impartial hearing officer found that the parents provided the requisite notice and further found no basis to reduce or deny tuition reimbursement (IHO Decision at p. 20).

The impartial hearing officer ordered that the district reimburse the parents for the cost of tuition as of the date of the decision upon presentation of proper documentation, and that the district develop and implement an IEP placing the student at the private school for the remainder of the 2010-11 school year (IHO Decision at p. 20).

Appeal for State-Level Review

The district appeals and asserts that the impartial hearing officer's decision ignored the LRE requirement and the student's progress while attending integrated classes in the district in kindergarten and first grade. In areas where the student began to exhibit difficulties in the second half of first grade (reading and writing), the district asserts that the June 2010 IEP appropriately addressed the student's needs by the addition of two hours of direct instruction in specialized reading and writing for the student, rather than an entire day of self-contained classes. The district further asserts that the parents' experts did not observe the student in the district's classes or placement, and either did not know of or ignored the student's success in integrated classes in kindergarten and first grade, and lacked knowledge of the consultant teacher model.

In addition, the district asserts that the Community School was not appropriate. Referencing the impartial hearing officer's decision, the district asserts that it disregards the lack of objective evidence regarding the student's progress. In addition, the district asserts that the impartial hearing officer's decision ignores that the Community School lacks an individual plan for dealing with the student's needs, such as distractibility and counseling. In addition, the district asserts that the Community School failed to conduct an FBA or attempt to implement a behavior plan, and did not perform objective testing to verify academic progress or lessening of gaps with peers. Moreover, the district asserts that the Community School does not provide OT. The district also asserts that the Community School has no opportunities for mainstreaming and is not the LRE because it is located in New Jersey and requires the student to be on a bus for almost two hours a day.

As to the equitable considerations, the district asserts that the impartial hearing officer ignored proof of the parents' lack of cooperation and their predetermination not to enroll the student at the district, citing a down payment of \$10,000 in February 2010 and a June 4, 2010 letter to the CSE requesting consideration of the Community School.

In an answer, the parents assert that the impartial hearing officer properly found that the district denied the student a FAPE. In addition to asserting that the impartial hearing officer properly rejected the district's LRE argument, the parents assert that the student did not make progress in the integrated setting and that the student's first grade teacher documented the student's lack of progress in her original April 29, 2009 teacher report. In addition, the parents assert that the district's contention that the student could have benefitted from the district's mainstream math is erroneous as the district failed to provide any special education support, and third grade math requires reading skills. In the answer, the parents agree with the impartial hearing officer that the district's IEP disregarded the student's needs, including the impact of pulling the student out of an academic class, writer's workshop, recess or physical education; the student's need for consistency and routine; the student's expected difficulty in a large class setting; management of the student's distractibility in a large class setting; and the student's anxiety and need for immediate reassurance. The parents assert that in order to implement the student's IEP, the student would need to miss, among others, some sessions of science or social studies, math, physical education, recess, snack, and writer's workshop.

In addition, the parents assert that the Community School appropriately addresses the student's needs. In support of its position, the parents assert that the Community School is a State-approved private school, subject to inspections, that the impartial hearing officer accurately detailed the intensive reading instruction, that the Wilson reading method is used, and that multisensory material and instructional methodologies are employed. The parents further assert that the Community School provides appropriate behavioral support and integrates social skills in the class; that the student made progress at the Community School; and that the Community School is the LRE for the student.

As to the equitable considerations, the parents assert that they attended all CSE meetings, provided the district with private evaluations and consent to observe the student at the Community School, and initiated an observation of the district's recommended placement. In addition, the parents assert that they did not sign the 2010-11 contract until September 1, 2010.

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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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]).

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).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

June 2010 IEP

Upon review, and as more fully described below, I find that the hearing record reflects that the district developed an appropriate program for the student at the June 14, 2010 CSE meeting and that the June 2010 IEP accurately reflected the student's needs, included appropriate annual goals to address those needs, and provided the student with appropriate related services in the LRE.²⁰

The student's June 14, 2010 IEP reflected the results of assessments conducted by the both the district and the Community School in spring 2010 (Joint Ex. 15 at pp. 4-6; see Joint Exs. 10; 11; 14; 19; Parent Ex. T). The student's present levels of performance indicated that the student's full scale IQ was in the average range and that his working memory was an area of relative weakness (Joint Ex. 15 at p. 4). As detailed in the IEP, the student's most significant academic needs related to his reading, spelling, and writing abilities (id.). Math was described as an area of strength for the student (id.). The June 2010 IEP reflected the student's ongoing difficulty with articulation and remaining on topic (id.). According to the IEP, the student's physical abilities were age appropriate with the exception of delays in visual motor integration skills, motor coordination, and decreased upper extremity strength (id. at p. 6). The IEP characterized the student as "very" impulsive and distractible, but also noted that the student no longer demonstrated "meltdowns," although he might get agitated and cry (id. at p. 5). When anxious, the student responded to praise and encouragement from the teacher (id.). The IEP indicated that the student responded to behavior systems and incentives and was beginning to exhibit more age appropriate social skills (id.).

To address the student's deficits in reading, spelling, and writing, the CSE recommended that the student be placed in a 15:1 special class for 90 minutes daily for reading and language arts instruction (Joint Ex. 15 at p. 2). In addition, the CSE recommended that the student receive supplemental reading instruction using the Wilson Reading System, daily for 40 minutes in a group of two (Joint Ex. 15 at pp. 2, 6). For the remainder of the school day, the CSE recommended that the student be placed in a general education third grade class with two hours per week of direct consultant teacher services and one half hour per week of indirect consultant teacher services (id. at p. 1).²¹ The student's IEP indicated that the special education teacher would provide direct consultation to the student in all academic areas, except for

²⁰ I note that the parties do not contest the appropriateness of the annual goals or the appropriateness of the related services.

²¹ The director of special services indicated that the consultant teacher was in the general education classroom for all academic instruction with the exception of reading, language arts and math (Tr. pp. 144-45, 149-50, 269-70).

reading/language arts, and indirect consultation to the team (Joint Ex. 15 at p. 2; see Tr. pp. 269-70).²² To address the student's speech-language and motor deficits, the CSE recommended that the student receive speech-language therapy three times weekly in a group and OT two times weekly in a group (Joint Ex. 15 at p. 2). The CSE recommended a once weekly counseling consultation to address the student's social-emotional and behavioral needs (id.).²³ The June 14, 2010 IEP indicated that the school psychologist would consult with the student's team regarding improving the student's social skills and helping to reduce the student's anxiety as it pertained to academic stress (id.). The CSE further recommended that an FBA be conducted and a BIP developed at the beginning of the school year (id. at pp. 3, 6). The recommended IEP also included program modifications, including refocusing and redirection, to address the student's attending deficits, and time for breaks (if needed) to address the student's low frustration tolerance and anxiety (id. at p. 3). In consideration of the student's academic weaknesses and attending difficulties, the June 14, 2010 IEP afforded the student the following testing accommodations: special location (small group with minimal distractions), extended time (1.5), and tests read (except for reading comprehension tests) (id.). The CSE developed annual goals related to study skills, reading, writing, speech-language development, and motor skills (id. at pp. 7-10).

Class Size

Regarding the impartial hearing officer's finding that the district failed to explain why it did not follow the recommendations of the student's neurologist, psychiatrist, and psychologist to place the student in a small class (see IHO Decision at pp. 11, 15), I note that, although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; Watson v. Kingston, 325 F. Supp. 2d 141, 145 (N.D.N.Y. 2004); see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567; Application of the Dep't of Educ., Appeal No. 09-127; Application of the Bd. of Educ., Appeal No. 09-101; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child Suspected of Having a Disability, Appeal No. 06-087). Moreover, in evaluating the testimony of a privately retained expert in determining what class size is appropriate for a student and whether a student needs a "small" class size in order to receive educational benefit, the expert's familiarity with the program offered by the district and the level of support offered to the student within the program is a relevant factor (see M.H., 2011 WL 609880, at *12; see also Application of the Dep't of Educ., Appeal No. 09-127).

Upon review of the hearing record, I find that the CSE properly considered reports from the privately retained experts (see Joint Ex. 15 at pp. 4-6) and, moreover, that the district provided a reasonable explanation for recommending that the student be placed in a general education classroom with consultant teacher services for part of the school day instead of placing the student exclusively in a full-time special class. In particular, the district's assertions that the

²² The hearing record indicates that the student likely would have received indirect consultation teacher services for mathematics (Tr. pp. 582-83).

²³ The CSE offered, but the parents declined, direct counseling services for the student because at the time of the CSE meeting the parents did not believe that the student required direct counseling services (Tr. p. 1098).

student demonstrated progress while participating in the consultant teacher model, that the student's distractibility and anxiety were not related to class size, and that the program recommended by the June 14, 2010 CSE was designed to provide the student an appropriate education in the LRE are supported by the hearing record.

Regarding the student's progress, the hearing record indicates that the student made significant progress in math in the consultant teacher model and that he also demonstrated improvement in his speech and language skills, and his ability to interact with peers (Tr. pp. 1790, 1835, 1847-48, 1887-88, 1955; Joint Exs. 2 at pp. 3-5; 3 at pp. 3-6; 18 at pp. 3-5; 20 at p. 7; 30 at p. 1; Parent Exs. E at p. 2; PP at p. 1). The student also made some gains in reading and writing, but was not progressing at a rate that his teachers would have liked and his skills remained below grade level (Tr. pp. 396-97, 411, 422-24; Joint Ex. 3 at p. 3; 2 at p.3; 18 at p. 3). In addition, the hearing record indicates that while participating in a general education class with consultant teacher support the student was able to meet most grade level standards for art, music, and physical education (Parent Exs. E; PP). The student's first grade regular education teacher reported that the student loved science and social studies and that with respect to those subjects the student "didn't hesitate to be in the group" (Tr. p. 395-96). I find that the hearing record supports the district's claim that historically the student has been able to make progress in some areas when placed in a general education classroom with consultant teacher support.

Moreover, in considering whether the student required a small class size in order to make educational progress, I note that the term "small" class is a relative term which is used frequently throughout the hearing record but remains essentially undefined (see, e.g., Tr. pp. 215, 625, 733, 793, 810, 821, 825, 1838). A review of the hearing record reflects that the student's June 2009 IEP recommended individualized support in the student's identified areas of need, and, in particular, I note that in the student's primary areas of deficit, the student was placed in a 15:1 special class for reading and language arts for 90 minutes a day and that in addition to the 90 minutes per day, the student's June 2009 IEP provided another period every day for 40 minutes of supplemental instruction in reading in a group of two (Joint Ex. 15 at pp. 1-3). Regarding the number of students assigned to the general education class, the director of special services estimated that the third grade general education class could have between 20-24 students (Tr. p. 177). Consistent with the student's IEP, the special education teacher reported that for reading/language arts and math, the students in the class would be broken down into two groups, with some students remaining in the general education class and others moving to an adjacent self-contained class for instruction (Tr. pp. 501-02, 531). The program model included a teacher assistant who was assigned to the general education class and who assisted in the self-contained classes as determined by the special education teacher (Tr. p. 543). The students in the general education class would receive instruction from the regular education teacher while the students in the self-contained class would receive instruction from a special education teacher (Tr. pp. 501-02, 531-32). On a daily basis, the special education teacher met with the regular education teacher to discuss the needs of the students in the self-contained class as well as the needs of the students that received consultant teacher services in the general education class (Tr. pp. 501, 503-04).

In evaluating whether the student could make educational progress in the district's recommended program, I recognize that the student's neurologist, psychiatrist, and a

psychologist who evaluated the student recommended, among other things, that the student be placed in a "small" classroom (Joint Ex. 17; Parent Exs. L; M; N). Neither the neurologist nor the psychiatrist indicated a specific class size and the director of special services reported that the psychiatrist and psychologist had not visited the district's placements or inquired as to the actual class size of the district's placements as of the date of her testimony, which was October 19, 2010 (Tr. p. 131; Joint Ex. 17; Parent Exs. L; M; N).²⁴ The hearing record indicates that the psychologist who evaluated the student had not observed the student in a classroom setting at the time she made her recommendation for a small class (Tr. pp. 904, 910, 972-73).²⁵ In addition, the psychologist testified that she was unfamiliar with the consultant teacher model (Tr. pp. 941-43). The psychologist acknowledged that Wilson was an appropriate program for the student and that the program modifications included in the student's IEP were appropriate (Tr. pp. 948, 949). I further note that, although the student's mother testified that her son needed a small class, and that to her an appropriate small class size was 12 students, when asked if 15 students in a class would be appropriate, the student's mother said that "I never really thought about it" (Tr. p. 733).

While the impartial hearing officer placed great emphasis on the opinion of the parents' physicians and evaluators, the hearing record also supported viewpoint of district staff who had observed and worked with the student in a larger, general education setting (Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that the underlying judgment of those having primary responsibility for formulating a student IEP is given considerable weight]; Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 641, [7th Cir. 2010]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]) see Rowley, 458 U.S. at 207; Watson, 325 F.Supp.2d at 145). The psychologist who evaluated the student indicated that the evaluation team recommended a small class for the student so that he wouldn't have so many things going on at the same time and he could get immediate feedback to alleviate his anxiety (Tr. pp. 821-22). However, the student's first grade regular education teacher, as well as the special education teacher and school psychologist who worked with the student during kindergarten and first grade, all opined that the student's anxiety and distractibility was task specific and did not seem to be related to the size of the class in which instruction took place (Tr. pp. 1838-39, 1862-63, 1890-91, 1917-18, 1943; Joint Ex. 30 at pp. 2-3).²⁶ District staff indicated that the student's anxiety was primarily related to reading and writing (Tr. pp. 398; 1835; Joint Exs. 18 at p. 3; 30 at p. 3).

Pull-outs

²⁴ There is no indication that the student's neurologist visited or contacted the school.

²⁵ The hearing record reflects that the student's psychologist subsequently observed the student at the Community School and some aspects of the district's program on November 5, 2010 and November 10, 2010, respectively (Tr. pp. 869, 880).

²⁶ Although the impartial hearing officer found that the psychologist's testimony regarding small class size was inconsistent with her earlier evaluative reports (see IHO Decision at p. 12), I note that the psychologist testified that the student made progress towards the end of the school year, and that she had not issued a written report documenting that progress, but that she had reported on the progress at the June 14, 2010 CSE meeting (Tr. p. 1836).

Regarding the impartial hearing officer's finding that the June 2009 CSE did not consider the effect of scheduling the student's pull out Wilson reading or related services upon his academic classes, a writing workshop, recess or physical education, I find initially, as reflected herein, that the hearing record does not support a finding that using the consultant teacher model with pull-outs on the student's IEP would preclude the student from receiving educational benefit. In addition, the hearing record indicates that the self-contained reading/language arts class included writing instruction and that the special education teacher would have been responsible for addressing the writing goals on the student's IEP (Tr. pp. 507, 510-11, 515, 590). Moreover, I find that the adverse effect alleged by the parents is speculative, and matters such as scheduling are generally administrative issues left to the district's discretion upon implementing a student's IEP. While a district must have an IEP in effect at the beginning of each school year for each student with a disability in its jurisdiction (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6; Application of the Bd. of Educ., Appeal No. 10-006; Application of a Student with a Disability, Appeal No. 09-111; Application of a Student with a Disability, Appeal No. 08-157; Application of a Student with a Disability, Appeal No. 08-088), an IEP can be implemented only if the student is enrolled in a district's recommended placement (see generally Application of a Student with a Disability, Appeal No. 08-005; Application of a Child with a Disability, Appeal No. 07-043).

LRE

In addition, I find that the hearing record reflects that the student was recommended for part time placement in a general education class with consultant teacher support because the student was capable of participating in a mainstream environment for part of the school day. The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson, 325 F. Supp. 2d at 144; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services

(34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).

In this case, the evidence regarding the student's needs described above does not support the conclusion that the student can be educated satisfactorily in a general education environment only, nor does either party suggest that such a placement would be appropriate. Consequently, the first prong of the Newington LRE test is resolved in favor of the district and I will therefore turn to whether the district has provided mainstreaming opportunities to the student to the maximum extent appropriate (see J.G. v. Kiryas Joel Union Free Sch. Dist., 2011 WL 1346845, at *33 [S.D.N.Y. Mar. 31, 2011]). While recognizing that the student's psychiatrist and evaluating psychologist stated that the student required a small class setting, I also note that they recommended that the student be placed with peers of normal intelligence who would serve as good social models for the student (Joint Ex. 18; Parent Ex. S). The school psychologist noted that although the student complained that the lunchroom was loud and had too many kids, the student preferred to have lunch there, rather than the psychologist's office, because he wanted to be with the other students (Tr. p. 1887). In addition, as noted herein, the student demonstrated progress in mathematics in a general education classroom with direct consultant teacher support and the hearing record reflects that the student would have been able to benefit from mainstreaming in math. The hearing record further reflects that, regarding science and social studies, with appropriate program modifications, related services and direct and indirect

consultant teacher support, the student could have benefitted in an integrated class with non-disabled students. Moreover, the hearing record reflects that, in the areas of speech-language skills and social skills, the student would have benefitted while participating in a mainstream environment. Accordingly, upon review of the hearing record, I find that, at the time of the June 2009 CSE meeting, the district's recommended placement with the appropriate supports and modifications provided in the June 2009 IEP were designed to mainstream the student to the maximum extent appropriate and, therefore, constitutes the student's LRE.

Conclusion

Based on the above, I find that the hearing record demonstrates that the district met its burden to show that the June 2010 IEP accurately reflected the student's needs and that the district's recommended program was reasonably calculated to enable the student to receive educational benefits in the LRE (see Walczak, 142 F.3d at 131-32; Mrs. B., 103 F.3d at 1121-22; Gavriety v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *36 [N.D.N.Y. Sept. 29, 2009] [concluding that "the CSE was obligated to recommend the [LRE] which [the student] could make meaningful progress"]. Therefore, I find that the hearing record does not support the impartial hearing officer's conclusion that the district failed to offer the student a FAPE for the 2010-11 school year.

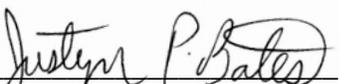
Having found that the district offered the student a FAPE for the 2010-11 school year, I need not reach the issue of whether the parents' placement at the Community School was appropriate and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 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.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portions of the January 27, 2011 decision of the impartial hearing officer which determined that the student cannot benefit from an integrated classroom, awarded the parents tuition reimbursement and directed the district to place the student at the Community School at public expense for the remainder of the 2010-11 school year are hereby annulled.

Dated: Albany, New York
April 18, 2011



JUSTYN P. BATES
STATE REVIEW OFFICER