



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-035

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

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, G. Christopher Harriss, Esq., of counsel

Susan Luger Associates, Inc., attorney for respondents, Lawrence D. Weinberg, Esq., of counsel

DECISION

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

At the time of the impartial hearing, the student was attending the Rebecca School in an ungraded classroom with seven students, one head teacher, and two assistant teachers (Tr. p. 201; Parent Ex. G at p. 1). The Rebecca School provided the student with related services consisting of individual occupational therapy (OT) two times weekly, individual physical therapy (PT) two times weekly, and individual speech-language therapy three times weekly (Tr. p. 203; Parent Ex. G at pp. 4-5). In addition, the student received the services of a 1:1 health paraprofessional at the Rebecca School, voluntarily paid for by the district, to "keep him safe and help him participate throughout the day" (Tr. pp. 216-17, 219, 258-60). The Rebecca School is a nonpublic school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

The student has diagnoses of congenital myasthenia gravis, global developmental delays, and an autism spectrum disorder (Dist. Exs. 1 at p. 1; 2 at pp. 1-2; 3 at p. 1).¹ The hearing record reflects that the student is fed through a gastrostomy tube (G-tube) due to difficulties with swallowing; he also has difficulties with mobility and requires orthotics, medication every two hours to counteract fatigue and muscle weakness, 1:1 assistance to ensure his safety, and the use of a "stroller" when he is extremely weak and unable to walk (Dist. Ex. 3 at p. 1; Parent Exs. E at p. 5; G at p. 1). The hearing record also reflects that the student requires assistance with activities of daily living (ADLs), including toileting (Parent Ex. G at p. 3). The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute in this appeal (34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

Background

According to the hearing record, the student began receiving home-based Early Intervention Program (EIP) services beginning at seven months of age (Dist. Ex. 1 at p. 2). Prior to attending kindergarten at a school located in a children's day hospital for intensive rehabilitation, the student attended an approved public preschool program at an early learning center where he received PT, OT, and speech-language therapy, as well as the services of a 1:1 paraprofessional (Tr. pp. 400, 407-08; Dist. Ex. 1 at pp. 1-2). On December 9, 2008, when the student was five and one-half years old, the parents obtained an initial neurodevelopmental evaluation of the student due to concerns at that time about his behavior and social relatedness (Dist. Ex 2 at p. 1).² The evaluator determined that the student's history and her examination of him supported a diagnosis of an autism spectrum disorder and opined that the student would benefit from emphasis on communication and behavioral therapies, specifically discussing applied behavior analysis (ABA) with the parents as a therapeutic modality (*id.* at p. 2).

A March 9, 2009 psychological evaluation report indicated that the student was referred for evaluation to better understand his abilities and assist with academic placement (Dist. Ex. 1 at p. 1). The report described the student's developmental and health history including his global delays, hospitalizations related to respiratory concerns, and the student's swallowing difficulties which required insertion of a G-tube in May 2007 (*id.* at pp. 1-2). The psychological evaluation report indicated that due to the student's medical condition at the time of such evaluation, he experienced inconsistent school attendance (*id.* at p. 2).

The March 2009 psychological evaluation report reflected the student's diagnoses of congenital myasthenia gravis and global developmental delays, as well as a diagnosis of a pervasive developmental disorder-not otherwise specified (PDD-NOS) (Dist. Ex. 1 at pp. 1, 7).

¹ The hearing record reflects that congenital myasthenia gravis is a neuromuscular disease which causes marked muscle weakness that increases when the student becomes ill; the disease is a lifelong chronic condition with no current cure (Dist. Ex. 3 at p. 1). In the student's case, the disease puts the student at greater risk for aspiration and respiratory failure (*id.*).

² The hearing record reflects that the December 9, 2008 neurodevelopmental initial evaluation report admitted as evidence during the impartial hearing proceeding on October 20, 2010 consisted of a total of three pages (Tr. p. 42; Dist. Ex. 2 at pp. 1-3). Review of the content of the exhibit reveals that at least one page of the exhibit was missing at the time of admission of the exhibit into the hearing record (*id.*). Neither party objected to the admission of the exhibit and the impartial hearing officer did not note any irregularity when the exhibit was entered into the record (Tr. p. 42).

The psychological evaluation report also noted that administration of age-appropriate cognitive standardized tests was not possible due to the student's global developmental delays (id. at p. 7). Instead, the student's cognitive skills were evaluated via informal evaluation, classroom observations, and parent reports (id. at pp. 3, 7). The evaluator indicated that consistent with the student's diagnosis of a PDD, he continued to display significant need in the areas of language and social/emotional development (id. at p. 7). Results of the Vineland Adaptive Behavior Scales, Parent/Caregiver Rating Form, Second Edition (Vineland II) indicated that the student's overall adaptive functioning fell below the three-year-old level and that he required significant 1:1 support from adults to participate in academic tasks and ADLs (id. at pp. 1, 4, 7).

The March 2009 psychological evaluation report further indicated that at that time, continued special education services were essential for the student in order to address his cognitive, language, and motor needs through therapies provided away from distracting areas, material presented through several modalities, and repetition of information (Dist. Ex. 1 at p. 7). The evaluator made multiple recommendations for the student including a special education classroom with a small student-to-teacher ratio; a program "suitable for children with autism/PDD" with such methodologies as ABA, Treatment and Education of Autistic and Communication Handicapped Children (TEACCH) or Floor Time; a 12-month school program; access to nursing services, and a barrier-free school (id.). The evaluator also recommended program modifications/accommodations such as a modified curriculum, decreased gross and fine motor demands, refocusing and redirection, clarification of social rules, frequent breaks, a reduced homework load, and frequent adult support in the classroom (id. at pp. 7-8). Additional recommendations were for assistive technology, use of an augmentative communication device/book, testing accommodations whereby the student would be exempt from local and state standardized testing, and continuation of PT, OT, and speech-language therapy (id. at p. 8).

A district social worker completed a social history of the student on March 20, 2009 (Parent Ex. N at pp. 1-2). The social history report reflected the student's inability to climb stairs and walk for long periods of time, limited communication and eye contact, need for assistance; use of a wheelchair and a walker and indicated that he was not toilet trained (id. at pp. 2, 4). The social history report included health and feeding related information consistent with the March 2009 psychological evaluation report, and further indicated that the student used a "pediatric high-frequency chest compression vest" twice a day for 20 minutes to help thin and loosen secretions in his airways and lungs, followed by a "[c]ough [a]ssistant [m]achine," four to six times per day, to help him cough up and expel secretions in his lungs and airway (compare Parent Ex. N at pp. 2-4, with Dist. Ex. 1 at pp. 1-2). Furthermore, the student took several medications during the school day (Parent Ex. N at p. 4). According to the social history report, the student's father described the student as "ha[ving] medical issues," weak, wanting love and affection, frustrated when angry or upset, sometimes biting himself or hitting to get another person's attention, and needing to be "watched at all times" (id. at p. 3). The student's mother described the student as "a sweet child. He has lots of potentials. [The student] has a lot of Autistic features. [The student] knows about 100-200 words but he uses approximately 50 words in his communications" (id.). The social history report further indicated that the student enjoyed water and "[was] good" with colors and shapes, had no concept of danger, and that he slept in a hospital bed (id.). The social history report indicated that at that time, the parents were interested in the student receiving ABA services and they were open to suggestions (id. at p. 4).

In an April 27, 2009 letter addressed "To Whom It May Concern," the student's pediatrician described the student's medical needs resulting from his diagnosis of myasthenia gravis including marked muscle weakness, hypotonia, and risk for aspiration and respiratory failure, as well as the multiple medical and therapeutic interventions required to address those needs (see Dist. Ex. 3 at p. 1).³ The April 27, 2009 letter included a PT progress note dated March 30, 2009 from the children's day hospital school program, which the student attended, that indicated the student was scheduled for discharge in August 2009 and that the student's mother was searching for a school nearby to suit the student's medical and physical needs (id. at p. 2). The PT progress note indicated that there was no change in the student's functional mobility or gait and that his tolerance fluctuated day-to-day with "behavioral and temporal patterns," although overall he continued to remain consistent at his highest functional levels on good days (id.).

The Committee on Special Education (CSE) convened on April 29, 2009 for a requested CSE review (Parent Ex. B at pp. 1-2). The resultant April 2009 IEP indicated that the student was classified as a student with multiple disabilities and reflected that the CSE recommended continuing the student's related services, all in a separate location, of individual OT and PT, each two times per week for 30 minutes; individual speech-language therapy three times per week and in a small group (3:1) one time per week, each for 30 minutes; a full time health services paraprofessional; and individual health services by a nurse five days per week, intermittently as needed (id. at pp. 1, 13-14). The April 2009 CSE recommended the student participate in the alternative assessment due to his "severe cognitive disability with significant deficits in communication and adaptive behavior" (id.). The April 2009 IEP indicated the CSE also considered other programs and services in general education and special education, but rejected those options because the

[s]tudent exhibits developmental and global delays which warrants a small intensively supervised setting to address the student[']s genetic medical condition, as it warrants the monitoring of medication and distribution of medication in a timed manner. He has a G-tube; he has a medical diagnosis of [m]yasthenia [g]ravis with marked [h]ypotonia. He wears ortho[t]ics. He is unaware of danger and requires constant supervision

(id. at p. 12).

According to the student's mother, the entire CSE agreed that a more appropriate program for the student would include an "autism curriculum" and that the student's psychologist, teachers, and doctors felt that the student's "medical fragility had come to a point where it was [no] longer a primary issue," and that his cognition needed to be addressed (Tr. pp. 396-98). The April 2009 IEP reflects that the CSE deferred to the district's central based support team (CBST) to consider a nonpublic school placement (Parent Ex. B at p. 1).

A November 6, 2009 psychological evaluation update/addendum written by the same psychologist who conducted the student's March 2009 psychological evaluation indicated that

³ The April 27, 2009 letter listed multiple medications administered to the student to address muscle weakness, breathing, and reflux/indigestion (Dist. Ex. 3 at p. 1).

overall, the student had made "slow and steady" progress in therapies and in school (Parent Ex. S at p. 4). The evaluator noted that it was possible to present the student with new learning challenges as he became more comfortable with the staff, environment, and routines at the hospital-based school program (id. at pp. 4-5). According to the evaluator, the student's parents and therapists observed "notable improvements" in the student's expressive language and regulation skills (id. at p. 5). The evaluator indicated, "[u]nfortunately, these improvements are most noticeable when he is working with an adult in a 1-1 setting" (id.). The evaluator further indicated that the student "significantly benefited" from the therapies offered at the hospital-based school program, but required a classroom environment that was designed for students with a diagnosis with PDD (id.). Recommendations in the addendum were consistent with those in the March 2009 psychological evaluation report, however did not specify possible methodologies (i.e., ABA, TEACCH or Floortime) to be used in the classroom (compare Dist. Ex 1 at pp. 7-8, with Parent Ex. S at pp. 5-6).

In November 2009, the student began attending the Rebecca School (Tr. pp. 395-96). The district conducted a 30-minute observation of the student during "morning meeting/story time" in his classroom at the Rebecca School on December 2, 2009 (Parent Ex. F at p. 1). The classroom observation report indicated that the student's 1:1 paraprofessional was present during the entire observation, and that there were five students and five staff members in the classroom at the time (id.). Overall, the classroom observation report described how the student participated in classroom routines and activities with physical support (including lifting and carrying the student) and physical prompting provided by his 1:1 paraprofessional as he maneuvered through the classroom (see id. at pp. 1-2). Among other things, the classroom observation report reflected that the student vocalized when asked a question and spontaneously verbalized a two-word phrase (id. at p. 2). He verbalized "water" three times in a row and drank from a cup independently after receiving a drink (id. at p. 1). When shown photos of students who were not present at the time of the observation, the student offered no response (id.).

In a letter dated January 8, 2010, and addressed "To Whom It May Concern," a director of pediatric epilepsy and a nurse practitioner briefly summarized the student's medical diagnoses and the services he received at the Rebecca School and at home (Parent Ex. H). The physician and nurse practitioner "strongly recommended" that the student continue at the Rebecca School, as his physical, social, behavioral, academic, and medical needs were appropriately met there, opining that "[a]ny deviation would result in a devastating regression" for the student (id.).

A February 4, 2010 developmental pediatric report indicated that the student was seen for a developmental reevaluation to aid in educational planning (Parent Ex. O at p. 1). In addition to summarizing the student's medical and educational history, the developmental pediatrician indicated that, overall, although it was difficult to document measurable gains in the student's development over the past few months, "clinically, [the student seemed] less agitated, more vocal and less perseverative" (id. at pp. 1-2). The developmental pediatrician recommended that the student continue at the Rebecca School for 2010-11 because it "seems to be the only program that can really provide all the services he needs" (id. at pp. 2-3). The developmental pediatrician also recommended that the student's program continue with intensive OT, PT, and speech-language therapy, and that his unusual dual diagnosis of myasthenia gravis and autism required a "creative and individualized program" (id. at p. 3).

A March 16, 2010 OT assessment/progress report written by the student's occupational therapist at the Rebecca School indicated that the student received individual OT two times per week for 30 minutes (Parent Ex. L at p. 1). The OT assessment/progress report described the student as a sweet, affectionate child, who frequently reached out for hugs and physical contact with familiar staff members (id.). In addition, the student was described as usually presenting with a state of lower arousal, and that his energy level and strength fluctuated throughout the day and the week (id.). The student was noted to usually transition well between activities, but sometimes needed adult support to initiate transition (id.). In regard to the student's sensory profile, the report indicated that the student presented with a mixed sensory profile; he responded well to most vestibular input but did not seek it outright; he did seek some proprioceptive input (id.). The student typically presented at a higher level of arousal after being provided with proprioceptive and vestibular input; however, the student would sometimes avoid unfamiliar forms of sensory input (id.). The report indicated that the student was sensitive to bright light and sought out spaces that were darker than others, such as a corner (id.). The student was noted to have difficulty processing some sensory input; he demonstrated poor body awareness by walking into objects and flopping onto the floor without displaying an awareness of where he was or what happened (id.). In regard to the student's motor planning and sequencing abilities, the report indicated that the student had difficulty with initiating, sequencing, and executing many motor sequences (id.). The student demonstrated poor postural control, and would often have trouble balancing, a situation that might be linked to his hesitancy to seek out vestibular input (id.). In addition, the report reflected that ambulation was difficult for the student on days when he presented with lower arousal and muscle tone (id.). In regard to the student's visual spatial processing abilities, the student appeared to have difficulty scanning for objects, and was often only engaged with people and things that were directly in front of him (id. at p. 2). The report indicated that the student could usually navigate familiar hallways well, provided he had a sufficient level of arousal and strength and that he was able to doodle and paint on paper but did not show signs of being able to copy specific forms (id.). Recommended goals focused on addressing the student's ability to process sensory information to better engage and participate in school and home based activities; the student's ability to improve motor planning skills to increase participation in physical activities in class and in the community; and the student's visual spatial processing skills to attain greater involvement and engagement with the surroundings (id.).

On April 11, 2010, the parents executed a contract with the Rebecca School for the student to attend the Rebecca School during the 2010-11 school year (Parent Ex. K).

In an April 29, 2010 letter from the parents to the CSE chairperson, the parents noted that the CSE had not yet developed an IEP for the student for the 2010-11 school year; requested a CSE meeting to develop an IEP; and informed the district that they had made a deposit at the Rebecca School and would place the student there in the event that the CSE failed to offer an appropriate program and placement for the student (Parent Ex. J at p. 1).

A May 2010 Rebecca School interdisciplinary progress report update signed by the student's teacher, occupational therapist, physical therapist, speech-language pathologist, and mother indicated that the student attended a 7:1+2 classroom (Parent Ex. G at pp. 1-10). The interdisciplinary progress report update generally described the student as enjoying drawing with markers, balloons, and sensory activities such as water play and lotion. and that the student

primarily communicated using one to four word rote phrases (id. at p. 1). The report update described the student as warm and friendly to all he encountered and that he enjoyed spending 1:1 "comforting time" with adults (id.). In addition, the report indicated the student spent the majority of his time in a stroller or being assisted by a paraprofessional when walking to ensure his safety and that his physical challenges varied from day-to-day (id.). The student was supported by a school nurse who administered feedings three times per day through the student's G-tube (id.). The report also revealed that the student was usually very happy when he arrived at school, loved interacting with adults, and had begun requesting specific activities throughout the day (id.). The student generally transitioned with ease to activities in and outside the classroom when given verbal and physical cues (id.). Occasionally, the student would become frustrated during the transition if he was leaving an exciting activity, but was able to recover quickly and enjoyed participating in group activities with his peers (id.). The report included information about the student's progress on multiple educational, OT, PT, and speech-language goals, and included new short-term objectives as needed (id. at pp. 7-9). According to the progress report update, the student had made progress in his ability to remain regulated and enter into engagements with adults since starting at the Rebecca School in November 2009, but he continued to demonstrate difficulties with sharing attention and expanding on initiations with adults, difficulties which the report characterized as complicating the student's ability to engage, problem solve, make and connect ideas, think logically, and communicate his wants and needs (id. at p. 6). The report included a recommendation that the student continue with his current program where the focus would remain on meeting his "individual needs and full potential" (id.).

The CSE convened on May 25, 2010 for the student's annual review (Parent Ex. E at pp. 1-2). Attendees included a special education teacher who also participated as the district representative, a district school psychologist who conducted the December 2009 observation of the student, the parents, an additional parent member, the parents' advocate, and by telephone, a social worker and the student's special education teacher from the Rebecca School (Tr. p. 55; Dist. Ex. 4; Parent Ex. E at p. 2).⁴ The May 25, 2010 CSE determined that the student continued to be eligible for special education programs and services as a student with multiple disabilities and recommended 12-month programming in a 12:1+4 special class in a specialized school with a full time 1:1 health services paraprofessional (Parent Ex. E at pp. 1-2, 17). According to the May 2010 IEP, the student's mobility and physical needs warranted a 1:1 health services paraprofessional throughout the school day to ensure the student's safety (id. at p. 16). The CSE also considered and rejected a special class in a specialized school with student-to-teacher ratios of 12:1+1 and 8:1+1 as insufficiently supportive (id.). The CSE considered and rejected a 6:1+1 special class in a specialized school because it would not sufficiently address the student's significant health/physical needs (id.).

The CSE also recommended increasing the student's individual OT and PT sessions each from two 30-minute sessions per week to four 30-minute sessions per week, as well as continuing three individual 30-minute sessions and one small group (3:1) 30-minute session per week of speech-language therapy (Parent Ex. E at pp. 1-2, 17). In addition, the May 2010 CSE recommended program accessibility, special education transportation, and adapted physical

⁴ The hearing record reflects that the student's special education teacher from the Rebecca School participated in the May 25, 2010 CSE annual review; that her name was included in the minutes of the CSE meeting, but not on the attendance page of the IEP itself (Tr. pp. 55-6; Dist. Ex. 4; Parent Ex. E at p. 2).

education for the student (id. at p. 1). The CSE recommended classroom academic accommodations and modifications of visual support, sensory support and breaks, motivating and manipulative [activities], and 1:1 support (id. at p. 3). The CSE also recommended social/emotional accommodations and supports of sensory tools and sensory breaks, access to a quiet space/a less stimulating setting with dim lighting, visual supports, and continuation of a health services paraprofessional (id. at p. 4). The CSE also recommended health/physical management accommodations and supports of G-tube feeding by a nurse, assistance with toileting, and a full time health paraprofessional (id. at pp. 5, 17).

In a letter to the district department of transportation dated May 26, 2010, the student's pediatrician explained the student's diagnoses of congenital myasthenia gravis and an autism spectrum disorder, and the effects of those conditions on the student (Parent Ex. I at pp. 1-2). The pediatrician included a list of the student's prescribed medications and time of administration of such medications to control muscle weakness (id. at p. 2). The letter stated, "[d]eviation from the scheduled administering of these medications could possibly cause [the student] to go into a [m]yasthenic [c]risis which would affect all the muscles in his body, and possibly cause respiratory failure" (id.). In consideration of the established medication administration schedule, the pediatrician strongly recommended that the student's bus trip home from the Rebecca School take no longer than one hour (id.). In addition, the letter noted that the student's myasthenia gravis affected the student's tolerance to excessive heat and cold, and that excessive exposure to either temperature might cause a myasthenic crisis to occur (id.). The pediatrician recommended that adequate heat and air conditioning be provided on the bus accordingly (id.).

The district sent a notice to the parents dated June 3, 2010 indicating the student's classification, summarizing the placement recommendation made in the May 2010 IEP, and identifying the name of the student's assigned school (Dist. Ex. 5).

According to the student's mother, the parents visited the assigned school on June 14, 2010 (Tr. pp. 402-03). By letter to a district representative dated June 14, 2010, the parents informed the district that they had visited the assigned school and did not believe that the school was an appropriate placement for the student and would continue the student's enrollment at the Rebecca School (Parent Ex. J at pp. 3-4). The parents stated their concerns with the proposed program and the assigned school, including among other concerns that the student-to-teacher ratio was too high, that the assigned class did not offer an autism curriculum, and that the student's OT and PT needs might not be properly addressed in the proposed setting (id.).

The parents later received a second copy of the June 3, 2010 notice that included a handwritten notation that the student would receive the related service of a health paraprofessional per the May 2010 IEP (Parent Ex. D at p. 1).⁵

Due Process Complaint Notice

⁵ Review of documentary evidence revealed an envelope postmarked July 8, 2010 was attached to the second copy of the June 3, 2010 notice (Parent Ex. D at p. 2). Testimony by the parent at the impartial hearing indicated that as a result of telephone communication with the district she learned that the second notice was sent for "informational purposes," because the health paraprofessional was not included on the first notice (Tr. p. 402).

In a due process complaint notice dated June 28, 2010, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) because, among other reasons, the CSE was not properly constituted, the parents were deprived of meaningful participation, the goals and objectives in the IEP did not reflect all of the student's needs, the CSE failed to consider all appropriate programs on the continuum by failing to consider a nonpublic school placement, and the recommended placement in a 12:1+4 program was contrary to the opinions of the professionals who had direct knowledge of the student and did not adequately address both the student's myasthenia gravis and autism spectrum disorder needs (Parent Ex. A at pp. 1-6). Additionally, the parents alleged that the assigned school placement was inappropriate because the assigned class did not offer an "autistic curriculum" and that the school might not have been able to meet the student's OT mandates (*id.* at pp. 3-4). The parents also alleged that the district failed to provide the student with related services authorizations (RSAs) for related services while attending the Rebecca School (*id.* at p. 4). Among other things, the parents sought payment of the student's tuition at the Rebecca School for the 2010-11 school year as well as the provision of transportation and related services (*id.* at pp. 5-7).

In a letter dated August 13, 2010, the parents again informed the district of their intention to continue placing the student at the Rebecca School and their assertion that the district failed to offer the student an appropriate placement (Parent Ex. J at p. 8).

Impartial Hearing Officer Decision

An impartial hearing convened on July 20, 2010, and concluded on February 1, 2011, after five days of testimony (Tr. pp. 1, 39, 123, 251, 367).⁶ During the impartial hearing, the district called two witnesses and entered five documents into evidence (Tr. pp. 52, 129; Dist. Exs. 1-5). The parents called 6 witnesses and entered 22 documents into evidence (Tr. pp. 200, 228, 254, 308, 369, 395; Parent Exs. A-V).

In a decision dated February 28, 2011, the impartial hearing officer noted that the May 2010 CSE deliberated between two programs: "a 12:1+4 class designed for multiply disabled students or a 6:1+1 class for autistic youngsters" (IHO Decision at p. 10). The impartial hearing officer determined that the recommendation of a 12:1+4 program constituted a denial of a FAPE because while a 12:1+4 program was sufficient to address the student's medical and physical needs, it did not adequately address the student's primary educational impairment—his autism (*id.* at pp. 10-12). The impartial hearing officer noted that the student's developmental pediatrician testified that autism was the student's "most significant disability" in an educational setting (*id.* at p. 10). The impartial hearing officer found that the district's recommended 12:1+4 program lacked the "intense 1:1 attention," teachers trained to address autism, and methodology tailored to meet the student's needs related to autism (*id.* at pp. 10-12). She further determined that the May 2010 IEP did not sufficiently address his needs related to autism and noted that the district's witness said the CSE "hoped" that staff in the assigned class would have experience working with students with autism (*id.* at p. 11). According to the impartial hearing officer, the

⁶ The provision of a 1:1 health paraprofessional while the proceeding was pending was the subject of a previous appeal (*see Application of the Bd. of Educ.*, Appeal No. 10-083).

student's physical and medical needs could be addressed with a 1:1 health paraprofessional (id. at p. 10).

Next, the impartial hearing officer found that the parents' unilateral placement of the student at the Rebecca School was appropriate (IHO Decision at p. 12). She found that the services of a 1:1 paraprofessional along with the 8:1+3 class consisting of students with similar "functional levels and management and social characteristics" were specifically tailored to meet the student's needs and that the student had demonstrated progress in a variety of ways (id. at pp. 12-13). According to the impartial hearing officer, the district's arguments regarding the lack of mainstreaming and availability of related services at the Rebecca School were unpersuasive because mainstreaming would be of limited benefit to the student and because the district itself provided RSAs to deliver required services outside of its own schools (id.).

The impartial hearing officer found that no equitable circumstances barred an award of tuition because the parents cooperated with the CSE, visited the assigned school, and timely communicated their concerns to the CSE (IHO Decision at p. 13). She rejected the district's arguments that an impartial hearing officer cannot order an award of tuition at a for-profit school, like the Rebecca School, or direct the district to pay tuition directly to a nonpublic school (id.). The impartial hearing officer ordered the district to reimburse the parents for tuition already paid to the Rebecca School, to pay the balance of tuition owed for the 2010-11 school year directly to the Rebecca School, and to provide a 1:1 health paraprofessional and transportation for the student during the 2010-11 school year (id. at pp. 13-14).

Appeal for State-Level Review

The district appeals and argues that the impartial hearing officer erred in finding that the district failed to offer the student a FAPE for the 2010-11 school year because: (1) the CSE appropriately considered the student's needs, including his congenital myasthenia gravis and his autism, and recommended a program that was reasonably calculated to address those needs; (2) the May 2010 IEP addressed the student's needs related to autism as evidenced by the goals and objectives related to increasing engagement/pragmatic language skills, improving receptive and expressive language skills and oral/motor articulation, and increasing his initiation with adults and his ability to have longer communicative interactions with adults, and; (3) to the extent that the impartial hearing officer relied upon the opinions of the parents' witnesses, they testified about what would be "best" for the student, what would "benefit [him] the most" and what would "maximize" the student's abilities, rather than what would be appropriate for the student.

The district also argues that it is not required to provide a 1:1 health paraprofessional at the Rebecca School because the parents have put FAPE at issue and therefore cannot rely on the district to provide equitable services under NY Educ. Law § 3602-c.⁷ The district does not challenge the impartial hearing officer's order that the district provide transportation, but characterizes it as "superfluous" because the district already agreed to and is providing transportation to the student.

⁷ The parents argued in their closing arguments and briefs before the IHO that even if the parents failed to establish that the Rebecca School was appropriate for the student that the district was nevertheless required to provide the student with a 1:1 health paraprofessional at public expense.

The district next argues that the impartial hearing officer erred in finding that the parents' unilateral placement at the Rebecca School was appropriate because the Rebecca School does not provide the student with a 1:1 health paraprofessional; the parents have to supplement that service, which is currently provided by the district.

The parents filed an answer, asserting that the district failed to offer the student a FAPE because: (1) the district failed to comply with the procedural requirements of the Individuals with Disabilities Act (IDEA) regarding due process and parental participation; (2) the recommended 12:1+4 program did not address the student's autism; (3) there were too many related service providers using too small a space at the assigned school; and (4) there was no peer-reviewed research that supports placing a student with autism in a multiply handicapped classroom. The parents further assert that even if the district offered the student a FAPE, the district was still required to provide the student with a 1:1 paraprofessional at the Rebecca School.

According to the parents, the district's arguments regarding the appropriateness of the Rebecca School are not properly before a State Review Officer because the district failed to include these contentions in its closing arguments before the impartial hearing officer. The parents contend that they showed that the Rebecca School was appropriate for the student because instruction at the Rebecca School was specifically tailored to meet the student's individual needs, the student received all required related services, the Rebecca School could provide the student with a 1:1 paraprofessional had the district not agreed to do so, and the student made progress at the Rebecca School. The parents further assert that the impartial hearing officer properly found that the Rebecca School's status as a for-profit entity was not a bar to tuition reimbursement and that equitable considerations favor the parents because they provided notice of their concerns with the IEP at the CSE meeting and notice to the district of their unilateral placement in a timely manner and otherwise cooperated with the CSE.

Additionally, the parents assert that the impartial hearing officer erred in refusing to issue a subpoena sought by the parents regarding district policy information. The parents set forth that they did not waive any issues at the impartial hearing or on appeal. They also cross-appeal "any adverse rulings made by the impartial hearing officer and/or any issues that were not addressed by the impartial hearing officer" (Answer at p. 13).

In a reply and answer to the cross-appeal, the district contends that the parents have not cross-appealed any specific finding or action of the impartial hearing officer, that their cross-appeal is procedurally invalid, and that the district may properly raise a defense for the first time before a State Review Officer and therefore all of the district's arguments may be addressed by a State Review Officer.

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 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]).

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).

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

Scope of the Impartial Hearing

Before addressing the merits of this case, I will address a procedural matter. The parties dispute whether two issues should be addressed in this proceeding: (1) whether the student's IEP for the 2010-11 school year failed to include a statement of the services based upon peer-reviewed research (see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v][b]) and (2) whether, even if the district provided the student a FAPE, the district is nonetheless required to provide a health management paraprofessional to the student while the student attends the Rebecca School. With respect to these contentions, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). The parents' June 2010 due process complaint notice does not set forth claims that may be reasonably read to assert that the nature of the

problem included the district's alleged failure to offer services that were based to the extent practicable upon peer-reviewed research or that the district's alleged failure to provide services to the student under the State dual-enrollment statute, Education Law § 3602-c (see Parent Ex. A).⁸ Additionally, while the hearing record contains closing arguments relating to these issues, the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include these issues (Tr. pp. 413-15). Further, the hearing record does not reflect that the parents submitted, or that the impartial hearing officer authorized, an amendment of the parents' June 2010 due process complaint notice to include the issues. Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice including them, I decline to review them. To hold otherwise encourages the practice of "sandbagging," inhibits the development of the hearing record for the impartial hearing officer's consideration and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]). I further note that the impartial hearing officer did not reach these issues and, as set forth below, the parents have not properly cross-appealed that result. Therefore, these contentions that are raised for the first time on appeal, are outside the scope of my review and therefore, I will not consider them (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Application of a Student with as Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

May 2010 IEP and Recommended Placement

Upon review, and as more fully described below, I find that the impartial hearing officer erred in her determination that the May 25, 2010 CSE's recommendation for a 12:1+4 special class for the student denied him a FAPE. The hearing record reflects that the May 2010 CSE developed an IEP that accurately reflected the student's multiple needs, included appropriate annual goals and short-term objectives to address the student's deficits resulting from his medical/physical needs and autism spectrum diagnosis, and provided the student with an appropriate program in the LRE (see Dist. Ex. 4; Parent Ex. E at pp. 1-17).

As summarized above, the hearing record contains extensive information regarding the student's global delays and medical needs (Dist. Exs. 1 at p. 1; 2 at pp. 1-2; 3 at p. 1; Parent Exs. B at p. 12; G at p. 1; H; I at pp. 1-2; N at pp. 2-4; O at pp. 1-3). Consistent with information in the May 2010 CSE minutes, the district school psychologist testified that prior to the May 2010 meeting, the CSE reviewed all materials in the student's CSE file, including the December 2008 neurodevelopmental initial evaluation, a psychological evaluation (date not specified), the April 2009 pediatric report, the December 2009 classroom observation, the May 2010 interdisciplinary progress report from the Rebecca School, as well as the student's April 29, 2009 IEP (Tr. pp. 58-9, 61-4, 107; Dist. Exs. 1 at pp. 1-10; 2 at pp. 1-3; 3 at pp. 1-3; 4; Parent Exs. B at pp. 1-14; F at pp. 1-2; G at pp. 1-10). Testimony by the school psychologist and review of the May 2010 CSE minutes reflect that the CSE reviewed, discussed, and revised the student's present levels of performance, based on documentation before it and input from the student's Rebecca School

⁸ Even if this issue had been raised, the parents do not allege that they sought services from the district in accordance with Education Law 3602-c, nor is there any evidence to that effect in the hearing record.

teacher (Tr. pp. 64-65; Dist. Ex. 4). Consistent with the evaluative information available to the CSE, the May 2010 IEP reflects the student's diagnoses of congenital myasthenia gravis syndrome and an autism spectrum disorder, physical challenges, reliance on 1:1 assistance for transitions and ambulation, and low state of arousal (Parent Ex. E at p. 3). In addition, the May 2010 IEP indicated that the student benefited from visual support and sensory input, learned better in a quiet environment with low light, loved and was motivated by water, and responded well to encouragement and praise (*id.*). Academically, the IEP indicated that the student was able to recognize his own name and other familiar names inconsistently; he was able to count to ten with an adult and could identify basic colors (*id.*). The IEP and the CSE minutes both noted that, according to current teacher observation the student's reading decoding, listening comprehension, and math computation skills were at the pre-kindergarten level (Dist. Ex. 4; Parent Ex. E at p. 3). The May 2010 CSE identified the student's academic management needs for visual support, sensory support and breaks, motivating manipulatives, and 1:1 support (Parent Ex. E. at p. 3).

In regard to the student's social/emotional present levels of performance, the May 2010 IEP indicated that the student was generally calm throughout the day, yet often appeared to be in a low state of arousal (Parent Ex. E at p. 4). The IEP indicated that the student exhibits dysregulation when there was a change in the environment (such as lighting) or when leaving preferred activities (*id.*). The IEP noted the student was able to engage in relationships with preferred adults in a variety of settings and through a variety of emotions; however, his ability to engage was limited if his environment became too bright or too crowded (*id.*). Emerging skill was noted in the student's ability to reference peers when sharing preferred activities (*id.*). The IEP indicated that the student's interactions with adults were limited to familiar phrases and preferred activities (*id.*). The student required support to "close circles of communication," had limited ability to enter into two-way purposeful communication and, due to difficulty with scanning for objects, the student was often engaged only with people and things that were in front of him (*id.*).⁹ The IEP indicated the student displayed self-stimulatory behaviors and limited peer interactions (*id.*). The May 2010 IEP indicated that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher (*id.*). The IEP further noted that in addition to the special education teacher; the student required support through OT, PT, speech-language therapy, a health services professional, and a nurse (*id.*). The CSE identified the student's social/emotional management needs for sensory tools and sensory support and breaks, access to a quiet space/a less stimulating setting with dim lighting, visual supports, and a 1:1 support from a health services paraprofessional (*id.*).

In regard to the student's present health status and physical development, the May 2010 IEP included the student's diagnoses and described the student's limited mobility and low muscle tone; swallowing difficulties; and risk of aspiration of food and liquids, which required him to be fed through a G-tube; and his need for medication every two hours during the school day (Parent Ex. E at p. 5). Furthermore, the IEP noted the student's use of orthotics and periodic use of a wheelchair, inability to walk for long periods of time, and difficulty climbing stairs (*id.*). The IEP indicated the student required adapted physical education, an accessible program, oral medication administered during the school day, and a health paraprofessional as a related service

⁹ Review of the May 2010 interdisciplinary progress report revealed that the expression "close circles of communication" refers to two-way/back and forth interaction (*see* Parent Ex. G at pp. 2, 5).

(id.). The CSE identified the student's health/physical management needs as G-tube feeding by a nurse, assistance with toileting, and a full-time health paraprofessional (id.). Review of the May 2010 CSE minutes revealed that when the draft IEP was read to the student's mother and teacher, the parent commented, "[T]hat describes [the student]" (Dist. Ex. 4).

The May 2010 CSE developed 17 goals and 36 short-term objectives that were aligned to the student's needs (Parent Ex. E at pp. 6-14). Goals and objectives incorporated direct instruction, teacher prompting and visual supports in addressing the student's needs specific to word recognition skills, comprehension skills, interest in reading and reading fluency, basic math skills, ability to process sensory information, improvement of motor planning skills, increasing visual spatial processing skills, improving functional negotiation skills and overall muscle strength, improving dynamic balance skills, improving bilateral coordination, increasing engagement/pragmatic language skills, improving receptive and expressive language skills, improving oral motor/articulation skills, increasing initiation with adults, and improving strength and endurance in the classroom (Tr. pp. 81-92; Parent Ex. E at pp. 6-14). The hearing record reflects that the goals and objectives in the May 2010 IEP were based on or derived from the documentation reviewed by the CSE (Dist. Exs. 1 at pp. 1-10; 2 at pp. 1-3; 3 at pp. 1-3; 4; Parent Exs. B at pp. 1-14; F at pp. 1-2; G at pp. 1-10). Testimony by the school psychologist indicated that the May 2010 CSE collectively reviewed and discussed each of the goals, included recommendations from the Rebecca School special education teacher, and both the parents and the Rebecca School participants then approved the goals for inclusion in the IEP (Tr. pp. 90, 93-94; Parent Ex. E at pp. 13-14).

Further review of the May 2010 CSE minutes shows that the CSE participants discussed related services for the student and recommended increasing the student's individual OT and individual PT services by two 30-minute sessions each, for a total of four sessions each per week (Dist. Ex. 4; Parent Ex. E at p. 2). In addition, the CSE recommended the student receive speech-language therapy, a health services paraprofessional, and nursing services as well as adapted physical education and special education transportation (Parent Ex. E at pp. 1-2, 17).

According to the May 2010 IEP, the CSE considered and rejected several placements as insufficient to address the student's multiple needs prior to recommending a 12:1+4 special class with a 1:1 full-time health paraprofessional (Parent Ex. E at p. 16). The student's mother testified that the student had previously attended a 12:1+4 class at the children's day hospital school program (Tr. pp. 399-400).¹⁰ According to the student's mother, the parents believed that a 12:1+4 class would be too large, too distracting, and inappropriate for the student (Tr. p. 399). Due to the student's recent diagnosis of autism, the parents sought a 6:1+1 special class for the student and expressed disagreement with other placement recommendations (Tr. p. 400; Dist. Ex. 4). The CSE minutes also reflected that the Rebecca School social worker and teacher who attended the May 2010 CSE meeting disagreed with both the 12:1+4 and 6:1+1 special classes (Dist. Ex. 4). Ultimately, the CSE determined that a 6:1+1 special class was insufficient to address the student's significant health/physical needs and that a 12:1+4 special class could better address the student's multiple needs (id.).

¹⁰ The student's mother also referred to the class at the children's day hospital school program as a 12:1+2 class (Tr. pp. 399-400).

Testimony by the district school psychologist, who conducted the December 2009 observation of the student and participated at the May 2010 CSE meeting, indicated that a 12:1+4 special class generally consisted of students with significant medical, health and physical concerns, and who were eligible for special education programs and services as students with multiple disabilities (Tr. pp. 110-11, 113). She also opined that a student with multiple diagnoses such as congenital myasthenia gravis and autism would be appropriately placed in a 12:1+4 special class (Tr. p. 111). The school psychologist testified that although at the time of the May 2010 CSE meeting the CSE did not know the particular school to which the student would be assigned, the student's teacher would have his IEP and an understanding of his needs, and she anticipated that the May 2010 IEP would be followed (Tr. p. 114). The school psychologist further testified that if the student's IEP was followed as written, especially in regard to the goals related to communication and socialization, the student's needs related to autism would be addressed (Tr. p. 115). In addition, the school psychologist indicated that the student's teacher would be a licensed, special education teacher, who should have knowledge and experience working with students with autism (Tr. pp. 115, 117).

Contrary to the impartial hearing officer's finding and the parents' position that a 12:1+4 special class would not adequately address the student's needs related to his autism, the hearing record demonstrates that the 12:1+4 special class at the assigned school would address the student's multiple needs, including his autism (IHO Decision at pp. 10-11). Testimony of the special education teacher of a 12:+4 special class at the assigned school indicated that the class uses a variety of strategies to elicit language based on a student's individual needs, including the picture exchange communication system (PECS), visual cues, prompting, sign-language, and augmented communication devices (Tr. pp. 139-42). To address a student's sensory needs, including a student's need for heightened arousal and to address self-stimulatory behavior, the assigned class uses a sensory cart with materials that address a variety of sensory needs, individualized activities designed by the occupational therapist, auditory and tactile stimulation, a sensory integration period, oral stimulation, and a water table for those students for whom water play is a highly motivating activity (Tr. pp. 143-45, 171-73, 184-85, 188-89). Consistent with the February 2009 psychological evaluation report and the October 2009 psychological evaluation update/addendum report, the assigned class uses the TEACCH methodology, which the special education teacher testified was designed for students with autism because it provided a very structured setting; a classroom schedule and individual schedules for each student based on that student's agenda, cognitive level, and communication level; and provided for individualized instruction through the use of trials and data collection (Tr. pp. 154-57; Dist. Ex. 1 at pp. 7-8; Parent Ex. S at pp. 5-6) The assigned class also uses a variety of program modifications and accommodations including repetition, visual supports, access to a dimly light environment, and use of manipulatives for academics (Tr. pp. 158, 160-63; Dist. Ex. 1 at pp. 7-8; Parent Ex. S at pp. 5-6). The assigned school also has two full-time nurses available to administer the student's G-tube feedings and medication (see Tr. pp. 146-47; Parent Ex. E at p. 5).

Moreover, the IDEA ensures an "appropriate" education, but 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). To the extent the impartial hearing officer relied on the testimony of the student's developmental pediatrician who opined that "the [student's] autism is the much more significant barrier to his classroom performance" (Tr. p. 388)

and that "children with autism benefit the most from programs that are targeted to specifically address the autistic features," (Tr. p. 376), the hearing record demonstrates that the May 2010 IEP and the district's recommended 12:1+4 special class would have appropriately addressed the student's needs related to his autism as well as his significant medical and physical needs that must be managed within the educational setting. Although the CSE is required to consider the opinions of private experts that are offered by the parents, it is not required to adopt their recommendations for different programming (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]; see also Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 641 [7th Cir. 2010] [overturning the decision of an ALJ that inappropriately deferred to opinion of the private physician over a reasoned decision by the IEP team]).

Based on the foregoing, I find that the CSE's recommendation of a 12:1+4 special class in a specialized school with a 1:1 full-time health services paraprofessional was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The hearing record demonstrates that the May 2010 IEP identified the student's multiple needs, developed annual goals and short-term objectives to address the student's needs, and recommended a program in the LRE (see 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]). Furthermore, I note that the hearing record, in its entirety, does not support the conclusion that, had the student attended a 12:1+4 special class at 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 benefits (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]).

Cross-Appeal

In their verified answer the parents assert a cross-appeal consisting of a single sentence that reads, "[r]espondents cross-appeal any adverse rulings made by the impartial hearing officer and/or any issues that were not addressed by the impartial hearing officer in her decision" (Answer at p. 13). In its reply and answer to cross-appeal the district correctly asserts that the parents' cross-appeal fails to allege any particular finding of the impartial hearing officer that was in error or issue that the impartial hearing officer improperly failed to address. The parents in this matter are represented by counsel and I find that the purported cross-appeal is unduly vague and ambiguous, and it provides no particulars as to the reasons why they challenge the impartial hearing officer's decision, which precludes meaningful review (Application of a Child with a Disability, Appeal No. 07-112). To the extent that the parents' argument that the impartial hearing officer erred in failing to issue a subpoena could be viewed as a cross-appeal, that argument is also insufficiently pled because the parents do not identify how the information sought in the subpoena could have impacted the fact finder's determination (Answer p. 12). To the extent that the parents' argument that they were denied meaningful participation in the formulation of their son's May 2010 IEP could be viewed as a cross-appeal, I find that argument

unpersuasive where the hearing record indicates that the parents attended the May 2010 IEP meeting and were able to voice concerns about the placement and have a "lengthy discussion" regarding which placement would be appropriate for the student (Tr. pp. 398-401). Absent any evidence in the hearing record to suggest that the parents were precluded from presenting their concerns to the district, there is no basis to find that the district "ignored" the parents' concerns or failed to afford the parents the opportunity to participate in the development of their son's IEP merely because the parents disagreed with the CSE's recommended placement (see 34 C.F.R. § 300.322; 8 NYCRR 200.5[d]; see Cerra, 427 F.3d at 193; Perricelli, 2007 WL 465211, at *14-15 Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d. 366, 378-79 [S.D.N.Y. 2006]; see also Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]; A.E. v. Westport Bd. of Educ., 2006 WL 3455096 [D. Conn. Nov. 29, 2006]). Accordingly, the cross-appeal is dismissed.

Conclusion

Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary to reach the issue of whether the Rebecca School was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated February 28, 2011 which determined that the district failed to offer the student a FAPE for the 2010-11 school year, directed the district to either pay or reimburse the parents for the student's tuition costs at the Rebecca School for the 2010-11 school year, and ordered the district to provide a 1:1 health paraprofessional for the student are annulled.

Dated: Albany, New York
June 6, 2011



JUSTYN P. BATES
STATE REVIEW OFFICER