



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-038

**Application of the BOARD OF EDUCATION OF THE
[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:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Michael K. Lambert, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondents, Neal Howard Rosenberg, 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 Eagle Hill School (Eagle Hill) for the 2009-10 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending an ungraded class in a special education setting at Eagle Hill (Tr. pp. 766, 769, 773; Parent Exs. D-H; L-R). Eagle Hill is an out-of-State nonpublic school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]; see Tr. pp. 5, 8-9).

Background

The hearing record shows that the parents had concerns regarding the student's early development as his speech was unintelligible and he exhibited problems with balance, feeding skills, and temperament (Tr. pp. 708-09). At age three, the student started receiving speech-

language, occupational, and physical therapies through the Committee on Preschool Special Education (CPSE) (Tr. p. 709; Dist. Exs. 3 at p. 4; 14; 15; 16; 17; 18). Around this same time, the parents sought a neurological evaluation of the student which reportedly indicated that the student exhibited a general developmental delay, but did not provide a specific diagnosis (see Dist. Ex. 3 at p. 4).

In June 2006, the student was referred to the Committee on Special Education (CSE) for an initial review (Dist. Ex. 3 at p. 4). The CSE recommended that for the 2006-07 school year, the student be classified as having a speech or language impairment and that he be placed in a 12:1+2 special class and receive related services of speech-language, occupational, and physical therapies (id. at pp. 1, 4-5; see Dist. Exs. 19; 20; 21). The student was also recommended for adapted physical education (Dist. Ex. 3 at p. 5). In March 2007, the student's June 2006 individualized education program (IEP) was modified by amendment and goals were to address his receptive/expressive language skills, social/pragmatic language abilities, and social/emotional behavior (Tr. pp. 711-13; Dist. Exs. 4; 5 at pp. 4, 6-8).

On March 30, 2007, a subcommittee of the CSE convened for the student's annual review and to develop a program for the student for the first grade (2007-08) (Dist. Ex. 6 at p. 1). Although the student's teachers and therapists reported that the student had made progress during the 2006-07 school year, they also noted that the student continued to demonstrate deficits in academics, speech and language, social/emotional development, play skills, and motor skills (Dist. Exs. 6 at pp. 3-6; 29 at pp. 2-3, 4, 8). The student also had difficulty attending, and his classroom behavior moderately interfered with instruction (Dist. Ex. 6 at pp. 3-6). For the 2007-08 school year, the CSE recommended that the student continue to be classified as having a speech or language impairment and that he be placed in a 12:1+2 special class for language arts and math, and receive direct consultant teacher services for 2 1/2 hours per day in a general education class (id. at pp. 1, 2, 6).¹ In addition, the March 2007 CSE recommended that the student receive enhanced staffing (1:1) during lunch and recess, along with speech-language therapy, occupational therapy (OT), and a monthly physical therapy (PT) consultation (id. at pp. 1-2). The March 2007 IEP also afforded the student numerous program modifications and accommodations as well as access to assistive technology devices (id. at p. 2).

The student attended the district's elementary school for first grade (see Dist. Ex. 30). On November 1, 2007, the student's IEP was modified by amendment (Dist. Exs. 7; 8). The ratio for the enhanced staffing provided to the student during lunch and recess changed from 1:1 to 3:1 as the parties agreed that the student no longer required that level of "intense" supervision (id.). In addition, the student's participation in a 12:1+2 special class for language arts and math was discontinued and direct consultant teacher services were increased to five hours per day (Dist. Exs. 8 at pp. 1; 6).² On January 4, 2008, the student's IEP was again revised by amendment (Dist. Exs. 9; 10). The parties agreed to revise the student's academic goals because they were

¹ The March 2007 IEP indicated that the consultant teacher service would be provided by the special education teacher, teacher assistant, and/or teacher aide as a push-in to the general education class to support academic subjects (Dist. Ex. 6 at p. 2).

² The proposed amendment did not include the change from a special class to direct consultant teacher services; however, the IEP indicated that this change was made (Tr. pp. 50-51; Dist. Ex. 8 at p. 1).

redundant, and the student's social/emotional goals were modified as the student no longer demonstrated behavioral difficulties (Dist. Exs. 9; 10 at pp. 6, 7-12).

A subcommittee of the CSE convened on March 2008 for the student's annual review and to develop a program for the student for the 2008-09 school year (second grade) (Dist. Ex. 11 at p. 1). The student's special education teacher reported that he was making good progress in decoding and reading comprehension using multisensory reading strategies (*id.* at pp. 3, 5; *see* Dist. Ex. 30 at pp. 6, 7).³ She noted that the student enjoyed writing but that difficulties with spelling, handwriting, and organization made it hard for him to create complete sentences (Dist. Ex. 11 at pp. 3, 5). With respect to math, the special education teacher reported that the student could solve simple addition and subtraction word problems but that he required a lot of visuals, modeling, repetition, and practice (*id.*). The student's classroom teacher reported that the student had made "great" progress during the 2007-08 school year (*id.* at p. 5). She commented that after an illness or absence from school, the student could at times, become anxious and have difficulty expressing himself (*id.*). The student's speech-language pathologist reported that the student had made "nice" progress in his phonemic awareness skills (*id.* at p. 3). With respect to language concepts involving time, space, and quantity, the speech-language pathologist reported that the student's understanding was solid, but that he continued to demonstrate difficulty following multi-step directions involving these concepts (*id.* at pp. 3, 5). According to the speech-language pathologist, the student's fluency was impacted by word retrieval difficulties and difficulty organizing his ideas (*id.* at p. 5). The speech-language pathologist noted that the student continued to exhibit delays in syntax, grammar, and articulation skills (*id.*). The student's occupational therapist indicated that the student had improved in his general organization, but noted that the student continued to have difficulty tracking a moving object and that his limited visual attention impacted his accuracy (*id.* at p. 6). The student's physical therapist reported the student was much more confident in his movement and that he was on par with other students his age (*id.*).

For the 2008-09 school year, the subcommittee of the CSE recommended that the student continue to be classified as having a speech or language impairment and that he be placed in an integrated co-teaching (ICT) class with enhanced staffing (3:1) during lunch and recess (Dist. Ex. 11 at pp. 1, 6).⁴ In addition, the CSE recommended that the student receive related services of speech-language therapy and OT, and that his PT be discontinued (*id.*). The student's IEP afforded him program modifications/accommodations of checks for understanding; modified assignments; and use of a word bank when possible, for writing assignments (*id.* at p. 2). The IEP included annual goals in the areas of reading, writing, mathematics, speech-language skills, and motor development (*id.* at pp. 6-9).

On May 30, 2008, at the end of his first grade year, the parents obtained a private psychological evaluation for the purpose of reviewing the student's current supports and to consider whether he required additional intervention in school or at home, or an alternative

³ The student's mother reported that the student received four hours per week of private tutoring during the prior school year (Tr. p. 875).

⁴ According to State regulations, "integrated co-teaching services" means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]).

school placement (Dist. Ex. 41 at p. 1).⁵ Based on the results of his assessment, the private psychologist concluded that the student continued to manifest a moderate developmental coordination disorder and that he exhibited a significant nonverbal learning disability (learning disorder NOS) specifically related to his perceptual organization and visuo-spatial abilities; a significant language-based learning disability (reading disorder); and a significant attention disorder (attention deficit disorder [ADD], combined type) (*id.* at pp. 8, 10, 14, 16). The private psychologist offered numerous recommendations, among them that the student would benefit from significant school-based accommodations and supports within a mainstream academic program (*id.* at p. 19).

The student's spring 2008 achievement report indicated that his skills in language arts, mathematics, and science, as well as his work habits and social development had advanced during the 2007-08 school year (Dist. Ex. 30 at pp. 2-4, 8, 9, 11). However, the student continued to require teacher assistance in all academic areas and his behavior was inconsistent (*id.* at pp. 2, 3, 6, 7). The student's mother indicated that "socially and emotionally [the student] had a nice year" (Tr. pp. 721, 810, 815-16).

For the 2008-09 school year, the student attended the ICT class recommended by the March 2008 subcommittee of the CSE (Tr. pp. 120-21). A fall 2008 progress note indicated that the student worked hard on a daily basis to adjust to second grade and to attend to class routines (Dist. Ex. 31 at p. 6). The progress report indicated that in reading, the student was becoming more aware of selecting appropriate texts for his reading level and was therefore better able to attend during independent reading time (*id.*; *see* Dist. Ex. 23). In addition, the progress report stated that due to "small" motor deficits, writing was a less preferred task for the student and that staff often assisted the student by taking dictation from him or having him trace prewritten, highlighted words so that he could better attend to the writing concepts being taught (Dist. Ex. 31 at p. 6). The progress report further indicated that the student enjoyed expressing his ideas and was always willing to share his work with classmates (*id.*). According to the progress report, during math the student required language support to express his understanding and to effectively use manipulatives to support learning (*id.*). The progress report noted that the student required refocusing throughout the day but was eager to please and most often easily redirected (*id.*). The student's mother reported that during second grade, the student began to notice the differences in skill level between himself and the other students in his class, which resulted in the student withdrawing, picking at his skin, feigning illness and asking to go to the nurse, and stating that he wanted to harm himself (Tr. pp. 728-33).

During the 2008-09 school year, the district conducted a triennial reevaluation of the student that included a social and developmental history completed by the school social worker in November 2008, a psychological evaluation conducted in March 2009, an OT evaluation conducted by the student's certified occupational therapy assistant (COTA/L) in April 2009, an educational evaluation conducted by the student's teacher in May 2009, and a speech and language evaluation conducted by the student's speech-language pathologist in May 2009 (Dist.

⁵ During the impartial hearing, the parties disputed whether this private evaluation was shared with the district (Tr. pp. 609-10). Also, the parties stipulated that the private evaluation, while admitted into evidence, would not be relied upon in determining whether the student was offered a free appropriate public education (FAPE) for the 2009-10 school year (*id.*).

Exs. 24; 25; 26; 27; 28).⁶ The district also conducted a classroom observation of the student as part of the psychological evaluation (Dist. Ex. 25 at p. 1).

The student's mother served as the informant for the November 2008 social and developmental history (Dist. Ex. 24). With respect to the student's academic, social, and emotional growth, the student's mother reported that she had observed progress in all of the student's academic areas since the previous year and found the ICT model helpful for the student (id.). The student's mother indicated that reading and writing continued to be difficult for the student (id. at p. 1). She further commented that tracking was challenging for the student, although his vision was checked and reported to be within normal limits (id.). As noted by the social worker, the student's mother indicated that the student was tested privately over the summer and found to have weaknesses in working memory that were thought to affect his attending skills (id.). The student's mother reported that the student received speech-language therapy, OT, and private tutoring twice weekly (id.).⁷

With respect to his emotional development, the student's mother reported that the student had become more capable of discussing his emotions openly with her, in part due to his prescribed medication (Dist. Ex. 24 at p. 2).⁸ The student's mother reported that the student had difficulty regulating his responses to specific events and at times, responded at home with a tantrum when feeling overwhelmed by emotions (id.). As recorded by the social worker, the student's mother indicated that the student had relationships with others in both the school and community (id.). She opined that the student continued to make progress with respect to learning social rules (id.). According to the student's mother, in social settings with peers the student at times tended to speak off topic and his relationships were affected when others had difficulty understanding him (id.). The student had play dates with peers and sought to be involved in activities with others, who the mother described as "acquaintances" (id. at p. 1).

The school psychologist conducted a psychological evaluation of the student over two days in March 2009 (Dist. Ex. 25). Administration of the WISC-IV yielded the following standard scores and (and percentile ranks): verbal comprehension 96 (39th percentile), perceptual reasoning 88 (21st percentile), working memory 77 (6th percentile), processing speed 85 (16th percentile), and full scale IQ 84 (14th percentile) (id. at p. 4). The psychologist reported that the student's overall performance suggested intellectual functioning in the low average range (id. at p. 5). She identified as strengths, the student's age expected fund of general knowledge and his ability to access and apply it, his inductive reasoning ability, and his ability to process and quickly make decisions based on visual information (id.). The psychologist cited as weaknesses, the student's non-verbal problem solving ability, visual-spatial processing ability, and short-term and working memory (id.). The psychologist described the student as attentive and engaged

⁶ The psychological evaluation was conducted by a school psychology intern and signed by the school psychologist who was her supervisor (Dist. Ex. 25 at p. 5). The OT evaluation was co-signed by a licensed, registered occupational therapist (Dist. Ex. 16 at p. 3).

⁷ The student's mother reported that during second grade, the student received four hours per week of private tutoring (Tr. p. 875).

⁸ The social worker reported that the student was prescribed medication by his neurologist to address his attention and difficulty focusing, and that an additional medication had been recently added to help the student with his anxiety and reactive behavior (Dist. Ex. 24 at p. 1).

during testing and noted that the student did not give up or become frustrated when challenged (id. at pp. 1, 5). The psychologist reported that when the student was more distracted, he was responsive to redirection and was able to maintain focus thereafter (id. at pp. 1-2, 5).

As part of the evaluation, the psychologist observed the student in his classroom during a math assignment (Dist. Ex. 25 at p. 1). The psychologist reported that during group instruction, the student sat calmly and quietly while the teacher spoke, that he paid attention to instruction, and that on occasion the student raised his hand to answer the teacher's questions (id. at p. 5). The psychologist reported that the student worked well when paired with another student and he was very cooperative in sharing blocks and grouping them into different numbers (id. at p. 1). In addition, she noted that the student was receptive to the psychologist's help during individual seat work (id. at p. 5).

Assessment of the student's academic skills by his special education teacher using the Wechsler Individual Achievement Test–Second Edition (WIAT-II), yielded the following standard scores (and percentile ranks): word reading 85 (16th percentile), reading comprehension 84 (14th percentile), numerical operations 68 (2nd percentile), math reasoning 85 (16th percentile), spelling 74 (4th percentile), written expression 86 (18th percentile), and oral expression 98 (45th percentile) (Dist. Ex. 27 at p. 4). With respect to word reading, the special education teacher reported that the student was able to identify similar sounds in the beginning and final position of words presented orally (id. at p. 1). She noted that the student had some difficulty with visual tracking/attention to text, but that he was most often able to respond appropriately (id.). According to the special education teacher, the student was able to read several grade level sight words and decode some words that incorporated blends, digraphs, and more abstract spelling rules (id.). The special education teacher reported, however, that the student's use of decoding strategies was "somewhat inconsistent" (id.). With respect to reading comprehension, the special education teacher noted that the student was able to accurately read many of the sentences and one passage presented on the reading comprehension subtest (id. at p. 2). She indicated that the student had difficulty responding to comprehension questions with sufficient detail and could not attend to the details in the text that support inferential comprehension (id.).

On the spelling subtest, the student was able to accurately represent letter sounds and blends by providing the corresponding letters (Dist. Ex. 27 at p. 2). The special education teacher reported that during testing, the student was unable to spell words appropriate to his grade level, although he was able to spell many of these same words during class (id.). The special education teacher commented that the student's handwriting was difficult to read and mitigated the student's ability to accurately demonstrate his skills during all writing tasks (id.). On the written expression subtest, the special education teacher reported that the student omitted several letters when asked to write the alphabet (id. at p. 3). When asked to combine sentences without changing their meaning, the student was unable to copy the sentences from a model but provided one accurate response verbally (id.). The special education teacher indicated that the student scored within the average range on the oral expression subtest (id.).

With respect to mathematics, the special education teacher reported that the student was able to write single and double digit numbers in isolation and in response to test items that assessed numeration concepts (Dist. Ex. 27 at p. 2). However, on computational tasks presented

as vertical and horizontal equations, the student guessed at the answers and wrote random numbers (id.). The special education teacher reported that the student's score on the numerical operations subtest was significantly below average, but not completely indicative of the student's performance in an instructional setting (id.). The special education teacher indicated that math reasoning was a relative strength for the student as it allowed him to express his understanding verbally with visual supports (id.). The special education teacher further commented that the student demonstrated an understanding of the concepts of measurement, using whole numbers to describe quantities and creating and solving addition and subtraction problems with pictorial support (id.). She noted, however, that the student had difficulty when the problems became more language dense (id.).

As part of the district's reevaluation, the student's speech-language pathologist assessed the student's speech and language abilities over three sessions using a variety of standardized tests (Dist. Ex. 28). The speech-language pathologist reported that the student's affect and language ability varied from session to session and commented that on some occasions the student appeared very talkative and friendly, and on others the student's affect was "spacey" and he engaged in very little spontaneous language (id. at p. 1).⁹ According to the speech-language pathologist, the student was cooperative during the evaluation but answered questions very tersely (id.). Based on her assessment, the speech-language pathologist reported that the student continued to exhibit expressive and receptive language delays including difficulties with word retrieval, syntax, and articulation (id. at pp. 1-4). She indicated that in the classroom setting the student would need directions to be broken down, clarified, and repeated (id. at p. 4). She further indicated that the student would need to continue to develop strategies for recalling content area vocabulary (id.).

In her evaluation report, the speech-language pathologist provided a summary of the student's progress (Dist. Ex. 28 at pp. 3-4). She indicated that the student had been seen twice per week individually and once per week in a small group for speech-language therapy (id. at p. 3). The focus of the student's individual sessions had been on improving his articulation and syntax skills, and the focus of group sessions had been on improving the student's listening comprehension and ability to make inferences (id.). The speech-language pathologist stated that the student had made progress in his ability to produce specific sounds, but continued to have difficulty producing these same sounds consistently, especially in conversation (id.). She noted that the student used compound and complex sentences to communicate, but that he continued to exhibit memory/word finding difficulties that interfered with his ability to clearly formulate and organize his ideas (id. at pp. 3-4). The speech-language pathologist reported that the student had made "nice" progress in his understanding of language concepts and was able to follow multi-step directions involving concepts of time, space, and location (id. at p. 3). She further indicated that the student's understanding of irregular past tense verbs and irregular plural nouns had improved, as had his ability to answer inference questions (id.).

Also as part of the district's reevaluation, the student's COTA/L conducted an evaluation that assessed the student's fine motor skills, visual motor integration, and handwriting abilities

⁹ The speech-language pathologist noted that the student's behavior was very different in second grade and reasoned that the inconsistency may have been due in part to medication (Tr. p. 280).

(Dist. Ex. 26). The COTA/L reported that the student was easily distracted and displayed impulsive behaviors that interfered with following directions and staying on task (id. at pp. 1, 3). She also reported that the student exhibited avoidance behaviors and at times, appeared to "shut down" when presented with challenging tasks (id.). According to the COTA/L, although the student's fine motor skills had improved, his skills continued to be below average (id.). She noted that the student had recently been introduced to keyboarding (id. at pp. 1-2). The COTA/L indicated that the student continued to demonstrate difficulty copying more complex shapes and designs and he was not able to consistently identify differences in visual details (id. at pp. 2, 3). She noted that the student had difficulty scanning left to right and did not track smoothly with his eyes (id. at p. 2). The COTA/L described the student's handwriting as poor and noted that inaccurate letter formation, letter reversals, letter case reversals, and inaccurate alignment of letters to the writing line affected the student's legibility (id. at pp. 2, 3).

On May 14, 2009, the parents signed an enrollment agreement with Eagle Hill for the 2009-10 school year (Parent Ex. J at pp. 1-2). In addition, on or about May 18, 2009 the parents made a non-refundable deposit of over \$5000 to the school (id. at pp. 1, 4).

Academic rubrics completed by the student's teachers at the district in May 2009 detailed the student's performance with respect to handwriting, mathematics, reading, and writing (Dist. Ex. 31 at pp. 8-11). As indicated by the rubrics, the student's academic skills fell between the first and second grade levels (id.). The teachers' records revealed that the student had advanced from an early beginning reader (DRA level 3, guided reading level C) to an advanced beginning reader (DRA level 10, guided reading level F) (id. at pp. 5, 8-11, 13-34).^{10, 11} The student's classroom teacher reported that the student was able to sit and read independently and retell a story, and that he had made progress in the books he chose to read independently (id. at p. 12). Additional teacher reports indicated that the student had to work "really hard" during unstructured times because he did not know what to say or do if someone did not want to play with him, and that he could become physical (id.). The teacher noted that afternoons were difficult for the student because he got tired and had to work hard at staying on task (id.).

On June 1, 2009, the parents provided Eagle Hill with an advanced tuition deposit of over \$23, 000 (Parent Ex. J at p. 4).

On June 8, 2009, a subcommittee of the district's CSE convened to conduct the student's annual review and to develop an educational program for the 2009-10 school year (Dist. Ex. 12). The meeting was attended by the CSE chairperson, who was also the director of elementary special education; the school psychologist; the student's special education and regular education teachers; the student's speech-language therapist and COTA/L; and the student's parents (Tr. p. 39; Dist. Ex. 12 at p. 6). The subcommittee recommended that the student's classification be changed from a student with a speech or language impairment to that of a student with a learning

¹⁰ I note that there is a discrepancy in the page numbering for District Exhibit 31. The exhibit is listed by the impartial hearing officer as containing 25 pages; however, 9 of the 25 pages are double sided (Dist. Ex. 31). For purposes of this decision, I have referred to the exhibit as containing 34 consecutively numbered pages as submitted for review. However, I note that the pages referenced in this decision may not coincide with the pagination as referenced by the parties in the hearing transcript (see Tr. pp. 26-27; Dist. Ex. 31 at pp. 13-34).

¹¹ "DRA" is a Developmental Reading Assessment (Tr. p. 140).

disability and recommended that he be placed in a 12:1 ICT class in one of its schools for four hours per day (Dist. Ex. 12 at pp. 1, 6).^{12, 13} The subcommittee also recommended that the student receive a weekly 30-minute group counseling session, six monthly 30-minute individual sessions of OT, six monthly 30-minute individual sessions of speech-language therapy, and three monthly 30-minute group sessions of speech-language therapy (*id.* at pp. 1-2). The subcommittee further recommended twice monthly 30-minute speech-language consultations and two monthly 30-minute OT consultations (*id.*).¹⁴ The subcommittee recommended the following daily program modifications and accommodations for the student, to be provided "when needed": checking for understanding; modification of assignments; the use of a word bank; modification of the curriculum; refocusing and redirection; the use of manipulatives; and access to a word processor (*id.* at p. 2). In the area of assistive technology devices, the subcommittee recommended that the student have access to a pencil grip, modified paper, and a portable word processor (*id.*). Recommended testing modifications included alternative forms of recording, directions and questions read and explained, extended time, language of directions simplified, tests read to the student (except for reading comprehension), and breaks as needed (*id.* at pp. 2-3).

The subcommittee developed annual goals and short-term objectives for the student, including five reading goals, four writing goals, three math goals, five speech-language goals, two social/emotional/behavioral goals, and six motor goals (Dist. Ex. 12 at pp. 7-11). The subcommittee considered placing the student in a special education classroom; however, this option was rejected as being overly restrictive and the subcommittee determined that the student's needs could be met in a less restrictive environment (*id.* at p. 7).

The IEP developed by the June 2009 subcommittee reflected the results of the district's reevaluation of the student, as well as information provided by the student's teachers regarding his classroom performance (Dist. Ex. 12 at pp. 3-7; *see* Dist. Ex. 31). The June 2009 IEP noted that the student continued to have delays in motor, speech-language and academic skills, which affected his progress in the general education curriculum (Dist. Ex. 12 at p. 3). The IEP further noted that the student required the support of special instruction in a general education program with a smaller student-to-teacher ratio in order to progress toward achieving the learning standards (*id.*). According to subcommittee meeting minutes, the parents expressed concern regarding the size of the recommended ICT class and the student's ability to make progress in the recommended placement (*id.* at p. 6). Meeting minutes indicated that the subcommittee of the

¹² According to State regulations, an ICT classroom is comprised of one regular education teacher, one special education teacher, and no more than 12 special education students integrated with nondisabled general education students (8 NYCRR 200.6[g]).

¹³ The special education teacher testified that the school day was "about" 6 1/2 hours long (Tr. p. 215). She indicated that the students were with the special education and regular education teachers for four hours per day and for the other 1 1/2 hours, the students attended lunch, recess, and specials (Tr. pp. 216-17). The director of elementary special education testified that an aide was available to assist students during this time (Tr. pp. 88-89).

¹⁴ The June 2009 IEP reflected that speech-language and OT consultations may include the therapists pushing into the classroom and/or consultation with teachers and professionals, as well as the parents (Dist. Ex. 12 at p. 2).

CSE agreed that a team meeting should be scheduled in the fall to review the student's progress and the program (id.).

In a letter dated July 20, 2009, the parents notified the district's assistant superintendent for student support services (assistant superintendent) that they were rejecting the district's proposed placement for their son for the 2009-10 school year (Dist. Ex. 32). In the letter, the parents noted that their son required a "small class in a smaller school so as to respond to his need to work in smaller groups," and that he required refocusing because he was easily distracted (id.). Further, the parents noted that the student needed modified assignments and a modified curriculum, as well as visual and tactile supports (id.). The parents further noted that the student did not like to be "looked at as different," and would avoid activities such as using a keyboard or other modified supports that set him apart from his classmates (id.). The parents stated that as reflected in the classroom observation, their son would "pretend to work" until a teacher was available to help him, and that his self-image had deteriorated as the difference between him and his peers had increased (id.). Finally, the parents advised the assistant superintendent that unless the district was able to provide an appropriate setting, they would have to "look elsewhere" (id.).

In a response dated July 27, 2009, the assistant superintendent notified the parents that he had received their letter and indicated that he would like to meet with them to discuss the matter (Dist. Ex. 33). He further stated that the director of elementary special education would be returning to the district in mid-August and at that time the assistant superintendent would discuss the parents' concerns with her, as well as discuss possible resolutions (id.). The letter requested that the parents contact the district's office for special education to schedule a meeting (id.).

By letter dated August 3, 2009, the parents notified the assistant superintendent that they had received his July 27, 2009 letter and needed to meet with the assistant superintendent "as soon as possible," due to their need to determine where they were going to send the student to school in September (Dist. Ex. 34). The parents further stated that they would be contacting the assistant superintendent to set up a mutual time and date (id.).

The parties met on August 10, 2009, to discuss the parents' concerns regarding the student's June 2009 IEP (Dist. Ex. 35). In a letter dated August 11, 2009, the assistant superintendent summarized the discussion that took place on August 10, 2009, including the parents' belief that the student required "very small group specialized instruction," and their assertion that the recommended ICT class with related services was not individualized enough to address the student's learning needs (id.). The assistant superintendent noted that the parents had investigated out-of-district schools for the student for the 2009-10 school year, and had requested that the district support the student's placement at one of those schools (id.). He noted that the parents believed that Eagle Hill might be the appropriate learning environment for the student at that time (id.).¹⁵ The assistant superintendent reiterated that he would meet with the director of elementary special education when she returned the following week to discuss the parents' concerns and that he would contact the parents prior to August 21, 2009 (id.). The assistant superintendent indicated that he discussed the parents' due process rights with them and shared

¹⁵ The hearing record reflects that the parents had not yet advised the district that they had made tuition payments to Eagle Hill at the time of the August 10, 2009 meeting (Tr. pp. 888-89).

with them possible steps for resolution (id.). He concluded with a remark that it had been a "productive and enjoyable" meeting (id.).

In an August 25, 2009 letter to the assistant superintendent, the parents notified the district that because the district was "unable to provide a suitable placement" for the student in September, they were unilaterally placing their son at Eagle Hill for the 2009-10 school year, and that they were retaining counsel in order to seek tuition reimbursement (Dist. Ex. 36). The parents also requested transportation to and from Eagle Hill (id.).

In a letter to the parents dated August 26, 2009, the assistant superintendent acknowledged receiving the parents' August 25, 2009 letter regarding unilateral placement of the student at Eagle Hill (Dist. Ex. 37). While the assistant superintendent indicated that he had reviewed the student's 2009-10 school year IEP with the director of elementary special education and that they believed that the IEP appropriately addressed the student's needs, he requested a meeting with the parents in order to resolve the parties' different views (id.). The assistant superintendent also assured the parents that the student would receive transportation to and from Eagle Hill (id.).

On August 27, 2009 the assistant superintendent, director of elementary special education, and school principal met with the student's father (Dist. Ex. 13 at p. 6).¹⁶ Minutes from the meeting indicated that the student's father presented his concerns regarding the ability of the recommended program to meet the student's educational needs (id.). According to the meeting minutes, program options were discussed and it was recommended that the following be added to the student's June 2009 IEP: daily reading support using a multisensory approach; portable word processors made available to the student and his classmates so that he wouldn't feel singled out; bi-monthly staff meetings to coordinate the student's services; social skills goals added to the June 2009 IEP and an understanding that counseling would focus on the development of the student's social skills as well as acceptance of his disability; multisensory decoding instruction training for the special education teacher to insure continuity between the reading teacher, special education teacher, and regular education teacher; and a CSE review meeting in eight weeks (id.). As further reflected in the meeting minutes, the student's father indicated that he was still intending to send the student to Eagle Hill (id.).

In a letter dated August 28, 2009 to the parents, the assistant superintendent summarized the outcome of the August 27, 2009 meeting, with a list of the proposed changes to the June 2009 IEP that were discussed during the meeting and reflected in the meeting minutes (Dist. Ex. 38; see Dist. Ex. 13).

The student attended Eagle Hill for the 2009-10 school year (Tr. pp. 523, 766, 769, 773). His program at the school included a daily 2:1 language arts tutorial for emerging readers; a daily 2:1 math class; a daily 6:1 oral language class designed to build receptive and expressive

¹⁶ The results of this meeting were noted on an IEP form, with a notation that the meeting was a "resolution meeting" (Dist. Ex. 38 at p. 1). However, the August 27, 2009 meeting and the document memorializing it, took place prior to the parents' September 15, 2009 due process complaint notice and therefore, could not formally constitute a resolution meeting as contemplated under the IDEA and attendant federal and State regulations (20 U.S.C. § 1415[f][1][B]; 34 C.F.R. § 300.510; 8 NYCRR 200.5[j][2]; compare Dist. Ex. 13, with Dist. Ex. 1).

language skills, as well as pragmatic language skills; a daily 6:1 writing class that was coordinated with the student's tutorial program and included fine motor work; and a daily 8:1 core curriculum class (double block) which combined social studies, science, and literature (Tr. pp. 509-13). The student also received speech-language therapy once per week in a dyad, and the same speech-language "teacher" pushed into the student's oral language class one time per week (Tr. pp. 511, 515).¹⁷ The student engaged in a co-curricular elective and a supervised study hall after school (Tr. p. 515). The student also had advisory periods at the beginning of the day and mid-morning (Tr. pp. 516-19).

Due Process Complaint Notice

In a due process complaint notice dated September 15, 2009, the parents requested an impartial hearing asserting, among other things, that the district failed to offer the student a free appropriate public education (FAPE) because the "12-1" ICT class recommended in the June 2009 IEP was inappropriate for the student in that he required a smaller class size in order to address his need for refocusing, redirection, and individualized attention (Dist. Ex. 1 at pp. 2, 6). The parents also asserted that procedurally, the CSE disregarded the parents' input when creating the June 2009 IEP and that the IEP ignored many of the student's specific issues (id. at p. 5).

The parents further asserted that the student required an educational environment wherein the students had similar learning disabilities to the student in this case in order to allow him to take "full advantage" of the supports and services he needed (Dist. Ex. 1 at p. 3). The parents asserted that in a larger (12:1) ratio class, the student's feelings that he is "different" would lead to regression because the student would refuse to access his support services and assistive technology (id.). The parents also asserted that placing the student into a 12:1 integrated classroom where assistive technology or related services were available to all students, as recommended on the June 2009 IEP, would not address the fact that the student may be the only student in the class who needed those services and devices, which in turn would make the student feel "estranged," and lead to his refusal to use those supports (id.). The parents also requested that the student be placed in a classroom that had two certified special education teachers in the class at all times in order to aid in the student's refocusing and redirection (id. at p. 4). The parents further asserted that because the student is "very conscious of his deficits," a placement with general education students would negatively affect his confidence level, and thus his academic progress (id. at pp. 3-4). Finally, the parents asserted that the student required the assistance of an aide during his lunch and recess periods in order to help him initiate and sustain social interactions with his peers (id. at pp. 4-5).

Regarding their unilateral placement at Eagle Hill, the parents asserted that the placement was "necessary" because of the deficiencies in the June 2009 IEP (Dist. Ex. 1 at p. 5). For relief, the parents requested tuition reimbursement for the student's attendance at Eagle Hill and "other related educational expenses and services" that the parents were providing "due to the inadequacy of the IEP" (id. at p. 6).

¹⁷ The hearing record also refers to this individual as a "speech-language clinician," but does not clarify if the individual is a speech-language pathologist or a teacher of the speech and hearing handicapped (TSHH).

District's Response to the Due Process Complaint Notice

In a letter dated December 2, 2009, the district responded to the parents' due process complaint notice (Dist. Ex. 2). The district responded to each of the parents' assertions, contending, among other things, that: the June 2009 IEP was rendered moot by the superseding "August 27, 2009 IEP;"¹⁸ the recommended program in the June 2009 IEP would have allowed the student to continue making gains; the recommended program provided the structure and support the student needed to address any deficits with respect to distractibility; the assigned school was appropriate; the June 2009 IEP appropriately addressed the student's needs in the areas of refocusing and redirection; the June 2009 IEP addressed the student's perceptions of his weaknesses, strengths, and learning differences; the student did not require an aide during lunch and recess; and the CSE considered parental input (id. at pp. 2-3). Attached to the letter, the district provided the parents with a copy of both the June 2009 IEP and the resultant documentation from the August 2009 meeting.

Impartial Hearing Officer Decision

An impartial hearing began on January 19, 2010, and ended on November 3, 2010, after six days of hearing (Tr. pp. 1, 184, 389, 492, 700, 916).¹⁹ By decision dated February 28, 2011, the impartial hearing officer determined that the district failed to offer the student a FAPE for the 2009-10 school year (IHO Decision at pp. 23, 28-29).²⁰ The impartial hearing officer also determined that the parents' unilateral placement of the student at Eagle Hill was appropriate (id. at pp. 29-31). Finally, the impartial hearing officer found that equitable considerations supported an award of tuition reimbursement to the parents (id. at pp. 31-32). The impartial hearing officer ordered the district to reimburse the parents for the student's tuition costs at Eagle Hill for the 2009-10 school year (id.).

In determining that the district failed to offer the student a FAPE for the 2009-10 school year, the impartial hearing officer determined that the record was "clear" concerning the difficulties the student had experienced in the "same inclusion program, the integrated co-teaching class" the student had attended in the prior (2008-09) school year (IHO Decision at p.

¹⁸ The district's response to the parents' due process complaint notice alleged that the document memorializing the August 27, 2009 meeting was an "IEP" and that such IEP rendered the parents' claims with respect to the June 2009 IEP moot and as such, the district asserted that it would move for dismissal of the parents' claims on those grounds (Dist. Ex. 2 at p. 2). However, the district did not assert this argument at the impartial hearing. In fact, it was the district's counsel that introduced the August 27, 2009 document into evidence (Tr. p. 17). Moreover, the district asserted during the impartial hearing that the June 2009 IEP was the focus of the impartial hearing (Tr. pp. 80-81). I also note that the hearing record does not contain evidence showing that the procedures for modifying a student's IEP without convening a CSE were used in this case. Therefore, I will initially address the parents' claims as they relate to the recommendations in the June 2009 IEP.

¹⁹ The last hearing date, November 3, 2010 was a teleconference call between the parties' counsel and the impartial hearing officer (Tr. pp. 916-28).

²⁰ I note that the impartial hearing officer initially determined that the scope of her inquiry was limited by what was raised in the parents' due process complaint notice (IHO Decision at p. 23). Specifically, she determined that the following issues were properly before her: the appropriateness of the recommended 12:1 ICT placement; the sufficiency of the IEP with regard to the student's behavior as it related to his level of consciousness of his deficits; and whether the student required an aide during lunch and recess (id.).

24). The impartial hearing officer determined that the district's recommendation for the 2009-10 school year was a continuation of the student's program during the 2008-09 school year, with the addition of counseling, changes to the amount of OT and speech-language therapy, and the elimination of enhanced staffing for lunch and recess (id.). The impartial hearing officer also determined that the 2009-10 IEP reflected that the student benefited from small group instruction, and that until the start of the prior 2008-09 school year, the student had been in a classroom setting with no more than 8 students, but he started to fall behind when he was placed in the larger 12:1 setting for the 2008-09 school year (id.). The impartial hearing officer also found that the student's self awareness of his being "different" from the other students was affecting the student's participation in those activities that set him apart from his peers, which in turn, led the student to refuse modifications and supports designed to make instruction accessible (id. at pp. 24-25, 27-28). The IHO further noted that although the district offered counseling to the student for the 2009-10 school year, this offer was "scarcely enough to address his needs" (id. at p. 28). The impartial hearing officer determined that the district's elimination of enhanced staffing for lunch and recess did not contribute to her finding that the district failed to offer the student a FAPE for the 2009-10 school year (id.). With respect to the district's contention that the recommended program was the student's least restrictive environment (LRE), the impartial hearing officer determined that the evidence showed that it was "abundantly clear" that the student could not be educated satisfactorily with supplementary aids and services in the ICT class (id. at p. 29).

With respect to her determination that the parents met their burden in demonstrating the appropriateness of Eagle Hill, the impartial hearing officer noted that Eagle Hill offered "uniformly small classes," which addressed the student's reading, writing, math, speech and language, and social/emotional needs (IHO Decision at p. 29). The impartial hearing officer also noted that the student made academic and social progress at Eagle Hill (id. at p. 30). Finally, the impartial hearing officer found that given the student's deficits, including his "extreme" emotional behaviors during the prior school year, which were exacerbated in large group settings, Eagle Hill was the LRE for the student (id. at pp. 30-31).

With respect to equitable considerations, the impartial hearing officer credited the parent's testimony that he was risking only the loss of the initial payment to Eagle Hill had the district offered an appropriate placement to the student (IHO Decision at p. 31). Further, the impartial hearing officer determined that in the series of letters between the parents and the district during July and August 2009, the parents provided the district with notice of both their dissatisfaction with the June 2009 IEP and that they would be looking elsewhere; and further, that the parents had discussed the possibility of placing the student at Eagle Hill in an August 2009 meeting with the district (id. at pp. 31-32).

Appeal for State-Level Review

The district appeals the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2009-10 school year, asserting that the impartial hearing officer erred when she made determinations that were beyond the scope of the due process complaint notice. The district also contends that the impartial hearing officer erred as a matter of law by finding that the student could not be educated "'satisfactorily'" in an ICT class with supplementary supports and services because she applied a "satisfactory" (versus "appropriate")

standard to the educational placement offered by the district. The district further asserts that the impartial hearing officer ignored evidence of consistent academic, speech-language, motor, and other gains made by the student in prior years at the district. The district contends that the impartial hearing officer's determination that the student required a small class size composed of students with a similar disability violated the LRE mandate under the Individuals with Disabilities Education Act (IDEA), and as such, constituted an error as a matter of law. Finally, the district argues that the impartial hearing officer's determination that the student required a small class size in order to make progress is not supported by the evidence.

With respect to the parents' unilateral placement of the student at Eagle Hill, the district asserts that the hearing record did not provide adequate evidence that the school was appropriate because: the parents did not provide information with regard to the functional grouping within the student's class; the staff at Eagle Hill did not create an "individualized plan" to address the student's unique educational needs; Eagle Hill did not provide the student with OT; and the level of speech-language support provided by Eagle Hill was inadequate. With regard to equitable considerations, the district asserts that the parents never seriously considered a public school placement, as demonstrated by their completion of an application and submission of non-refundable payments of "almost \$30,000" to Eagle Hill prior to the June 2009 CSE meeting. The district further contends that the parents did not inform the district that they had visited, applied to, and paid monies to Eagle Hill until July 20, 2009. The district requests that the impartial hearing officer's decision be overturned.

The parents filed an answer admitting and denying the claims raised in the district's petition, and requesting that the relief requested in the district's petition be denied.

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).

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 Dept of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Scope of the Impartial Hearing

The district asserts that the impartial hearing officer exceeded the scope of permissible inquiry when she determined issues that were not raised in the parents' due process complaint notice, including that: the student had social/emotional needs, which prompted "numerous trips to the school nurse;" the IEP lacked a behavior plan; and the IEP did not address that the student was "exquisitely aware" of his academic support needs and the "difference" from the other students in the class. State regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice 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. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see Snyder v. Montgomery County, Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 11-042; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140).

Here, I find that the hearing record demonstrates that the parents failed to assert in the due process complaint notice any claim relating to the district's failure to develop a behavior plan (see Dist. Ex. 1). Moreover, the hearing record does not indicate that the parents amended their due process complaint notice or that the district agreed to expand the scope of the impartial hearing to include this issue. In fact, in this case, the district objected on a multitude of occasions to the introduction of testimony concerning issues it believed were not raised in the due process complaint notice (see Tr. pp. 71, 314-20; see also Tr. pp. 73, 74, 76-81, 84, 89-92, 94, 98, 99, 105, 206, 207, 215, 218, 309, 313, 314, 420, 481, 485). Therefore, the issue of the lack of a behavior plan was not properly before the impartial hearing officer, and she should have confined her determination to only those issues that were raised in the parents' due process complaint notice (see IHO Decision at p. 26; see also 20 U.S.C. § 1415[c][1],[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[b],[d][3], 300.511[d]; 8 NYCRR 200.5 [i][1][iv],[i][7],[j][1][ii]; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095;

Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

With respect to the remaining issues that the district contends were not properly before the impartial hearing officer, I disagree and find that the parents' due process complaint notice may be reasonably read as encompassing the parents' remaining claims described above (Dist. Ex. 1 at pp. 3-5). Therefore, the impartial hearing officer properly addressed them in her analysis and I will review them in this appeal.

Placement – ICT Class

On appeal, the district asserts that the impartial hearing officer erred in determining that its recommended ICT placement was inappropriate. Initially, I note that the student's classification, related services, goals, and objectives in the June 2009 IEP are not in dispute in this case (see Dist. Ex. 1). Moreover, there are no procedural issues regarding the June 2009 CSE meeting before me on appeal. The crux of both the impartial hearing and this appeal with regard to the first prong of the Burlington/Carter analysis, is whether the student's placement in an ICT setting with supports and services was appropriate to meet his needs (id.; see IHO Decision at p. 23).

The impartial hearing officer based her determination that the district had not offered the student a FAPE largely on her finding that the student had failed to progress in an ICT program with supports and services during the prior 2008-09 school year, and that the district had offered the same inappropriate program for the 2009-10 school year (IHO Decision at pp. 24-28). The student's mother testified that during the student's prior school year (2008-09) in the district's ICT class, the parents did not see a "large improvement" in the student's academic skills, if any, and that emotionally the year started out "okay," but then "went downhill" (Tr. p. 751). The student's special education teacher for the 2008-09 second grade ICT class testified that the student often required direct 1:1 instruction; that he required more direct instruction than other students, but was not the only student that required it; and that globally the student performed better in 1:1 and small group settings than he did in large group instruction (Tr. pp. 133, 194, 214, 220). The special education teacher also acknowledged that the student would, at times, pick at his skin and cause it to bleed; say that he was ill so that he could go to the nurse; and shut down or withdraw in class (Tr. pp. 223-25, 231). She further confirmed that the student had difficulty accepting the modifications that were offered to him and that at times, universal access helped the student accept his IEP modifications and at other times it did not (Tr. pp. 211, 229). The special education teacher recalled conversations in which the parents reported the student would come home and state that he wanted to harm himself (Tr. pp. 224-25).

However, despite the student's social/emotional difficulties, the student's teachers and therapists also reported that his skills improved in the ICT setting during second grade. The student's teachers testified that the student made progress with respect to decoding and comprehending text, and noted that the student's DRA/guided reading levels advanced from 3 (C) to 10 (F) during the 2008-09 school year (Tr. pp. 140-51, 170-71; Dist. Exs. 11 at pp. 3, 6; 31 at pp. 7, 13-34). More specifically, the student's second grade special education teacher testified that the student made gains in phonemic awareness, reading comprehension, and reading fluency (Tr. pp. 138-39, 160). She noted that when tested in March 2009, the student demonstrated the

ability to make predictions and had begun self-correcting his miscues (Tr. p. 147). With respect to writing, the special education teacher reported that the student became more willing to develop a story if the physical components of writing were removed (Tr. p. 240). She noted that in math, the student would take advantage of manipulatives and having instruction presented in a small group, and that he was able to grasp concepts and employ them independently (id.).

The second grade special education teacher also noted improvement in the student's social skills in school. She testified that as the year progressed, the student became more inclined to seek out social interaction and became more appropriately social (Tr. pp. 160, 222, 239-40). According to the special education teacher, the student became more of a "community member" in the classroom and was able to participate more effectively with other students on academic tasks and in social situations (Tr. p. 163). With respect to attending, the special education teacher reported that the student was able to attend to instruction in the classroom with greater consistency as the year went on (id.). Both classroom teachers reported in testimony and in a district achievement report that although the student had difficulty attending, he was not difficult to redirect (Tr. p. 156; Dist. Ex. 31 at p. 6). In her March 2009 observation of the student in his ICT class, the school psychologist described the student as quiet and attentive during instruction, and cooperative when working with a partner (Dist. Ex. 25 at p. 1).

According to the student's speech-language pathologist, during the 2008-09 school year, the student demonstrated improvement in his ability to understand language concepts, irregular past tense verbs, and irregular plural nouns (Tr. pp. 286-87, 289, 298; Dist. Exs. 12 at p. 4; 28 at p. 3). She noted that the student demonstrated progress in his ability to answer questions about characters and events, as well as answer inference questions about what might happen next in a story read aloud (Tr. pp. 288-89, 298; Dist. Exs. 12 at p. 4; 28 at p. 3). In addition, the speech-language pathologist reported that the student demonstrated progress in his ability to produce certain speech sounds, although he had difficulty producing the sounds consistently in conversation (Tr. pp. 290, 295-96; Dist. Exs. 12 at p. 4; 28 at p. 3). The speech-language pathologist also reported that the student was better able to produce multisyllabic words and that his overall intelligibility had improved in conversation (Dist. Exs. 12 at p. 4; 28 at p. 3).

The student's COTA/L reported that the student's motor coordination was below average, but that the student had made improvement in this area during the 2008-09 school year (Dist. Ex. 12 at p. 6). She indicated that the student's fine motor skills had improved, including his ability to create drawings made up of basic shapes and to self-generate upper and lower case letters (Tr. pp. 345-48, 351-54; see Dist. Ex. 26). The COTA/L further noted progress in the student's visual perceptual skills and commented that over the course of the 2008-09 school year, the student was able to complete more complex puzzles (Tr. pp. 354-56). She confirmed that despite the student's progress, his skills remained delayed (Tr. p. 372).

Based on the results of standardized testing and the student's performance in second grade, the June 2009 subcommittee of the CSE recommended that the student be placed in a 12:1 ICT class, as he had been the previous year (Dist. Ex. 12 at p. 1).²¹ In addition to the

²¹ According to the impartial hearing officer, the student's mother testified that the ICT class recommended for the 2009-10 school year was "described as larger than the class the previous year" (IHO Decision at p. 24). However, the student's mother testified that the class "was described as the same as the previous year, it was going to be a larger class, there were not 12 kids and one teacher, there may be 12 special education kids but not

recommendation for an ICT class, the subcommittee of the CSE recommended that the student continue to be afforded the program modifications and accommodations that were in place during the previous school year including checks for understanding, modified assignments, and use of a word bank (Dist. Ex. 12 at p. 2). The June 2009 IEP also included additional program modifications and accommodations, and assistive technology devices for the student for the 2009-10 school year; however, the hearing record reflects that some of these supports were in place during the 2008-09 school year although they were not reflected on the prior year's IEP (compare Tr. pp. 136, 137, 338, with Dist. Ex. 11). The additional program modifications and accommodations included a modified curriculum, refocusing and redirection, the use of manipulatives, and access to a word processor (Dist. Ex. 12 at p. 2). The recommended assistive technology devices included a pencil grip, access to modified paper, and access to a portable word processor (id.). The recommended June 2009 IEP also included testing accommodations not found on the student's previous IEP that specifically allowed for alternative forms of recording, directions and questions to be read and explained, extended time (1.5), the language of directions to be simplified, the test to be read (except for reading comprehension), and breaks as needed (id. at pp. 2-3). While some of the academic goals were carried over from the student's previous IEP, the June 2009 IEP also included new goals reflecting more advanced academic skills (id. at pp. 7-9).

To address the student's speech and language needs, the June 2009 subcommittee recommended that the student receive individual and group speech-language therapy, along with monthly speech-language consultations (Dist. Ex. 12 at pp. 1-2). In addition, to address the student's graphomotor, visual perceptual and attending skills, the subcommittee of the CSE recommended that the OT services previously provided to the student in a group setting be provided individually for the 2009-10 school year (id. at p. 1).

With respect to the student's social/emotional needs, the June 2009 subcommittee of the CSE recommended that one time per week group counseling services by the school psychologist be added to the student's IEP (id. at pp. 1). The subcommittee also recommended that goals related to the student understanding and accepting his unique learning differences and accepting and utilizing support within the classroom be added to the student's IEP (id. at p. 10). While the impartial hearing officer found that the addition of counseling by the subcommittee was "scarcely enough to meet these needs", the hearing record reflects that, based on the parent's concerns, the subcommittee of the CSE agreed to reconvene in the fall to review the student's progress and program (id. at p. 6).

For the reasons discussed above, I find that the district's June 2009 IEP recommended an educational program and services designed to address the student's academic, social, motor, and speech-language deficits and needs and was reasonably calculated to enable the student to receive educational benefits for the 2009-10 school year.

Furthermore, although unnecessary to reach a determination in this case, I note that the hearing record also shows that following the June 2009 CSE meeting the assistant superintendent

12 students in the class" (Tr. p 754). The student's mother confirmed that the recommended class was described as a co-teaching class (id.). The hearing record shows that the ICT class recommended for the student for the 2009-10 school year would have been the same size as his second grade ICT class (Tr. p. 125).

met with the parents on two occasions to listen to their concerns (Dist. Exs. 35; 38). At the second such meeting, which took place on August 27, 2009, the director of elementary special education and school principal were in attendance, and the district offered the parents additional services to strengthen the student's IEP (Dist. Exs. 13; 38). These services included daily 1:1 reading support by a reading specialist using Preventing Academic Failure (PAF) strategies focusing on decoding; AlphaSmarts available in the classroom for all students to use; a bi-monthly staff meeting to coordinate the student's program; social skills counseling support connected to recess participation and a focus on developing friendships; PAF training for the special education teacher; and a reconvening of the CSE in eight weeks to review the student's program (*id.*). I find that the district's offer to further modify to the student's recommended programs and services on the June 2009 IEP, had the parties elected to pursue that course, would have resulted in an appropriate IEP for the student for the 2009-10 school year.

LRE

Turning to the district's assertion that it provided the student a FAPE within the LRE, 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 v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; 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. 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).²²

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In this case, I find that the hearing record evidences that the recommended placement reflected in the June 2009 IEP was the LRE for the student. With regard to the first prong of the Newington test, whether the student could be educated satisfactorily in a general education classroom with supplemental aids and services, as discussed above, the district has shown that the student progressed academically in an ICT class during the prior school year and also demonstrated improvement in his socialization, speech-language, and motor skills (see Tr. pp. 138-51, 156, 160, 163, 170-71, 286-90, 295-96, 298, 354-56, 372; Dist. Exs. 11 at pp. 3, 6; 12 at pp. 4, 26; 28 at p. 3; 31 at pp. 7, 13-34). In addition, the hearing record shows that the district recommended a variety of supplemental aids and services for the 2009-10 school year to provide the student with access to his nondisabled peers while at the same time tailoring the recommended program to the student's unique needs (Dist. Ex. 12 at pp. 1, 2). There is nothing in the hearing record that compels the conclusion the student could not have been educated in a general education setting for the 2009-10 school year.

With regard to whether the student's social/emotional needs would have been addressed in the recommended ICT program, the hearing record demonstrates that the district considered the student's needs for socialization and integration and determined that the student's anxiety and difficulty with accepting his disabilities would have been exacerbated had he been placed in a

²² The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

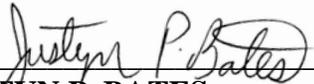
special class, and also that a full-time special education class was not an appropriate social placement for the student (Tr. p. 248). Moreover, the student's second grade special education teacher reported that the student "wanted to be a social child" and "would go out of his way to engage with his peers" (Tr. p. 239). The student was also described in a 2008-09 achievement report as "sweet" and "well-liked by his peers" (Dist. Ex. 31 at p. 6). According to the student's second grade special education teacher, the student became more of a "community member" in the classroom and was able to participate more effectively with other students on academic tasks and in social situations (Tr. p. 163). She also noted that the student was not difficult to redirect in class, because the student was not by and large, oppositional nor was he disruptive (Tr. pp. 156, 239-40). She further noted that the student could be redirected by a tap on the student's desk or even to the teacher's face, and that typically, the student would nod his head and get back to work (*id.*). In the March 2009 observation of the student in the ICT class, the school psychologist described the student as quiet and attentive during instruction, and cooperative when working with a partner (Dist. Ex. 25 at p. 1).

Based on the above, I find that the district has satisfied the first prong of the Newington test (Newington, 546 F.3d at 120). I therefore need not address Newington's second prong, whether the student has been mainstreamed to the maximum extent appropriately. After determining that the parents have not prevailed in their claim that the district failed to offer the student a FAPE for the 2009-10 school year, I have considered the parties' remaining contentions and find that I need not reach the issue of whether Eagle Hill was appropriate for the student or whether the equities support an award of tuition reimbursement 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).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that that impartial hearing officer's February 28, 2011 decision is hereby annulled.

Dated: Albany, New York
June 22, 2011



JUSTYN P. BATES
STATE REVIEW OFFICER