



The University of the State of New York

The State Education Department
State Review Officer

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No. 11-164

**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, attorneys for petitioner, Tracy Siligmuller, Esq., of counsel

Law Offices of Regina Skyer and Associates, attorneys for respondents, Gregory Cangiano, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which ordered it to reimburse respondents (the parents) for their son's tuition costs and related services at the Ezra Hatzvy Learning Center (Ezra Hatzvy) for the 2010-11 school year. The parents cross-appeal from the portion of the impartial hearing officer's determination which denied their request for some of the related services provided at Ezra Hatzvy and home-based services. The appeal must be dismissed. The cross-appeal must be dismissed.

Background

At the time of the impartial hearing the student was attending Ezra Hatzvy (Tr. p. 42).¹ Ezra Hatzvy 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's eligibility for special education programs and services

¹ The hearing record reflects that at the time of the impartial hearing the student was in his third year at Ezra Hatzvy (Tr. p. 242).

as a student with multiple disabilities is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1 [zz][8]).

The student's educational programs have been the subject of one previous administrative appeal (see Application of a Student with a Disability, Appeal No. 09-019). The parties' familiarity with the student's prior educational history is presumed and the educational history described in those appeals will not be repeated herein.

As relevant to the instant case, the Committee on Special Education (CSE) convened on August 31, 2010 and developed an individualized education program (IEP) for the student for the 2010-11 school year with a projected initiation date of September 2010 (Parent Ex. B at pp. 1, 2).² The CSE recommended placement for the student in a special class in a special school with a 12:1+4 ratio and the following related services: 1:1 health paraprofessional; speech-language therapy (5 times per week for 60 minutes per session); vision therapy (4 times per week for 60 minutes per session); physical therapy (PT) (5 times per week for 45 minutes per session); and occupational therapy (OT) (5 times per week for 60 minutes per session) (*id.* at pp. 1, 22). In addition, the CSE recommended that the student receive the programs and services for a 12-month school year (*id.* at p. 1). The student's mother reported that the parents received a Final Notice of Recommendation (FNR) from the district assigning the student to a particular school and that she had visited that school "in the past" (Tr. pp. 273-74).³

Due Process Complaint Notice

In a due process complaint notice dated June 8, 2011, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) on procedural and substantive grounds for the 2010-11 school year (Parent Ex. A at p. 1). The parents specifically asserted that the program recommended for the student by the district in the August 2010 IEP was inappropriate because the CSE did not "rely" on necessary evaluations to determine the student's skill levels; the CSE improperly disregarded procedures for participation of CSE members by teleconference; the annual goals and short-term objectives on the student's IEP were not appropriate; the recommended 12:1+4 setting did not provide enough support to meet the student's needs; and the proposed class at the assigned school would not have provided the student with an appropriate functional grouping for academic or social/emotional purposes (*id.* at pp. 3-4). In addition, the parents asserted that the student's placement at Ezra Hatzvy with a home program was appropriate for the 2010-11 school year and that equitable considerations favored their request (*id.* at pp. 5-6). As relief, the parents requested reimbursement for tuition at Ezra Hatzvy and for home-based services (*id.* at pp. 1-2).

² The CSE initially met in April 2010, but determined that further evaluative information was necessary in order to recommend an appropriate program for the 2010-11 school year (Tr. pp. 270-71). The CSE next reconvened in May 2010, although the student's mother had let the CSE know that she would not be able to attend the meeting, (Tr. pp. 271-72).

³ The FNR was not made part of the hearing record.

Impartial Hearing Officer Decision

On July 20, 2011 an impartial hearing convened and concluded on September 26, 2011, after five days of testimony (Tr. pp. 1-297). In a decision dated November 16, 2011, the impartial hearing officer found that the district failed to offer the student an appropriate program and placement for the 2010-11 school year (IHO Decision at p. 26). The impartial hearing officer noted, among other things, that the district failed to present any witnesses or documents to support the IEP and proposed placement (id. at p. 23). Regarding the parents' unilateral placement, the impartial hearing officer found that the placement at Ezra Hatzvy was appropriate to meet the student's special education needs and that the placement provided the student appropriate services with some limitations (id. at pp. 23-24). Specifically, the impartial hearing officer denied reimbursement for the following related services provided to the student at the school — aquatic therapy, feeding therapy, behavioral academic instruction, and augmentative assistive technology, finding that the services had not listed on the student's IEP, that the hearing record did not reflect that the parents had requested such services at a CSE meeting, and that the hearing record did not include information as to how the services were provided and how they differed or were necessary in addition to the speech-language and OT services already provided to the student (id. at p. 24).

Regarding the home-based services provided to the student, the impartial hearing officer found that the services were in part, required as part of the provision of services necessary for the student to receive a FAPE (IHO Decision at p. 24). The impartial hearing officer found that the student had significant needs that required a home-based program to supplement the school program and facilitate generalization (id.). While the impartial hearing officer denied reimbursement for speech-language services by a specific named private outside provider, special education itinerant teacher (SEIT) services, music therapy services and a paraprofessional for the summer, he awarded reimbursement for home-based speech-language therapy by the home-based provider, PT and vision services (id. at pp. 25-26). The impartial hearing officer further found that equitable considerations favored the parents (id. at p. 24).

In conclusion, the impartial hearing officer awarded the parents the cost of tuition reimbursement, as well as OT, PT, speech-language therapy and the 1:1 paraprofessional provided to the student at Ezra Hatzvy (id. at p. 26). As to the home-based program, the parent was awarded reimbursement for the cost of speech-language therapy services by the home-based provider, PT, and vision services (id.).

Appeal for State-Level Review

In an appeal from the impartial hearing officer's decision, the district asserts that the parents' unilateral placement was not appropriate because it did not provide the student with a 12-month school year and did not provide the necessary related services. Specifically, the district asserts that vision therapy was not provided at Ezra Hatzvy, that the student was not provided with enough OT and PT, and that the hearing record does not contain sufficient evidence regarding the related services that the student actually received at the school. As relief, the district requests reversal of the impartial hearing officer's finding that the private program at Ezra Hatzvy, consisting of the "base" tuition as well as OT, PT, speech-language therapy and a 1:1

paraprofessional, was appropriate. The district further requests that if the program and services at Ezra Hatzvy are found to be appropriate, that the district need only reimburse the parents upon proof of payment.⁴

In an answer, the parents assert general admissions and denials. Regarding the related services the student received at Ezra Hatzvy, the parents specifically assert, among other things, that they need not show that the unilateral placement provided every special service necessary to maximize the student's potential. Regarding the lack of a 12-month school year at the unilateral placement, the parents assert that while the district claimed to have developed a 12-month program for the student, the projected initiation date of the IEP was September 20, 2010, over two months into the 2010-11 school year; that the student attended a mainstream camp for summer 2010 with a full-time paraprofessional; and that the student received a home-based program and SEIT services during July and August 2010.

In a cross-appeal, the parents assert that the impartial hearing officer erred in denying reimbursement for the home-based SEIT, music therapy, and speech-language therapy by the private outside provider. In addition, the parents assert that the impartial hearing officer erred in denying reimbursement for the following services provided at Ezra Hatzvy: aquatic therapy, feeding therapy, behavioral academic instruction, and augmentative assistive technology. The parents further asserted that it was not relevant that certain services were not included on the student's IEP as the parents specifically challenged the appropriateness of the IEP and the district did not defend the IEP at the impartial hearing; that the CSE's refusal to provide certain services was objected to by the parents; and that the CSE was advised that funding would be sought for such services. The parents further assert that the impartial hearing officer erred in finding that information in the hearing record was lacking as to how certain services were delivered, by whom, and whether they were necessary in addition to the provided speech-language therapy and OT. As relief, the parents seek an order upholding the portion of the impartial hearing officer's decision finding that the private placement was appropriate and reimbursing the parents for the entire program, including OT, PT, speech-language therapy, and the 1:1 paraprofessional. In addition, the parents request that the portion of the impartial hearing officer's decision denying the parents' request for reimbursement for aquatic therapy, feeding therapy, behavioral academic instruction, and augmentative assistive technology provided to the student at Ezra Hatzvy be vacated. The parents also request that the portion of the decision denying the parents' request for home-based SEIT services, speech-language services by the private outside provider, and music therapy be vacated.

In an answer to the parents' cross-appeal, the district alleges that the impartial hearing officer properly denied the parents' request for home-based SEIT services, music therapy, and speech-language therapy from the private outside provider. The district further argues that the impartial hearing officer properly denied reimbursement for aquatic therapy, feeding therapy, behavioral academic instruction, and augmentative assistive technology provided at Ezra Hatzvy.

⁴ The district does not appeal those portions of the decision wherein the impartial hearing officer ordered the district to reimburse the parents for home-based speech-language therapy, PT, and vision therapy.

Discussion

Scope of Review

Initially, I note that the impartial hearing officer's determinations that the district failed to offer the student a FAPE for the 2010-11 school year and that equitable considerations did not preclude an award of tuition reimbursement have not been appealed, and therefore have become final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; IHO Decision at pp. 23, 26). In addition, neither party appeals the impartial hearing officer's determinations that the student had significant needs that required a home-based program to supplement the school program and that the student's home-based speech-language therapy, PT, and vision services were appropriate; therefore, such determinations have also become final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; IHO Decision at pp. 24-26). The sole issues before me in this case are the appropriateness of the parents' unilateral placement of the student at Ezra Hatzvy, the appropriateness of the related services provided at Ezra Hatzvy, and the appropriateness of the remaining home-based services.

Applicable Standards – Unilateral Placement

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 Individuals with Disabilities Education Act (IDEA) (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; 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]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of

demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement..." (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 [1982] and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"])). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 C.F.R. § 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

As implied in his factual findings but not expressly stated by the impartial hearing officer, courts have also repeatedly recognized the "broad discretion" that hearing officers and reviewing courts must employ under the IDEA when fashioning equitable relief, and as noted recently, courts have also "repeatedly rejected invitations to restrict the scope of remedial authority provided in Section 1415(i)(2)(C)(iii)" (see Mr. and Mrs. A v. New York City Dept. of

Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see also Forest Grove v. T.A., 129 S.Ct. 2484 [2009]). While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow they may take advantage of deficiencies in the district's offered placement to obtain maximization of their child's potential at the expense of the public, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148). As one circuit court recently explained, "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs)" (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]; see Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 301 [5th Cir. 2009] [explaining that "a finding that a particular private placement is appropriate under IDEA does not mean that all treatments received there are per se [reimbursable]; rather, reimbursement is permitted only for treatments that are related services as defined by the IDEA]).

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]).

Appropriateness of Unilateral Placement and Services

In determining whether the hearing record supports a finding that Ezra Hatzvy is appropriate for the student, a brief overview of the student's needs is in order. The student presents with hemivertebrae; cortical visual impairment and strabismus; severe global delays in language and communication, cognition, oral motor and feeding, and gross, fine and visual-perceptual motor areas; as well as altered tone in all four extremities and trunk (Parent Exs. D at pp. 1-3; E at p. 1; F at p. 1; G at p. 1). According to progress reports from Ezra Hatzvy dated March 2011 and the student's August 31, 2010 IEP, the student's communication development/social skills needs include developing the ability to maintain eye contact for longer periods of time, respond to name, follow one-step directions, make requests, indicate yes/no for desired/non-desired items, develop interactive communication skills using an augmentative communication device, and expand vocalization and gestural skills, and interact in a purposeful manner with others (Parent Exs. B at pp. 14-15; D at pp. 1-2; E at pp. 1-2). Also, the student requires additional time to process auditory information (Parent Ex. D at p. 1). Academically, the student was at a pre-kindergarten level and worked on skills such as expressively identifying animal sounds, receptively identifying body parts, common objects, common pictures, colors, and matching identical colors (Tr. pp. 69-72, 76; Parent Exs. B at p. 3; D at pp. 2-3). In regard to play skills, the student displayed the need to work on increasing his independent play skills, and increasing his repertoire of toys that interested/motivated him, as well as how to use them (Parent Ex. D at p. 3). Regarding self-management skills, the student displayed the need to work on developing feeding and oral motor skills such as chewing, motor coordination skills, initiation and problem solving skills, dressing and undressing skills, self-feeding skills, and toilet training with the assistance of a health paraprofessional (Parent Exs. B at p. 8; D at p. 1; F at p. 1).

Regarding gross and fine motor skills, the student displayed the need to further his development of gross motor strengthening and gait and balance training to be safe in school, home, and play environments; improvement of his ability to ascend and descend stairs; and strengthening his right hand to improve functionality and individual finger movements for fine motor activities (Tr. pp. 91-92; Parent Exs. B at p. 11; D at p. 2; G at p. 1). Also, regarding visual-perceptual skills, among other things, the student displayed the need to work on turning his head toward a sound source and attend (Parent Ex. B at p. 13).

Overall, Ezra Hatzvy is described as a school that fosters a state of regulation to facilitate the instruction of the student (Parent Ex. Q). Each student is supported by a sensory diet that is customized to their needs and integrated into their curriculum (*id.*). Each student's individual level of independence is focused upon for functional activities of daily living (ADL), including feeding and toileting (*id.*). The private school also addresses physical, cognitive, communication, and social/emotional development of each student (*id.*). According to testimony by the clinical director of Ezra Hatzvy, instruction of the students is provided on a 1:1 basis and supervised by the head teacher of each classroom (Tr. p. 38). The clinical director indicated that the student's curriculum was primarily based on results of the Assessment of Basic Language and Learning Skills (ABLLS), a "step by step . . . guide for instruction of children with significant cognitive impairment," that was "in line" with State standards; and that adaptations and modifications were individualized for each student (Tr. pp. 38, 54-55, 57). Students are grouped in the classes based on the developmental levels of each student (Tr. p. 41).

In addition to OT, PT, speech-language therapy, and 1:1 paraprofessional services, the student in this case received music therapy, aquatic therapy, and feeding therapy at the private school (Tr. pp. 30, 47, 52; Parent Ex. C). The student also received the following home-based services paid for by the parents: PT, speech-language therapy, vision therapy, music therapy, and SEIT services (Tr. pp. 110, 142-43, 164, 198-99, 201, 208, 222, 233, 247-48). The hearing record reflects that in addition to home-based speech-language therapy, the student received private speech-language services outside of the home (Tr. pp. 260-62).

12-Month Program

The district contends that Ezra Hatzvy was inappropriate because it did not provide a 12-month program.⁵ Initially, although the impartial hearing officer's finding that the district did

⁵ Pursuant to State regulations, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression, . . . who, because of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education" (8 NYCRR 200.6[k][1], [k][1][v]; see Application of the Bd. of Educ., Appeal No. 11-058; Application of a Student with a Disability, Appeal No. 09-088; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-047; Application of a Student with a Disability, Appeal No. 08-078; Application of a Child with a Disability, Appeal No. 07-089; Application of a Child with a Disability, Appeal No. 07-082; Application of a Child with a Disability, Appeal No. 07-073; Application of a Child with a Disability, Appeal No. 07-039; Application of the Bd. of Educ., Appeal No. 04-102). State regulation defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 C.F.R. § 300.106).

not offer the student a FAPE is uncontested on appeal, the August 2010 IEP in conjunction with other evidence contained in the hearing record establishes that the student was entitled to receive 12-month school year services and neither party contends that the student was not eligible for 12-month services to maintain skills and prevent regression. (see Parent Exs. B; D; E; F; G). However, the hearing record also establishes that the district failed to provide a program for the student for the extended school year, given that the August 31, 2010 IEP was not developed until after the 12-month school year had begun and reflected an initiation date of September 2010, after extended school year services should have concluded (see Parent Ex. B at p. 2).⁶ Moreover, the parents provided a home-based program during the entire 12-month school year, including July and August 2010, and the program included a SEIT, PT, speech-language therapy, vision therapy, and music therapy (Parent Exs. A at pp. 1-2; K; L; M; R; W; Y). Upon review of the hearing record, I find that Ezra Hatzvy did not meet the student's need for a 12-month program for the student to maintain skills and prevent regression during the summer; however, I also find that based on the facts of this case, the hearing record reflects that the parents' provision of a home-based program during the summer addressed, among other things, the student's need for a 12-month program.

Testimony by the student's home-based physical therapist indicates that he usually provided PT services to the student one time per week (Tr. p. 142).⁷ He testified that by the time of the impartial hearing, the student was able to walk independently for short distances, but required constant supervision to ensure his safety due to his vision needs and to avoid doing things such as stepping off a curb and walking into traffic (Tr. p. 138). In order to address the student's needs and continue his "slow but steady progress," the physical therapist worked on the student's balance, coordination, strength, range of motion, and functional activities such as stair climbing and motor planning activities (Tr. p. 139). The physical therapist's testimony indicates that it was essential to make the student's balance "as good as possible to offset his visual issues" (Tr. p. 141).

The home-based speech-language pathologist testified that she provided speech-language therapy to the student at home two to three times per week for 60 minute sessions (Tr. p. 166-67). She focused on active learning with the student to motivate him to assist in his care, develop oral motor skills for eating and speech purposes, and among other things, attending and following directions (Tr. pp. 164-65). The speech-language pathologist indicated that she kept records regarding her work with the student, collaborated with the other home providers, and reviewed notes from the student's school speech-language therapy provider (Tr. pp. 182-87).

The home-based teacher of the visually impaired worked with the student four times per week for 60 minute sessions (Tr. pp. 198-99). She indicated that the most important goal for the student was for him to get around independently in his home environment as well as other environments (Tr. pp. 195-96, 202-04). She noted that she collaborated with the parents and

⁶ The Education Law describes a school year as running from July 1 through June 30 (Educ. Law § 2[15]).

⁷ Testimony of the physical therapist does not indicate the length of the PT sessions, however the hearing record reflects that home-based PT sessions were provided one time per week for 45 minutes per session (Parent Ex. A).

other home providers (Tr. pp. 208-09). The vision teacher indicated she used visual exercises such as focusing and eye contact to work on mobility and independence (Tr. pp. 202-04).

Accordingly, upon review of the hearing record, I find that the provision of the home-based PT, speech-language therapy and vision therapy as private services unilaterally obtained by the parents for summer 2010 appropriately addressed the student's need for a 12 month program, under the facts of the instant case.

Turning next to the parent's cross-appeal regarding the remaining related home-based services as provided during summer 2010, the hearing record reflects that that a SEIT worked with the student in the home for five hours per week, and that the SEIT did not have any direct communication with the student's school, did not keep progress reports or written records of his work with the student, and that he worked on some of the same goals that he worked on when he started working with the student four years ago (Tr. pp. 112; 126-28, 130, 132-33). The SEIT indicated that some of the same goals still applied and he "sort of extrapolate[d] some of those goals into ... what [the student is] able to do now" (Tr. p. 126). Although the district failed to offer a summer program I note that it was nevertheless incumbent upon the parent to put forth evidence showing that the services unilaterally obtained for the student were educational instruction specially designed to meet the unique needs the student. Upon review of the hearing record, I find that there is insufficient evidence to support a conclusion that the provision of SEIT services during the extended school year were designed to address the student's needs by enabling the student to maintain skills and prevent regression.

Regarding the 1:1 paraprofessional provided by the parents for the student during the summer, the hearing record reflects that he assisted the student during his attendance at a mainstream summer camp program during summer 2010 and also assisted with transportation of the student for therapy (Tr. pp. 147-52). Upon review, I find that the hearing record does not support a finding that this service was obtained to support the specially designed special education instruction for the student nor does it support a finding that this support was offered to enabled him to maintain skills and prevent regression; accordingly, I cannot conclude that these services were appropriate for the student during summer 2010.

In addition, the hearing record does not support a finding that the services from the outside private speech-language provider were necessary for the student to maintain skills and prevent regression, given the home-based speech language therapy that the student received, as discussed above. Regarding home-based music therapy services I find that the hearing record does not support a finding that these services enabled the student to maintain skills or prevent regression, as is discussed in more detail below.

10-Month Related Services at Ezra Hatzvy

The district asserts that Ezra Hatzvy was not appropriate because it did not provide the necessary related services to address the student's needs during the 2010-11 school year. Specifically, the district asserts that the private school provided no vision therapy, and that it is undisputed that a student who has cortical visual impairment requires vision therapy. In addition, the district asserts that the student only received five thirty-minute sessions of OT at the

private school, in contrast to his IEP mandate of five sixty-minute sessions; and that he only received five thirty-minute sessions of PT at the school while his IEP mandated five forty-five-minute sessions. In addition, the district asserts that the hearing record contains insufficient information regarding the related services that the student received at Ezra Hatzvy, and that there was no evidence showing how the student's paraprofessional assisted the student to address his needs.

A review of the hearing record supports a finding that Ezra Hatzvy appropriately met the student's OT, PT, and speech-language needs. A March 14, 2011 OT progress report written by the student's occupational therapist from Ezra Hatzvy indicated that at the time of the report, the student received five individual OT sessions per week (Parent Ex. E at p. 1). Regarding the student's self-regulation, the OT progress report indicated the student was able to be calm, recover from distress with comforting, be alert, "look at one" when spoken to, and brightened up when provided with visual, auditory and/or tactile experiences (*id.*). The report noted that the student was able to regain composure upon positioning over a ride-on toy when auditory and tactile cues were presented, such as singing in a dynamic fashion and soothing touch (*id.*). The report described the student as being able to reach for toys and briefly manipulate them, follow objects in horizontal and vertical planes, respond to a variety of sounds, tolerate deep pressure touch, respond to different light intensities, and vocalize more than one type of sound (*id.*). As to forming relationships, attachments and engagement, the student displayed a positive loving affect toward his primary caregiver as well as other caregivers whereby he looked or smiled spontaneously and responded to their vocal expressions, voices, or touch with signs of pleasure such as smiling and relaxing (*id.*). The report indicated the student's motor abilities reflected interest in the world in that he tended to ready his body for lifting while being picked up, grasp objects voluntarily, look toward sound, enjoy "roughhouse type play," vocalize to caregiver's sounds, look and scan for objects, with support look toward an object that goes out of visual range, and with support play with toys and focus or attend for 30 or more seconds (*id.* at p. 2). Regarding two-way purposeful communication, the OT report indicated that the student was able to interact with intent, reciprocity, and cause-effect as evidenced with support, by his ability to initiate signals, and by his ability to respond purposefully to another person's signals (*id.*). The student was able to use multiple sensory modalities, the motor system, and a range of emotions whereby he could focus on a caregiver or toy for a least one minute, engage in cause-effect playing, pull on a part of an object or get the object closer, and discriminate between different people as evidenced by different responses (*id.*). The report noted that the student's OT consisted of a multisensory approach, and gains were slowly emerging, and expected to continuously develop (*id.* at p. 3).

Testimony by the clinical director of Ezra Hatzvy who is also an occupational therapist on staff at the school indicated that the student demonstrated improvement in his motor planning and orientation (Tr. pp. 34, 48). According to the clinical director, prior to the 2010-11 school year, the student was "predominantly dormant" and a "prisoner in his body," the student was unable to find doors or open a door, and he was unable to get up off a surface where his feet were not touching the ground without physical and verbal prompts (Tr. p. 49). However, the clinical director indicated that during the 2010-11 school year, the student showed "significant" growth by independently generalizing skills (*id.*).

A March 22, 2011 PT progress report written by the student's physical therapist from Ezra Hatzvy indicated that at the time of the report, the student received five individual PT sessions per week (Parent Ex. G at p. 1). The PT report indicated that the student demonstrated a large delay in his locomotion skills and object manipulation skills; he walked in a rigid gate and had no heel-to-toe pattern and no coordinated arm swing; running and jumping abilities were significantly delayed; and he demonstrated impaired coordination and poor dynamic and static balance (id.). PT addressed the student's gross motor strengthening and gait and balance training, so that the student was safe in school, home, and play environments (id.). The PT report indicated that the student had a fair amount of endurance although he looked very weak (id.). Specifically, the student was able to squat down and get up from the floor in good form; he could walk on the treadmill at a speed of 1.2 mph for up to 10 minutes as compared to 0.5 mph for five minutes at the beginning of the school year; he could do all bed and floor transfers independently; he could go up and down steps independently and with alternating feet when verbally instructed; and he displayed "significant improvement" in his muscle tone, particularly in the trunk muscles (id. at pp. 1-2). The PT progress report indicated that the student made progress in his ability to move around classrooms, toilets, lobbies, and in his home environment without losing balance or tripping (id.). At the time of the PT progress report, the student was able to walk on a balance beam with 50 percent accuracy if prompted verbally and held lightly, and he could walk around an obstacle course without losing balance 60 percent of the time (id. at p. 2). The student's physical therapist recommended continuing PT five times per week, as the student displayed significant progress with therapy during the 2010-11 school year and had the potential to develop in the gross and fine motor areas close to an age-appropriate level (id.).

A March 20, 2011 speech-language progress report written by the student's speech-language pathologist provider from Ezra Hatzvy indicated that at the time of the report, the student received individual speech-language therapy five times per week for sixty minutes (Parent Ex. F at p. 1). The speech-language progress report indicated that the student made "significant progress" (id.). The speech-language report reflected that the student recognized several two-dimensional pictures and showed recognition of people by their voices, and he produced differentiated vowel sounds for different situations (id. at pp. 1-2). In addition, the student was noted to occasionally count; however, he had a "very hard time" imitating sounds and words and the speech-language pathologist used aspects of specific programs and techniques to train sound awareness through motor movements to help the student imitate sounds (id.). The report described the student as often demonstrating a response lag to stimuli (id. at p. 1). The student was beginning to use an augmentative communication device, whereby he was learning to touch the picture of a desired item when presented with a choice (id. at pp. 1-2). In regard to feeding, the report indicated the student was starting to self-feed more with guided assistance of bringing his hand to his mouth, although he preferred not to do so; he was more consistently able to bite on his molars when presented with strips of cookies or a particular snack food, although the student preferred soft foods that did not require chewing; and he was able to drink through a straw (id.). The student's oral sensitivity was becoming more integrated (id. at p. 1). The report indicated that the student showed "distinct pleasure" for high drama with voice and songs, and was highly responsive to interactive games with gross physical movements (id.). Efforts to stop the student from sucking on his hand were met with "significant progress" when provided with a prompt of "hands down" (id.). Overall, the student was able to demonstrate likes through smiling and interaction or trying to have the items presented again (id.). He demonstrated

displeasure through resistance or slight whining (*id.*). The speech-language pathologist recommended continuation of the student's speech-language therapy, and that such therapy should be provided over 12 months in order to maintain the student's skills and prevent regression (*id.*).

The hearing record also reflects that the student's related service providers communicated regularly with his teachers, with "face-to-face" communication occurring at least weekly to address the student's progress and needs for carryover in the classroom (Tr. p. 82). The co-teacher of the student's class testified that she, the other co-teacher, and related service providers communicated with the parents and the home-based providers or therapists via a communication book that went "back and forth" between school and home every day (Tr. pp. 81-82, 98-99). Accordingly, upon review of the hearing record, I find that the student's OT, PT and speech language needs were appropriately addressed for the 2010-11 school year at Ezra Hatzvy.⁸

Regarding the provision of the 1:1 paraprofessional to the student at the private school, I find that the hearing record supports a finding that the student needed the 1:1 support provided by the paraprofessional due to his significant global needs and further, it is not disputed by the district that the student needed a full-time 1:1 paraprofessional inasmuch as one was recommended for the student in the August 2010 IEP (*see* Parent Exs. B at pp. 20, 22; D at p. 1; E at p. 1; F at p. 1).

I further note that in addition to the progress noted in the aforementioned reports, according to the student's co-teacher, the student made progress in his ability to attend to staff in the presence of environmental distractions; in his ability to participate in the self-help activities of independently carrying his bag to his desk or cubby and emptying it; in his ability to get undressed by himself; in his ability to more quickly identify and discriminate objects; in his ability to navigate around the classroom even in the presence of distraction; and despite continuing difficulty, he made progress regarding colors (Tr. pp. 76-79, 86-89). The co-teacher indicated that the student also improved his ability to use his communication device with little or no prompting in certain contexts (Tr. p. 90). In addition, the student was able to shake his head yes or no with prompting to indicate his response to desired versus nondesired objects (*id.*).

Accordingly, after consideration of the totality of the circumstances, I find that the related services of OT, PT and speech-language therapy in conjunction with a 1:1 paraprofessional provided at Ezra Hatzvy, as well as the home-based related services of OT, speech-language therapy, and vision therapy were reasonably calculated to enable the student to receive educational benefits (*Gagliardo*, 489 F.3d at 112; *Frank G.*, 459 F.3d at 364-65).

Remaining Related Services in School

In their cross-appeal, the parents assert that the impartial hearing officer erred in denying reimbursement for the following services provided at Ezra Hatzvy: feeding therapy,

⁸ Regarding the student's need for vision therapy, I note that although the student did not receive such services at Ezra Hatzvy, the parent obtained the services of an outside private provider to address the student's needs in this area, as discussed above. Moreover, the district does not appeal the impartial hearing officer's finding that the vision therapy obtained for the student by the parent was appropriate (*see* IHO Decision at p. 26).

augmentative assistive technology, behavioral academic instruction, and aquatic therapy. In addition, the parents assert that the impartial hearing officer erred in denying reimbursement for the following home-based services: the SEIT, music therapy, and speech-language therapy by the private outside provider.

Feeding Therapy

The tuition contract for Ezra Hatzvy⁹ indicated that for the 2010-11 school year, the student would receive two 30-minute feeding therapy sessions per week (Parent Ex. S at p. 1). The contract also indicated that the student would receive "speech pathology" services five times per week for 60 minutes per session (id.). A related service attendance record for feeding therapy indicated that the therapy occurred as a "speech" service at Ezra Hatzvy (Parent Ex. X at p. 3). As previously indicated herein, review of the aforementioned March 2011 speech-language progress report indicated that the student's self-feeding and oral motor needs were addressed during therapy sessions with progress noted, but the report did not reference the additional feeding therapy sessions (see Parent Ex. F at pp. 1-2). Upon review of the hearing record, I find that the student's needs in this area were addressed by his speech-language related service provider during the school day and separate feeding therapy sessions appear to be excessive. Therefore, I will not award reimbursement for feeding therapy services at Ezra Hatzvy.

Augmentative Assistive Technology

The tuition contract for Ezra Hatzvy indicated that for the 2010-11 school year, the student would receive an augmentative assistive technology evaluation for one to three hours,¹⁰ and "2x30," which apparently means two 30-minute assistive technology sessions per month (Parent Ex. S at p. 1). The hearing record does not expand upon what the two 30-minute sessions per month entailed. I note that the same March 2011 speech-language progress report discussed above indicated that the student had started to use his augmentative and alternative communication device ("AAC" device), and was described as beginning to touch the picture of a desired item on the AAC device when given a choice (Parent Ex. F at p. 1). The report further notes that the student did not verbally label any items, but that "an AAC device" was being used to see if the student could use the device to make requests (id. at p. 2). Testimony by the clinical director and one of the student's teachers reflects that the student used an augmentative communication device in school (Tr. pp. 51-52, 72, 85-86, 90-91); however, there is no information regarding the two 30-minute sessions per month of assistive technology the student was supposed to receive and that the parents apparently seek reimbursement for. In light of the above discussion regarding augmentative communication, I find that the student's needs in this area were addressed by his speech-language related service provider during the school day; therefore, additional assistive technology sessions were not necessary. Moreover, the hearing record lacks sufficient information as to what the sessions entailed.

⁹ The contract is not dated (see Parent Ex. S).

¹⁰ The parents do not seek reimbursement for any evaluations in their due process complaint notice or in their cross-appeal (see Parent Ex. A).

Behavioral Academic Instruction

The tuition contract for Ezra Hatzvy indicated that for the 2010-11 school year, the student would receive 20 hours of instruction per week of "[b]ehavioral [a]cademic [i]nstruction" (Parent Ex. S at p. 1). Although the hearing record reflects that Ezra Hatzvy uses the ABLLS to develop programs that utilize applied behavior analysis (ABA) for its students, it contains no information about the provision of additional "[b]ehavioral [a]cademic [i]nstruction" (see Tr. p. 58-59). Testimony by the co-teacher who provided the student with two to three hours per day of academic and socialization skills instruction using ABA and floortime methodologies indicates that by the time she became the student's teacher in February 2011, the student had an ABA book with established goals and that the co-teacher conducted her own assessments and modified the student's goals as necessary (Tr. pp. 70-71, 73-76). Upon review, I find that the hearing record does not clearly indicate whether the 20 hours of behavioral academic instruction per week referenced in the tuition contract were part of the instruction provided to the student as part of the special education program at the school or if it constituted an additional service.

Aquatic Therapy

The hearing record indicates that aquatic therapy or swimming occurred as a weekly activity at Ezra Hatzvy, but offers no information as to why the student required this as an additional service (Tr. pp. 53, 80). Furthermore, an attendance sheet for OT indicated that aquatic therapy occurred as an OT service (Parent Ex. X at p. 2). However, the hearing record offers no explanation of what the aquatic therapy entailed, how it addressed the student's special education needs or provided him with educational benefits, and in particular why this therapy was needed in addition to the OT provided to the student.

Home-Based Services

SEIT

While the hearing record reflects that a SEIT worked with the student in the home for five hours per week, the SEIT did not have any direct communication with the student's school, did not keep any progress reports or written records of his work with the student and, as described above, worked on the goals that were derived from those he had worked on when he started working with the student four years previously (Tr. pp. 126-28, 130, 132-33). Accordingly, I find that the hearing record lacks evidence to support a finding that the SEIT services were required in order for the student to receive educational benefits.

Music Therapy and Speech-Language Services from Private Provider

Regarding the home-based music therapy services and the speech-language services from the private outside provider, the hearing record does not reflect that the student required services beyond what he received at Ezra Hatzvy and by the home-based PT, speech-language therapy, and vision therapy service providers. Regarding the music therapy, although the hearing record shows that the student may benefit from the music therapy (see Tr. pp. 225-32), it does not show that the student required it to receive educational benefits during the 2010-11 school year.

Regarding the additional speech-language services, the hearing record shows that the student visited an outside provider in his office two times per week for between 30 to 90 minute sessions (Tr. pp. 260-61). As relevant to this appeal, the services were provided from July until October 2010 (Tr. p. 262). While the hearing record shows that the private outside provider worked on oral motor issues and expressive language (see Tr. pp. 263-64), it does not, however, show that the student required the services from the private outside provider to receive educational benefits. After review of the hearing record, I find that the student's speech-language needs were appropriately met by the provider at Ezra Hatzvy and the home-based speech-language provider.

Relief

As discussed above, I find that the evidence in the hearing record does not establish that the student required aquatic therapy, feeding therapy, behavioral academic instruction, and augmentative assistive technology service as additional related services provided by the student's private school during the 10-month 2010-11 school year in order to receive educational benefits. In addition, regarding the home-based services, I find that the evidence in the hearing record does not establish that the student required the additional speech services provided by the private outside provider, the music therapy services, SEIT services, or the 1:1 paraprofessional that attended the mainstream summer camp in order for the student to receive educational benefits. School districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 [2d Cir.2003]; Walczak, 142 F.3d at 132). While I can understand that the parents may believe these services were desirable for their son, it does not follow that the district must be made responsible for all of them. The IDEA 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]).

Accordingly, I find that the hearing record lacks evidence that the student required the services noted above. The hearing record further reflects that the student's significant needs in the areas of speech-language, OT, PT, and vision were appropriately addressed during the school day through an appropriate educational program with the addition of home-based services. Therefore, the relief awarded should reflect that the parents acquired sufficient appropriate services when all of the services are viewed in totality, but that the district is only required to pay for expenses to address the student's needs that it would have borne in the first instance had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; C.B., 635 F.3d at 1160).

Conclusion

Having found that the unilateral placement of the student at Ezra Hatzvy and the private home-based educational services obtained by the parents were appropriate for the student and required to the extent indicated, and that further equitable considerations are not at issue, the necessary inquiry is at an end and I find no reason to disturb the impartial hearing officer's decision (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 DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

**Dated: Albany, New York
February 22, 2012**



**JUSTYN P. BATES
STATE REVIEW OFFICER**