



The University of the State of New York

The State Education Department State Review Officer

No. 08-013

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

The Law Offices of Steven L. Goldstein, attorney for petitioner, Steven Goldstein, Esq., of counsel

Hon. Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily Goldman, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the parent did not meet the equitable considerations for tuition reimbursement to the Aaron School for the 2007-08 school year. Respondent (the district) cross-appeals from that portion of the impartial hearing officer's decision that found that the parent's unilateral placement of the student at the Aaron School for the 2007-08 school year was appropriate. The appeal is dismissed. The cross-appeal is sustained in part.

At the commencement of the impartial hearing in December 2007, the student was attending the Aaron School (Tr. pp. 82-83). The Aaron School is not 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 classification and eligibility for special education services as a student with an other health impairment (OHI) are not in dispute in this appeal (Tr. p. 46; see 8 NYCRR 200.1[zz][10]).

In June 2004, when he was 21 months old, the student was evaluated by a pediatric neurologist who reported normal development in all areas with evidence of "behaviors of a mild to moderate attention deficit hyperactivity disorder" (Parent Ex. Y at p. 3). Play therapy was reported to have been beneficial and psychopharmacology was not indicated at that time (id.).

A social history update completed on July 12, 2006 noted that the student had been attending the Therapeutic Nursery at the Child Development Center (CDC) since September 2005, and that he had been placed there to address concerns regarding hyperactivity, impulsivity, inattention and poor frustration tolerance (Parent Ex. X). The student was described as a "curious, enthusiastic" child who had developed "warm relationships" with students and teachers (id.). He was also described as a "very social child" who "eagerly seeks out playmates" (id.). The social history noted that the student's social skills were particularly apparent when he had the opportunity to interact with typically developing peers (id.).

The district's Committee on Preschool Special Education (CPSE) convened on December 19, 2006 (Parent Ex. S). The CPSE determined that the student should be classified as a preschool student with a disability and recommended placement in a special class at CDC with related services (id. at p. 1). The academic performance and learning characteristics portion of the resultant individualized education program (IEP) stated that the student presented with significant attention and regulatory difficulties as well as delays in his speech-language and play skills, which interfered with all educational tasks (id. at p. 3). The December 2006 IEP further noted that the student had a "strong memory for information and strong vocabulary," participated in discussions, and made connections between ideas being discussed (id. at p. 4). The student reportedly appeared to have some word retrieval difficulties and at times became frustrated by his inability to express ideas (id.). The December 2006 IEP stated that the student enjoyed playing with peers but often needed help initiating and maintaining play (id.). He was described as "easily redirected when behaving inappropriately" however, he needed reminders to attend (id. at p. 5).

In the area of social emotional performance, the December 2006 IEP indicated that based on a report from the student's then current school, the student demonstrated significant regulatory, attentional, emotional, and pragmatic weaknesses that interfered with his learning and that his behavior seriously interfered with instruction and required additional adult support (Parent Ex. S at p. 6). The December 2006 IEP also noted that in the physical domain, the student exhibited strengths that included a low center of gravity, as well as running, jumping, and stair climbing abilities (id. at p. 9). He also demonstrated weaknesses including an "in-toe gait" and high muscle tone of the hip-rotator muscles, which affected his hopping and catching abilities and resulted in "w-sitting" (id.).

The CPSE recommended an 8:1+2 special class and special education itinerant teacher (SEIT) services for five periods each week (Parent Ex. S at p. 25). General education and integrated settings were considered and rejected by the CPSE because of the student's regulatory, attentional, and emotional difficulties; speech, fine motor, and gross motor delays; and need for a highly structured small setting to address his intense management needs and social anxiety (id. at p. 26). The CPSE also recommended related services of two 30-minute pull-out sessions of individual speech-language therapy weekly, two 30-minute and two 45-minute pull-out sessions of individual occupational therapy (OT) weekly, one 30-minute pull-out session of individual physical therapy (PT) weekly, and two 30-minute pull-out sessions of individual counseling weekly (id. at p. 27).

On April 19, 2007, the district's school psychologist conducted an observation of the student at CDC (Dist. Ex. 3 at p. 1). She reported that the student's classroom teacher stated that the student exhibited poor body awareness and sense of safety and that he frequently engaged in

dangerous behavior during gross motor play (id.). The psychologist also reported that according to the student's teacher, when the student was in situations with loud noise and a lot of movement, he would seek out small enclosed spaces such as hiding under his chair (id. at pp. 2-3). The student was observed during morning activities that included dancing to music, choosing a job for the day, picking out names for the class pets, and "circle time" (id. at p. 3). The psychologist reported that the student selected "dramatic play at the pet store" as a free play activity (id.). The student required guidance from the teacher to engage in social play with another child and although he responded to the teacher's instructions and engaged in conversation with her, he did not do so with the other children (id.). The student transitioned well to the second circle time, but as the other children were singing he left the group and went to the library corner and sat with a book (id.). The psychologist reported that during an outdoor activity she observed the student following and playing with other children, making eye contact with them, and taking cues from them for the next action (id.). The psychologist opined that although the student demonstrated superior cognitive abilities, his significant language deficits and inability to sustain attention influenced his ability to "function adequately," and he continued to need speech-language therapy, PT and OT (id. at pp. 3-4). She also recommended that the student's "reduced sense of safety" be addressed (id. at p. 4).

An education update dated May 1, 2007 indicated that since the student's enrollment at CDC in January 2007, he had been on several trials of medication to address regulatory and attentional deficits and that his classroom performance had varied with these medications (Parent Ex. U at p. 1)¹. The student had reportedly made progress but continued to need "intensive adult support" in order to participate fully in classroom activities (id.). The student was able to participate in group activities when he was focused, but he frequently demonstrated difficulty attending, and at those times was unable to employ the pre-academic skills he had learned, and would run around, scream, or throw objects (id.). The report stated that the frequency and intensity of those episodes had diminished with medication, but that the student continued to require support to remain calm (id.).

Cognitively, the student was able to recognize his name, label common shapes and colors, and count with one-to-one correspondence (Parent Ex. U at p. 1). Socially, he demonstrated interest in his peers, but required adult prompting to initiate play and to play cooperatively (id.). Receptively, the student was able to follow three-step commands (id. at p. 2). Regarding the student's expressive language, he was able to use sentences of up to five words to communicate his basic needs, but his language was vague and unspecific, suggesting possible word-finding difficulties (id.). The student's responses to questions and greetings from others were inconsistent and he sometimes required adult prompts to engage in reciprocal conversation (id.).

A psychological update of the student was completed on May 1, 2007 (Parent Ex. W). The evaluator noted that he had previously assessed the student in December 2006, at which time evaluation results revealed "very superior nonverbal intelligence and high average verbal intelligence despite language and processing deficits" (id. at p. 1). The evaluator also noted that the student had benefitted from the structure of a 1:1 setting (id.). He reported that the student's attention had improved, but was still variable and that the student became more inattentive as tasks

¹ At the time of the education update, the student was taking a stimulant medication, which reportedly successfully regulated his activity levels (Dist. Ex. 3 at p. 3). The student was taking this same stimulant medication via a patch when he attended the Aaron School (Tr. pp. 224, 292-93).

became increasingly challenging but could be re-directed to the task (id.). The evaluator described the student's speech as "somewhat more spontaneous and fluent" but still evidencing difficulties with pragmatic language (id. at p. 2). Administration of the Clinical Evaluation of Language Fundamentals – Preschool 2 (CELF-2) yielded an expressive language scaled score of 89 (23rd percentile) (id. at p. 3). The evaluator opined that the student's deficits in attention and self-regulation required continued placement in a "small, structured therapeutic school," and he recommended that the student receive a 12-month program (id. at pp. 2-3). The evaluator further opined that reduction of this recommended level of services "would likely lead to a significant regression" (id. at p. 3).

An OT progress report dated May 2, 2007 indicated that the student received OT twice weekly for 30-minute sessions (Parent Ex. V at p. 1). The student's OT goals were to enhance sensory processing/modulation responses to improve self-regulation, organization, attention, quality of movement and organized adaptive responses; to improve fine motor, visual, eye-hand and grapho-motor proficiency; and to increase body awareness, bilateral integration, balance/coordination and motor planning skills (id.). The occupational therapist reported that the student's need for constant sensory input had been reduced since medication trials had been started with him (id.). She reported that the student benefitted strongly from deep touch and proprioceptive input, and had learned to remove himself to a quiet space when classroom activities became too stimulating (id. at p. 2). The therapist also reported that the student's writing skills were affected by low muscle tone in his trunk and upper body and by weakness in hands and fingers but, he had recently taken an interest in grapho-motor activities and improvement was noted (id.). The student's body awareness, bilateral integration, balance and coordination, and motor planning skills had also reportedly improved because of the improvement in self-regulation; however, when he was fatigued or stressed, his postural control and planning abilities diminished (id.). The occupational therapist recommended continuation of OT services at the current level (id.).

The student's speech-language pathologist at CDC completed a progress report on May 7, 2007 stating that the student's attention and in-seat behavior had increased over the past "few months" (Parent Ex. Z at p. 1). She reported that the student was able to attend to familiar structured activities for a longer period of time and was able to play with a variety of toys and materials, but he required models from the therapist to talk and to play with materials more slowly (id.). She also reported that receptively the student had difficulty processing language, particularly in the presence of increased background noise, but that when he was focused and calm he followed simple commands and some complex commands (id.). Expressively, the student exhibited delays in language formulation and syntactical development (id.). He was able to communicate in sentences, participate in dialogues, use social greetings, initiate dialogue, make requests, and ask and answer questions (id.). The student required verbal models to help organize his thoughts and exhibited difficulty with word retrieval and topic maintenance (id.). The speech-language pathologist recommended that the student continue to receive speech-language therapy two times per week in 30-minute sessions and indicated that he would benefit from both individual and group sessions (id. at p. 2).

The district's Committee on Special Education (CSE) convened on May 9, 2007 to generate an IEP for the 2007-08 school year (Parent Ex. Q). The CSE determined that the student should be classified as a student with an OHI (id. at p. 1). The student's SEIT and his head teacher from

CDC were in attendance (id. at p. 2). The CSE recommended a 10-month placement in a 12:1+1 special education class in a community school and related services of individual PT once per week for 30 minutes, OT for 30 minutes once per week individually and once per week in a small group, speech-language therapy for 30 minutes once per week individually and once per week in a small group, and counseling once per week for 30 minutes individually and once per week in a small group (id. at pp. 1, 2). The IEP developed at the May 9, 2007 meeting noted that the student had previously been placed in a general education pre-kindergarten program with a SEIT, but had experienced difficulty in that class and was returned to a special class setting (id. at p. 24). The IEP also noted that placement in a special class in a specialized school would be too restrictive for the student because his high cognitive abilities required the challenges of higher functioning peer models (id.).

CSE meeting notes taken by the parent indicated that the district's school psychologist reviewed her classroom observation of the student and noted a marked difference between the student's social behaviors in the classroom, where he was very withdrawn, and on the playground, where he interacted and participated with other children, openly engaged in cooperative play, and appeared to enjoy his time with other children (Parent Ex. R at p. 1). The meeting notes also indicated that student's head teacher from CDC commented on the student's episodes of dangerous behavior, for which he required constant monitoring (id. at pp. 1-2). A Child Outcomes Summary Form was distributed and discussed at the May 2007 IEP meeting in relation to the student's progress in preschool (id. at p. 1).

A Final Notice of Recommendation (FNR) dated May 23, 2007 was mailed to the parent offering placement in a 12:1+1 special class at one of the district's public elementary schools (Parent Ex. M).

By facsimile dated May 29, 2007, the parent requested learning profiles of the students in the class that the district proposed for her son, information regarding the proposed teacher's credentials, and an appointment to visit the class (Parent Ex. N at p. 2). The parent did not receive a response from the district to her May 29, 2007 request for additional information about the proposed placement (Tr. pp. 269-72).

On June 12, 2007, the parent, accompanied by the student's social worker from CDC, visited the placement proposed by the district (Parent Ex. P). Based on observation and discussion with staff at the school, the parent determined and informed the parent coordinator and principal that the recommended placement was not appropriate for her son (id. at pp. 3-4).

The parent subsequently sent two additional requests to the district's parent coordinator on July 2, 2007 and August 10, 2007 requesting additional information about the learning profiles of other students in her son's proposed class and the credentials of the teaching staff (Tr. pp. 269-71; Parent Exs. K; L). The parent spoke with the district's parent coordinator via telephone in August 2007, at which time she was informed that the parent coordinator had no additional information to provide to the parent regarding her son's recommended 12:1+1 placement at the district's school (Tr. pp. 271-72).

The parent sent a letter dated August 17, 2007 to the district informing them of her belief that the district did not offer her son a free appropriate public education (FAPE) for the 2007-08

school year on both procedural and substantive grounds (Parent Ex. B). The parent further informed the district of her unilateral placement of her son in the Aaron School for the 2007-08 school year (id.). The parent requested that the district provide her with related service authorization (RSA) letters to allow her son to receive his related services as set forth in his 2007-08 IEP (id.). Additionally, the parent requested that the district provide her son with roundtrip transportation between his home and the Aaron School commencing upon the start of the 2007-08 school year (id.).

By due process complaint notice dated September 4, 2007, the parent requested an impartial hearing asserting that the district failed to offer her son a FAPE for the 2007-08 school year (Parent Exs. A at p. 1; F). On or about September 18, 2007, the parent was contacted and advised of the district's interest in a settlement of the matter (Parent Ex. A at p. 2). On October 15, 2007, the original impartial hearing request was withdrawn without prejudice (Parent Ex. H).

Settlement was not effectuated and the parent filed a due process complaint notice on October 25, 2007 requesting an impartial hearing seeking reimbursement for tuition at the Aaron School and related services (Parent Ex. E). The parent filed a revised due process complaint notice on November 1, 2007 (Parent Ex. A).² The parent asserts in the due process complaint notice that the student's 2007-08 IEP is inappropriate to address the student's individual needs; the program and placements recommended by the district are inappropriate; the student's placement at the Aaron School is appropriate based upon the district's failure to offer the student a FAPE; and that the parent's unilateral placement of the student and claim for tuition reimbursement are supported by equitable considerations (id. at p. 2).

By response dated October 26, 2007, the district replied to the parent's due process complaint notice (Parent Ex. D). The district's response consisted of a checklist indicating the student's classification, the CSE's recommended educational programs, decision-making materials referenced, rejected programs, and the final recommendation at one of the district's schools for the 2007-08 school year (id.).

The parent filed a motion through her attorney dated November 27, 2007 requesting that the impartial hearing officer issue an order limiting the district's ability to assert that it offered the student a FAPE for the 2007-08 school year; challenging the parental placement at the Aaron School; and asserting that equitable considerations do not favor the parent because the district's response did not adequately respond to the parent's due process complaint notice (Parent Ex. C at p. 3). In the alternative, the parent requested that the impartial hearing officer deem as true the allegations set forth in her due process complaint notice; or clarify that the district now bears the burden of production and persuasion regarding the appropriateness of its program and/or placement recommendations; and/or establish that regardless of which party bears the burden of persuasion regarding programs or placements, that the district bears the burden of production and therefore must present its witnesses and evidence first (id.).

² The parent's revised due process complaint notice dated November 1, 2007 corrected a typographical error contained in the initial due process complaint notice and was otherwise identical to the initial due process complaint notice filed on October 25, 2007 (compare Parent Ex. E, with Parent Ex. A).

The impartial hearing officer held a telephone conference call with both parties (IHO Decision at p. 2).³ During the conference call, the impartial hearing officer declined to address either the parent's motion or the district's opposition papers and directed the parties to proceed to hearing (*id.*).⁴

The impartial hearing concluded on January 9, 2008 after two days of testimony. During the impartial hearing, the district conceded that it did not provide the student with a FAPE for the 2007-08 school year (Tr. pp. 158-59; IHO Decision at p. 2). By decision dated February 1, 2008 the impartial hearing officer determined that: 1) that the district did not provide the student with a FAPE; 2) the parent met her burden in proving that the Aaron School was appropriate for her son; and 3) the parent did not consult openly with the CSE and in good faith by neglecting to inform the CSE in a timely manner of the application process and contract with the Aaron School until mid-August 2007 and therefore, the equities barred an award of tuition reimbursement (IHO Decision at pp. 8-9). The impartial hearing officer ordered the district to provide the related service of OT at a rate of two times per week for 45-minute sessions on a 1:1 basis and to provide transportation services for the student (*id.* at p. 10).

The parent appeals and asserts that the impartial hearing officer erroneously denied her claim for tuition reimbursement for her son's placement at the Aaron School for the 2007-08 school year. In particular, the parent asserts that the impartial hearing officer improperly refused to consider her application alleging that the district failed to properly respond to her due process complaint notice.⁵ The parent further contends that regardless of whether the district's response was proper, the impartial hearing officer's finding that the equitable considerations for tuition reimbursement for the 2007-08 school year were not in the parent's favor is in error as a matter of law.

The district cross-appeals and asserts that the impartial hearing officer incorrectly found that the parent met her burden in proving that the Aaron School was an appropriate placement for the student. The district requests that the remaining portions of the impartial hearing officer's decision be upheld.

The parent responded to the district's cross-appeal and raised the following affirmative defenses: 1) the district's memorandum of law in the cross-petition does not contain a table of contents, as required by 8 NYCRR 279.8(a)(6) and should not be considered; 2) the district did not raise any assertions and/or challenges regarding the provision of OT or PT for the student

³ It is noted that the impartial hearing officer includes a reference to the district filing opposition papers to the parent's motion (IHO Decision at p. 2). However, the district's opposition papers were not included as part of the hearing record.

⁴ The impartial hearing officer subsequently noted that since the district conceded the first prong of the Burlington test, the quality and timeliness of the district's answer "did not factor into the decision" (IHO Decision at p. 2).

⁵ The hearing record does not reflect that the district sent a prior written notice to the parent regarding the subject matter in the parent's due process complaint notice (see 8 NYCRR 200.5 [a], [i][4]; 34 C.F.R. §§ 300.503, 300.508[e]). In the event that the district does not provide a prior written notice to the parent, then the district's response, as in the current case, is required to contain the information set forth in 8 NYCRR 200.5[i][4] (see 34 C.F.R. 300.508[e]; 20 U.S.C. § 1415[c][2][B][i]).

during the impartial hearing, and therefore such assertions may not be raised for the first time on appeal; 3) the district did not introduce testimony or evidence during the impartial hearing asserting that the provision of additional OT, PT and/or counseling to the student outside of the Aaron School rendered it to be an inappropriate placement and may not do so for the first time on appeal; 4) the district did not introduce evidence during the impartial hearing as to how the student's 2007-08 IEP would be appropriate for him and therefore it cannot rely on the 2007-08 IEP to argue against the appropriateness of the Aaron School; and 5) the impartial hearing officer properly determined that the Aaron School constituted an appropriate placement for the student and therefore the district's cross-appeal must be dismissed in its entirety.

Preliminarily, I address a procedural issue raised by the parent in her answer to the district's cross-appeal. The parent requests that I reject the district's memorandum of law filed in support of the district's cross-petition because it lacks a table of contents. The State regulations provide that a memorandum of law shall include a table of contents (8 NYCRR 279.9 [8][a][6]), and specifically states that documents that fail to comply with these requirements may be rejected in the sole discretion of a State Review Officer (8 NYCRR 279.8[a]; Application of a Child with a Disability, Appeal No. 06-065; Application of the Bd. of Educ., Appeal No. 04-080). While the district's memorandum of law does not contain a table of contents, in the exercise of my discretion, I decline the parent's request to reject the district's memorandum of law; however, I remind the district to ensure compliance with Part 279 of the State regulations in the future.

I further address a second procedural issue. The parent asserts that the district's response to her due process complaint notice was inadequate. I find that the parent's argument has merit. A review of both pleadings reveals that the district's response did not contain the required descriptions and explanations related to the subject matter contained in the due process complaint (see 20 U.S.C. § 1415(c)(2)(B)(i)(I); 8 NYCRR 200.5[i][4]; 34 C.F.R. § 300.508[e]). However, although the district's response was procedurally inadequate, the parent did not demonstrate substantive harm caused by the procedural violation. Therefore, the requested relief is not granted (see Jalloh ex rel. R.H. v. District of Columbia, 535 F. Supp. 2d 13, 20 [D.D.C. 2008]).

As noted above, the district conceded that it failed to offer the student a FAPE for the 2007-08 school year (Tr. pp. 158-59; IHO Decision at p. 2). Therefore, that issue is not before me on appeal. Furthermore, the impartial hearing officer's orders that the student's OT related service increase from two times per week for 30-minute sessions to two times per week for 45-minute sessions in a 1:1 setting and that the district provide transportation services for the student (IHO Decision at p. 10) have not been appealed by the district. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.510[a]; 8 NYCRR 200.5[k]). Consequently, these parts of the decision are final and binding (Application of the Dep't of Educ., Appeal No. 08-025; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

What remains at issue in this appeal is the appropriateness of the parent's unilateral placement at the Aaron School for the 2007-08 school year, and the equity considerations for tuition reimbursement.

A central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

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 (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]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). 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 (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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).

New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007 and therefore applies to the present case.

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; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). 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. 08-016; 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). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). In addition, 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 also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate to meet a student's unique special education needs (Gagliardo, 489 F.3d at 115).

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 also Frank G., 459 F.3d at 364-65).

Turning to the question of the appropriateness of the parent's unilateral placement of the student at the Aaron School, after carefully reviewing the entire hearing record, I find that the impartial hearing officer incorrectly determined that the Aaron School was appropriate to meet the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192; Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121-22 [2d Cir. 1997]; Application of the Bd. of Educ., Appeal No. 05-081).

Although the hearing record provides general information about the Aaron School, it contains insufficient information regarding the educational services provided to the student or how the educational services at the Aaron School met the student's identified special education needs.

According to the hearing record, the Aaron School has an enrollment of approximately 114 children (Tr. p. 182). The student's classroom teacher testified that some of the students have speech and language processing deficits, attention deficit disorders, behavior difficulties consistent with attention deficit disorders, and autism (Tr. p. 176). Some of the students who are medically fragile or have physical disabilities have OHI classifications (id.).

For the 2007-08 school year, the student is in a class with a total of ten children, staffed by the teacher and an assistant (Tr. p. 177). A student teacher is in the classroom three days per week (id.). The classroom is joined with a second class of students by a set of double doors that remain open throughout the day except during reading and math instruction (Tr. p. 199). The student's teacher testified that the students in her class have the same needs exhibited by the students in the rest of the school, including speech-language and auditory processing deficits, and difficulties with self-regulation resulting in impulsive behavior (Tr. p. 183). Some students in the class are high-functioning children on the autism spectrum and one child has medical needs requiring the assistance of a nurse at mealtime (id.). There are seven boys and three girls in the student's class, all of whom are classified as eligible for special education services (Tr. pp. 183, 184). The student's teacher testified that, based upon an assessment conducted at the Aaron School, the student in this case "falls probably on the higher end of...the cognitive spectrum for the kids in the classroom" (Tr. p. 186).

The student's teacher testified that the Aaron School employs academic curriculum programs designed for the general education population and modifies the programs to meet the needs of each student (Tr. pp. 178-79). The teacher testified that the Stern Structural Arithmetic and the Saxon programs are used for math instruction (Tr. p. 179). The primary reading curriculum used is the Wilson program, which is an Orton-Gillingham based multi-sensory approach to reading instruction (id.). The Bank Street Reader series was used to teach sight vocabulary, and the Wilson Program was enhanced with another multisensory program called Sounds and Motion (id.).

When asked to describe the modifications used in the classroom, the student's teacher testified that students were placed in small groups of three to six students for reading and math (Tr. pp. 186-87). She indicated that the classroom environment was "very structured" and "very routine" and noted that the classroom was "designed to operate in a multisensory way" (id.). Pictorial aids were used for students who were identified as visual learners (id.). An occupational therapist who was a member of the classroom team was available to make any modifications necessary to assist students who needed additional sensory input (id.). A speech-language therapist who was part of the classroom team conducted a weekly social skills class for the entire class (Tr. pp. 191-92). Speech-language and OT were provided on either a push-in or pull-out basis, depending on specific need, and the school has a sensory gym that was also used for OT (Tr. pp. 218, 222). The student receives OT and speech-language therapy at the Aaron school, but does not receive PT or counseling at school (Tr. pp. 190, 219).

The student's speech-language therapy plan notes that the student receives speech-language therapy once per week individually for 30 minutes and once per week for 30 minutes with another student, and also participates in the 30-minute weekly social skills group within the classroom (Parent Ex. GG at p. 18). The student's goals for the 2007-08 school year included improvement in ability to formulate narratives, increased auditory processing skills, improved use of irregular

past tense, increased ability to maintain topics of conversation with peers, increased ability to follow directions involving spatial, quantitative and sequential concepts, and improved joint attention (id.).

The student's OT plan notes that the student receives individual OT once per week for 30 minutes and once per week for 30 minutes with a peer (Parent Ex. GG at p. 19). His goals for the 2007-08 school year include improved motor planning, improved graphomotor skills, improved functional shoulder, arm and hand control, improved regulation, processing and integration of sensory stimuli, improved postural control and improved visual perception and visual motor skills (id. at pp. 19-20). The plan includes specific objectives for each goal (id.). The student's classroom teacher testified that to address the student's difficulties with fine motor skills, he was given a reduced number of fine motor tasks and provided one-to-one assistance as needed (Tr. p. 206).

To address classroom behavior, the Aaron School uses an approach which the teacher described as "1-2-3 Magic" (Tr. p. 192). The program is designed to "make the children aware of their behavior" by identifying each instance in which a child does not follow classroom rules and charting these instances throughout the day (Tr. p. 196). If the student is unable to sit quietly after receiving reminders of his inappropriate behavior, he will be seated in a designated area in the classroom for three minutes (id.). If the student continues to have difficulty, an assistant will sit with him (id.). The student's teacher testified that the student had responded positively to this program (id.).

The classroom teacher testified that the student had been in her class since September 2007 (Tr. pp. 200-01). She described him as an "eager" student who was interested in learning (Tr. pp. 201-02). She also noted that he was a "sensory kid" who did not like to get his hands messy and who was distracted by noise (Tr. p. 202). She noted that he would often put his hands over his ears "if he thinks something's going to be loud, or if it's going to annoy him" (id.).

The student's teacher further testified that she had observed the student on occasions when he did not receive his medication and during those episodes he had "very little ability to control his impulses and regulate himself" (Tr. p. 202). She described his behavior at these times as "defiant" and noted that she had observed him slapping himself in the face and rolling around on the rug (Tr. p. 203). The teacher recounted an incident during which the student was not wearing his medication patch, and the change in his behavior was "extreme" and included hitting, kicking, spitting, running and oppositional and defiant behavior (Tr. pp. 224-26).

When asked how the student's management needs were accommodated in the classroom, the teacher testified that when a problem was anticipated, the student was given "ample warning" about what to expect, and a daily schedule was reviewed with him (Tr. p. 205). In large group settings, such as school assemblies, the student was offered headphones or a pillow (id.). Expectations for sitting still were reduced for the student if difficulty was anticipated (id.). The teacher further testified that because the student's medication affected his meal and snack times and he refused snack; he was provided one-to-one assistance to motivate him to eat some of his lunch (Tr. p. 204).

The student's teacher reported that he had demonstrated improvement in the management domain and his ability to participate in a group had increased (Tr. p. 207). Instead of walking

away from the group, the student would now raise his hand for assistance (id.). When asked if the student's behavior interfered with his learning, she stated "As long as he's medicated, it hasn't appeared to" (Tr. p. 223).

Narrative comments in the student's fall 2007 report card from the Aaron School stated that the student had made a successful transition into the classroom (Parent Ex. GG at p. 17). He was described as enjoying constructing and engaging in pretend play with classmates (id.). The report noted that staff members were working with the student to increase his ability to carry out classroom routines with less teacher prompting (id.). The student often demonstrated reluctance to contribute to classroom discussions and it was unclear whether or not he understood the discussion topic or if he was struggling to express his ideas (id.). The student was reportedly more engaged in play activities, where he appeared to be less self-conscious (id.). During classroom instruction, he was easily distracted, required prompting, and often had difficulty following directions when he was preoccupied with his own ideas (id.). When frustrated in the classroom, the student would become oppositional, withdraw to a beanbag chair, or close his eyes and cover his ears (id.). To address these behaviors, teachers employed a variety of techniques, including "a problem-solving approach to conflict resolution," and encouragement to "use words" to express his feelings (id.). Teachers were also working with the student to help him become more aware of when he was frustrated (id.). Teachers set "clear and consistent limits" and rewarded him when he expressed feelings in appropriate ways (id.).

Academically, the student's head teacher opined that the student had responded positively to the Aaron School curriculum (Tr. p. 204). The student's reading teacher had reported to her that the student now knew all letters of the alphabet and had mastered sound-symbol relationships (Tr. p. 202). He was beginning to blend sounds to decode and read simple words (Tr. p. 210). In math, the student was able to work independently with some of the math materials used for instruction (Tr. p. 208). Standardized tests were used to measure progress in reading, and progress in other areas was documented in report cards and narrative reports (Tr. p. 232). The classroom teacher estimated that the student was currently performing at a kindergarten level in reading and at a late kindergarten to early first grade level in math (id.).

The teacher opined that the student's placement for 2007-08 was appropriate because he "needed the small classroom size and the clear and consistent limit setting and consequences for behavior, and the structure of the classroom" (Tr. p. 214). She opined that he benefitted from peer modeling because many of the children at the Aaron School did not have "the same sort of social issues" and the student "learns from them" (Tr. pp. 214, 216).

In this case, the student has identified deficits in his frustration tolerance, expressive and pragmatic language, sensory integration, and social skills (Parent Ex. U). Both the student's private psychologist and his social worker from CDC recommended individual counseling for the student which he receives through an RSA outside of the school day (Tr. pp. 149-50; Parent Ex. W at pp. 2-3). Additionally, the student has a diagnosis of an attention deficit hyperactivity disorder and the hearing record reflects that, although his behavior is managed in part with medication, he continues to exhibit difficulties with attention, frustration, and social interaction. I note that the hearing record does not provide information regarding how these needs are addressed without counseling services in the school setting, where the behaviors are exhibited, other than through the use of a "problem-solving approach to conflict resolution" and instruction in a "social skills"

program (Parent Ex. GG at pp. 17, 18). Moreover, the hearing record does not describe the "problem-solving approach to conflict resolution" used with the student to address his frustration and oppositional behavior, nor does it identify the skills targeted in the weekly social skills program conducted by the speech-language pathologist (Tr. pp. 191-93; Parent Ex. GG at p. 17). When asked if the social skills program was analogous to counseling, the student's teacher responded "No" (Tr. p. 192). I note that the student still exhibits behaviors previously observed such as withdrawing to a beanbag chair if frustrated or there is too much stimulation (Parent Ex. GG at p. 17). While the student's teacher testified regarding headphones or pillows provided to the student when he attends large group events such as assemblies, she did not describe what modifications were considered to provide a less overwhelming environment in the student's class which is comprised of 10 children and combined with a second class for all activities except reading and math (Tr. pp. 199, 205).

Although the hearing record reflects that prompts are used and rewards are provided to the student when he exhibits appropriate behavior, it does not reflect the prompt levels required or the types of rewards that are provided (Parent Ex. GG at p. 17), and the teacher's testimony provides little insight into how the Aaron School identified the functional causes of the student's behavior or determined appropriate reinforcement for him. The teacher also testified that appropriate behavior was encouraged by a program in which, at the beginning of the 2007-08 school year, the students were engaged in "a discussion of what the children would like to achieve. We call it their hopes and dreams. And we sort of guide and lead them towards, you know, how they can think about how we can realize those things" (Tr. p. 192). The teacher, however provided no specific information regarding how, given the student's communication deficits, he was able to articulate his goals for the year. Moreover, it is a concern that when asked if the student's behavior interfered with his learning, his teacher stated "As long as he's medicated, it hasn't appeared to" (Tr. p. 223).

In addition, although the student has identified needs in his expressive language skills which are described as significant and "well below an expected level" and he is encouraged to "use words" to express his feelings when frustrated, there is no information in the record describing the strategies or methodologies used to meet these needs (Parent Exs. Q at p. 3; T at p. 3; GG at p. 17). Literature from the Aaron School contained in the hearing record describes the school's curriculum as "language based," but the student's teacher did not define this term and she provided no examples of modifications related to the student's language needs (Parent Ex. BB at p. 1).

Although the student's teacher testified that the classroom environment was "very structured" and "very routine" and that it was "designed to operate in a multisensory way," she provided no description of the student's participation in the daily schedule, the methodologies she used with the student for instruction, or the assessment strategies or formal tests she used to determine the student's needs or to measure his progress in areas other than reading (Tr. p. 186). The student's teacher also testified that the student was a "sensory kid" and that an occupational therapist who was a member of the classroom team was available to make any modifications necessary to assist students who needed additional sensory input; however, the hearing record does not reflect how this student's sensory needs are addressed within the classroom or how the strategies used in his OT sessions are incorporated into the classroom environment (Tr. pp. 186, 202). The hearing record reflects that the student also receives OT outside of the school day through an RSA, and there is no information in the record about what is addressed in these additional sessions or how, if at all they are coordinated with the OT sessions at Aaron.

Considering the above information, I note that while the hearing record provides general information about the Aaron School, the hearing record fails to specifically indicate how the program and services provided are specially designed to meet the student's unique needs for the 2007-08 school year, and thus, the parent is not entitled to tuition reimbursement (Gagliardo, 489 F.3d at 115). A unilateral private placement is only appropriate if it provides “education instruction *specifically* designed to meet the *unique* needs of a handicapped child” (Gagliardo, 489 F.3d at 115 [emphasis added] [quoting Frank G., 459 F.3d at 365]; see also Rowley, 458 U.S. at 188-89). Having decided that the parent failed to meet the second criterion for an award of tuition reimbursement, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations supported petitioner's claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parent's remaining contentions and find that it is unnecessary to address them in light of my decisions herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that, the portion of the impartial hearing officer's decision finding that the parent's unilateral placement of the student at the Aaron School for the 2007-08 school year was appropriate is hereby annulled.

Dated: Albany, New York
May 2, 2008

PAUL F. KELLY
STATE REVIEW OFFICER