



The University of the State of New York

The State Education Department State Review Officer

No. 08-034

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Hon. Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Karyn R. Thompson, Esq., of counsel

The Law Offices of Melvyn W. Hoffman, attorney for respondent, Melvyn W. Hoffman, Esq., of counsel

DECISION

Petitioner (the district), appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent) son and ordered it to reimburse the parent for her son's tuition costs at the Aaron School for the 2007-08 school year. The appeal must be sustained.

During the impartial hearing, the student was eligible to receive special education services as a student with an other health impairment (OHI) and was attending the Aaron School, which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with an OHI is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The hearing record reflects that the student's history includes diagnoses of Asperger's disorder and an attention deficit hyperactivity disorder (ADHD) (Parent Ex. M at p. 1). The student demonstrates cognitive functioning in the average range (Parent Ex. N at p. 6). He has a history of difficulty with writing assignments, as well as difficulty with pragmatic communication in his conversational skills and in his social interaction with peers (id. at p. 7). The student demonstrates repetitive behavior and anxiety, and needs to be redirected frequently (Dist. Ex. 14 at pp. 1-3).

The hearing record also reflects that the student's history includes difficulties with sensory integration and a low tolerance for frustration (Tr. p. 37; Dist. Ex. 12 at p. 4).

During the student's kindergarten year, an occupational therapist noted that the student engaged in behaviors such as placing his hands over his ears and rubbing his body (Tr. pp. 25, 137; Dist. Ex. 12 at p. 6). The occupational therapist recommended that the student be evaluated by the district and suggested that he receive private occupational therapy (OT) in the interim (Tr. p. 138; Dist. Ex. 12 at p. 7). The district conducted an OT evaluation of the student on March 21, 2003 that indicated that the student demonstrated sensory modulation problems (Dist. Ex. 15 at pp. 1, 4). He had difficulty screening, registering and processing incoming sensory information, and he presented with disorganized, inefficient problem solving and motor output (id. at p. 4). The OT evaluation report stated that the student's excessive movements interfered with his personal boundaries, impulse control and coordination skills (id.). The student's fine motor skills were reportedly not developed to an age appropriate level and upper extremity instability was noted (id.). The OT evaluator indicated that the student's difficulties directly affected his ability to adequately perform age appropriate tasks at home and at school (id.). Individual OT was recommended two times per week for 30-minute sessions (id.). The evaluation report also noted that the student had been receiving private OT for several months (id.).

The district conducted a psychological evaluation of the student on April 8, 2003 (Dist. Ex. 13 at pp. 1, 4). Administration of the Wechsler Preschool and Primary Scale of Intelligence-Revised (WPPSI-R) yielded a verbal IQ score of 102, a performance IQ score of 98, and a full scale IQ score of 100, all in the average range (id. at p. 3). The psychological evaluation report indicated that the student was socially oriented and intelligent, but had an impulsive response style (id. at p. 4). The evaluation report described the student as able to learn through both visual and auditory modalities, and noted that he had good long term memory for facts and common sense verbal reasoning skills (id.). Behaviorally, the student presented with symptoms consistent with ADHD, executive dysfunction, and a motor coordination disorder (id.). The evaluator recommended that the student be classified with an OHI and that he receive support to develop his pragmatic language, motor coordination, self-regulation and sensory integration skills (id.). The evaluator indicated that the student was able to learn "in the mainstream" with the full-time presence of an extra adult in his classroom to help him organize his behavior and modulate his responses (id.).

On April 11, 2003, the district conducted an observation of the student in his kindergarten class (Dist. Ex. 14 at p. 1). The observation report reflected that the student was in a class of 17 children, one teacher, one teacher assistant, and one student teacher (id.). The student required repetition of directions and redirection and he also displayed a frequent need to move/sprawl about the room (id.).

For the 2003-04 school year, when the student would be in the first grade, the district's Committee on Special Education (CSE) reportedly recommended that the student attend a collaborative team teaching (CTT) class (Tr. pp. 26-27, 138). According to the parent, the district did not have a first grade CTT class at that time (Tr. pp. 27, 138). Consequently, the student was reportedly placed part-time in a general education first grade class and part-time in an inclusion kindergarten class (Tr. p. 27). The student received OT services during the 2003-04 school year (Tr. p. 170).

For the 2004-05, 2005-06 and 2006-07 school years, the student attended CTT classes at a district school for grades two, three and four, respectively (Tr. p. 29). During the 2004-05 school year, the student was referred to the CSE for a speech and language evaluation due to concerns regarding his speech-language skills (Tr. p. 170; Dist. Ex. 11 at p. 1). A February 2, 2005 speech and language evaluation report indicated that administration of the Clinical Evaluation of Language Fundamentals-4 (CELF-4) yielded a core language standard score (and percentile) of 90 (25) and an expressive language standard score of 85 (16) (Dist. Ex. 11 at p. 2). The speech and language evaluation report stated that the student presented with low average performance in his receptive and expressive language skills and speech-language therapy was not recommended (id. at p. 3).

The parent stated that all of the student's teachers since kindergarten told her to enroll the student in a special education school and she refused (Tr. p. 138). The parent stated that the student's fourth grade teacher indicated to her that the student was not doing all of his work in class and that during writing time, the student "just kind of sits there" (Tr. p. 139). The parent stated that the student's grades during his fourth grade year "seemed okay" despite his anxiety and teasing from other children (id.).

In September 2006, the student was evaluated at a private autism center to assess whether he met the criteria for a diagnosis of autism (Parent Ex. N at p. 1). Administration of the Autism Diagnostic Observation Schedule (ADOS) and the Autism Diagnostic Interview (ADI) yielded results that indicated the student met criteria for a diagnosis of an autistic disorder (id. at pp. 2-4). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded average standard scores (SS) of 100 for the verbal comprehension index, and 94 for the perceptual reasoning index, as well as a low average SS of 88 for both the working memory and the processing speed indices (id. at p. 6). The student achieved an average full scale IQ score of 91 (id.). Completion of the Vineland Adaptive Behavior Scales, Survey Form (VABS) via interview with the parent resulted in responses that indicated the student's communication abilities were within normal limits for his age, but that he had difficulty with more complex expressive tasks (id.). Delays were also revealed in the areas of basic adaptive skills specific to daily living and socialization skills which were characterized by need for assistance in personal care, difficulty initiating conversations on topics of interest to others, and responding to indirect cues in conversations (id. at pp. 6-7). The student was described as able to participate in activities with others, able to follow the rules of the game, and at times having difficulty controlling his anger when denied his own way (id. at p. 7). The resultant evaluation report indicated that the student's symptoms were indicative of Asperger's disorder and included deficits in pragmatic communication such as in his conversational skills and deficits in his social interaction with peers (id.). The student demonstrated repetitive behaviors such as complex hand movements with body rocking and telling the same jokes repeatedly (id.). The student was described as exhibiting "considerable anxiety" that appeared to impair his daily functioning (id.). Recommendations included OT that focused on the student's independence in self-care and targeted his motor deficits, and counseling either at school or privately to address concerns relating to his anxiety, anger management and frustration tolerance (id. at p. 8). In addition, a recommendation was made for intervention to target the student's socialization skills and teach cooperative interactive skills with same age peers "that promote integration into general society" (id.).

A private speech and language evaluation was conducted in September 2006 to evaluate the student's level of functioning and to determine his need for therapy (Parent Ex. M at p. 1). Administration of the CELF-4 yielded standard (and percentile) scores of 84 (14) in core language, 85 (16) in receptive language, 77 (6) in expressive language, 76 (5) in language content, and 88 (21) in language memory (id. at p. 2). The speech and language evaluation report stated that the student presented with significant receptive, expressive and pragmatic language delays (id.). He demonstrated relative strength in short term memory tasks such as following complex directions requiring understanding of linguistic concepts and forming semantic relationships (id. at p. 4). The student was unable to retain information from a short story or complete tasks relying heavily on verbal skills such as word definitions, formulating sentences, and describing relationships between words (id.). The student's performance during formal testing "improved drastically" when he was encouraged or praised, but he was unable to complete tasks without the provision of external cues (id.). The speech and language evaluation report indicated that pragmatically, the student displayed immature body language and conversational skills (id.). "[N]on-productive" behaviors such as making sounds, fidgeting and placing his head on the table that interfered with processing information and completing tasks were noted (id.). The student did successfully ask for clarification when tasks were unclear to him (id.). Language therapy was recommended to focus on story comprehension, inference skills, problem solving abilities, defining words, defining relationships between words, review of left/right orientation and sequential concepts and narrative development (id.). A tutor as well as a reading and writing assessment were also recommended (id.).

An October 2, 2006 private OT evaluation report indicated that the parent's main concerns involved the student's decreased attention, clumsy behavior, difficulty with auditory processing, decreased social abilities with peers and his tendency to seek vestibular and proprioceptive input (Parent Ex. L at pp. 1, 5). Administration of the Bruininks-Oseretsky Test of Motor Proficiency, the Beery-Buktenica Developmental Test of Visual-Motor Integration, and Winnie Dunn's Sensory Profile detected that the student displayed below average performance in the areas of upper-limb speed, dexterity, and sensory processing (id.). OT was recommended one time per week for 45 minutes to address upper extremity fine motor manipulation, dexterity, speed, and accuracy, as well as sensory regulation and discrimination (id. at p. 5).

By letter dated October 24, 2006, the CSE requested that the parent provide consent for an evaluation of the student, that she advise the CSE of any specific assessments she wanted administered to her son and that she provide any private evaluation material that would assist the CSE (Parent Ex. S). In an October 30, 2006 letter to the CSE, the parent requested that the student receive speech and language, psychological, and OT evaluations (Parent Ex. T). The parent also provided consent for the CSE to evaluate the student (Parent Ex. S).

On or about December 15, 2006, the parent completed an application for the student's admission to the Aaron School (Dist. Ex. 18 at p. 1).

On January 12, 2007, the district's school psychologist conducted a 30-minute classroom observation of the student during a social studies lesson (Dist. Ex. 22). The school psychologist reported her observations of the student's behavior during the student's transition into the classroom, while the student was required to attend to an activity, and the appropriateness of the student's socialization with peers and his imitation of behaviors exhibited by peer models (id.).

The psychologist observed the student fidgeting and stretching (id.). The psychologist reported that the student exhibited compliance with unexpected directions and demands and that the student read "clearly, audibly and fluidly" when requested by the teacher (id.). The psychologist further stated the student interacted appropriately with a neighboring classmate (id.).

A January 19, 2007 OT progress note written by a district occupational therapist indicated that the student received OT services two times per week for 30-minute sessions in a group of three (Dist. Ex. 10 at p. 1). The student was reported to have mastered the "Handwriting Without Tears" cursive handwriting program (id.). He worked on keyboarding skills and was able to complete typing exercises demonstrating speed and accuracy (id.). Administration of the Beery Visual-Motor Integration Test yielded results within age appropriate limits for the visual-motor and motor coordination subtests, and significantly below average range limits on the visual-perceptual subtest (id.). The progress report indicated that the student struggled with independently organizing his personal belongings and needed school materials (id.). The OT report also indicated that the student was cooperative, motivated and a valued member of his class (id.). He displayed shyness and anxiety related to performing challenging tasks in a group, but he showed progress in his tolerance for answering questions when provided with support by the teacher (id.). The occupational therapist opined that a larger group setting seemed to be overwhelming for the student because he sometimes appeared over-stimulated or defensive to auditory, visual or kinesthetic input (id.). The progress note indicated that at times the student had difficulty regulating his alertness and emotional state, and might become over-excited, or he might avoid challenging tasks by turning away or hiding his head in his arms on his desk (id.). The student was also described as having difficulty sitting still in his seat while trying to remain focused on a task (id.). The OT progress report indicated that the student struggled with tasks that required novel and/or refined fine and gross motor skills, often rushing through motor tasks that required attention to spatial and sequential organization (id.). He had difficulty with activities involving postural control and muscle tone but participated fully within the school setting including gym and recess (id.). Recommendations included an air-filled seat cushion for home and school to facilitate posture and attention for writing activities; a desk checklist to facilitate end-of-the-day "pack-up" and independence in organizing his belongings; a computer assistive technology evaluation to assess his need for typing software; a word processor and a graphic organizer to facilitate task initiation and organization; and a home exercise program to continue development of body awareness, motor planning and sequencing (id. at p. 2).

On January 19, 2007, the CSE convened for the student's triennial review and to develop his individualized education program (IEP) (Dist. Ex. 3 at p. 13). The CSE recommended that the student remain eligible for special education as a student with an OHI and continue in a 12:1 CTT class (id.). The January 19, 2007 IEP indicates that the student's related services were modified to include individual OT one time per week for 30 minutes and group speech-language therapy two times per week for 30 minutes (id. at pp. 14, 21, 23).¹ Testing accommodations included a separate location (maximum 8); double time with breaks as needed; directions read, reread and rephrased

¹ It is unclear from the January 19, 2007 IEP what size group the CSE recommended for the student's speech-language therapy (see Dist. Ex. 3 at pp. 14, 23).

to support and sustain attention and effort; "masks" and markers as appropriate to support place keeping and organization; and answers recorded in any manner (id. at p. 23).

On March 9, 2007, the district conducted an augmentative and alternative communication (AAC) evaluation of the student per referral by the district's occupational therapist, to determine if technology could improve the student's written output (Parent Ex. K at p. 1).² The AAC evaluation report recommended that the student receive a word processor, Kidspiration software, a "graphic organizer applet," a printer and related accessories (id. at p. 4).

On March 21, 2007, the parent signed a contract for the student's enrollment at the Aaron School for the 2007-08 school year (Parent Ex. I). The hearing record reflects that between March 2007 and December 2007 the parent made tuition payments totaling \$27,500 to the Aaron School (Dist. Ex. 17; Parent Ex. O at pp. 1-4).

On April 25, 2007 the district's occupational therapist completed paperwork to modify the student's IEP to include the recommended AAC device (Parent Ex. H). The CSE convened on April 26, 2007 and added the student's need for assistive technology to the student's IEP (Parent Ex. P at pp. 1-2).

On June 6, 2007, the district's psychologist conducted an educational evaluation of the student (Parent Ex. G at p. 1). Informal assessment of the student's behavior revealed initial confusion and reluctance to participate upon meeting the examiner with whom he was unfamiliar (id.). The examiner observed the student tremble, cover his ears as if to block out the examiner's voice, fidget with his hands, jerk his head, talk loudly and stick his head in his shirt when frustrated (id.). Additional behaviors included apparent pleasure in receiving praise for a job well done, perseverance if he thought he could get an answer right, struggle with focus, a need for complete quiet, and frustration if interrupted by any noise (id.). Administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) yielded above grade level skills in isolated word reading (81st percentile) and spelling skills (73rd percentile) (id. at p. 2). Reading comprehension was at the student's grade level (53rd percentile) (id.). The educational evaluation report indicated that the student's difficulties with expressive language may have compromised his reading comprehension results as the student often provided brief responses that lacked pertinent information, although he appeared to know more than what he expressed (id.). Regarding the student's math skills, although he scored within the average range (37th percentile), his difficulty with concentration and attention caused him to make minor errors on the paper and pencil calculations portion of the subtest (id.). When given word problems requiring math calculations on the math reasoning subtest the student scored in the above average range (82nd percentile) (id.). The evaluator concluded that although the student was functioning at or above grade level in math and reading, his low frustration tolerance, reported lack of motivation in the larger class setting, and difficulty attending and concentrating may interfere with the student's ability to work to his optimum ability in the general education class setting (id.). The evaluation report also noted that

² The hearing record contains multiple duplicative exhibits. For purposes of this decision, only Parent exhibits were cited in instances where both a District and Parent exhibit were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of the Bd. of Educ., Appeal No. 06-074).

anxiety and social awkwardness may also hamper the student's ability to do group work and make meaningful connections with same age peers (id.).

The CSE reconvened for a "requested review" on June 8, 2007 (Parent Ex. F at pp. 1-2). Attendees included the parent, the school psychologist who also acted as district representative, the student's special education teacher and the student's school based occupational therapist (id. at p. 2). The school psychologist reported that the regular education teacher arrived five to ten minutes after the meeting started, but was "filled in" on what had transpired during her absence (Tr. pp. 198-99). The CSE continued the student's classification of an OHI and recommended a placement change from the CTT class to a 12:1 special class in a community school based on the student's severe anxiety, low frustration tolerance, difficulties with attention, and his need for consistency (Parent Ex. F at pp. 1-3, 11). The CSE recommended continuing speech-language therapy and OT, and added to the student's IEP group counseling one time per week for 30 minutes in a group of four as well as computer assistive technology (id. at pp. 2, 5, 10). The June 8, 2007 IEP indicated that the student's behavior did not seriously interfere with instruction and could be addressed by the regular education and/or special education classroom teacher, and that no behavior intervention plan was needed for the student (id. at p. 4).

A July 3, 2007 Final Notice of Recommendation (FNR) indicated that the student was offered a specific 12:1 special class placement at one of the district's schools with related services of OT, speech-language therapy, and counseling (Parent Ex. E).

By letter dated August 1, 2007, the parent notified the CSE that her son would be attending the Aaron School for the 2007-08 school year (Parent Ex. D). The parent requested the district provide "appropriate special education, related services and special education transportation" to and from the Aaron School (id.). She also provided consent for the CSE to exchange information with the Aaron School (id.).

In an August 20, 2007 letter to the CSE, the parent stated that her son needed a small school and a small class environment that had an appropriate special education program and services to meet his needs (Dist. Ex. C). The parent alleged in her letter that the CSE had not offered a free appropriate public education (FAPE) to the student for the 2007-08 school year and that she had no alternative but to place her son at the Aaron School beginning September 2007 (id.). The parent informed the CSE that she would be seeking tuition reimbursement for the Aaron School, as well as special education transportation and related services for the student (id.).

The student began attending the Aaron School on or about September 5, 2007 where he was repeating the fourth grade for the 2007-08 school year (Tr. pp. 30, 151).³

The hearing record reflects that the parent visited the district's recommended class in September 2007 (Dist. Ex. 5; Parent Ex. B).⁴ In a September 27, 2007 letter to the CSE, the parent

³ The hearing record offers no explanation why the student was repeating fourth grade at the Aaron School.

⁴ A September 27, 2007 letter from the parent to the CSE indicates that she visited the recommended class on September 6, 2007 (Parent Ex. B). A visitor log reflects that the parent visited the recommended school on September 12, 2007 (Dist. Ex. 5).

expressed her concerns about the district's recommended school (Parent Ex. B). Specifically, the parent noted that the recommended school had at least 500 children and that the atmosphere was "overwhelming for [the student] due to his sensory and anxiety issues" (id.). The parent indicated that the self-contained class had only one teacher and that the student required at least two teachers due to his attention deficits and lack of executive function skills (id.). The parent also noted that the class had a wide range of ages and the students in the class ranged from third grade to fifth grade (id.). As the student was academically at the fifth grade level, the parent indicated that some of the other students in the class were significantly below his level of instruction (id.). The parent further indicated in her letter that "most importantly the school does not address [the student's] social and emotional deficits" that "hinder his ability to learn and take direction" (id.). In addition, the parent alleged that there was no on-site occupational therapist at the district's recommended school (id.).

By due process complaint notice dated September 28, 2007, the parent requested an impartial hearing asserting that the district failed to offer her son a FAPE for the 2007-08 school year because the student's IEP was both procedurally and substantively flawed (Dist. Ex. 1). In particular, the parent asserts that she did not receive a class profile and program description; she did not have the opportunity to visit the district's recommended program until September 6, 2007 at which time she found the placement to be inappropriate because of the 12:1 ratio of students to teacher; and the district's program could not meet her son's social, emotional or OT needs (id.). The parent requested tuition reimbursement for the Aaron School for the 2007-08 school year, as well as transportation and related services for the student (id.).

By response dated October 23, 2007, the district replied to the parent's due process complaint notice (Dist. Ex. 2 at p. 3). The district's response consisted solely of a checklist indicating the student's classification, the CSE's recommended educational program, the decision-making materials referenced by the CSE, the other programs considered but rejected by the CSE, and the date which the district issued an FNR to the parent (id. at pp. 1-3).

An impartial hearing was held on December 13, 2007 and January 31, 2008 (Tr. pp. 1, 176). By decision dated March 11, 2008, the impartial hearing officer found that the district failed to offer a FAPE to the student (IHO Decision at p. 17). Specifically, the impartial hearing officer found that the regular education teacher did not meaningfully participate in the June 8, 2007 IEP meeting; the student's assigned 12:1 class was not appropriately grouped in terms of academics, social development, physical development, and management needs; the student would not be able to negotiate the hallways of the district's recommended school due to the number of students attending the school; the CSE failed to develop a functional behavioral assessment (FBA) and a corresponding behavioral intervention plan (BIP); the district failed to discuss the student's 2007-08 IEP goals with the parent thereby depriving her of the opportunity to meaningfully participate in the development of the 2007-08 IEP; the CSE did not recommend an auditory processing evaluation; and the CSE did not recommend an FM trainer for the student (id. at pp. 13-17). Additionally, the impartial hearing officer found that the goals included in the June 8, 2007 IEP were deficient and deprived the student a FAPE, and that the district was required to conduct a psychological evaluation of the student because it was requested by the parent (id. at pp. 16-17). With regard to the appropriateness of the Aaron School, the impartial hearing officer held that the parent demonstrated that the Aaron School provided an appropriate program for the student (id. at p. 17). The impartial hearing officer determined that equitable considerations weighed in the

parent's favor (*id.*). She ordered the district to reimburse the parent for the student's tuition at the Aaron School for the 2007-08 school year and provide transportation services for the student (*id.* at p. 18).

The district appeals and asserts that the impartial hearing officer erred in finding that it did not offer the student a FAPE for the 2007-08 school year. In particular, the district asserts that the impartial hearing officer erred in even considering the parent's allegations about the student's IEP raised during the impartial hearing because she failed to raise the allegations in her impartial hearing request. The district further asserts that the impartial hearing officer erred in finding that the Aaron School is an appropriate placement for the student and that equitable considerations weigh in favor of the parent. The district requests that the impartial hearing officer's order awarding the parent tuition for the 2007-08 be vacated.

In her answer, the parent maintains that the impartial hearing officer's decision was correctly decided and that the decision should be upheld.

The impartial hearing officer's order that the district provide transportation services for the student has not been appealed by the district (IHO Decision at p. 18). 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, this part of the decision is 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).

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).⁵

⁵ The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

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]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]; 34 C.F.R. § 300.513[a][1]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Bd. of Educ., Appeal No. 08-005; Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).⁶

Returning to the instant case, I will first address the district's assertion that the impartial hearing officer erred in finding that the student's 2007-08 IEP is deficient because the regular education teacher missed five to ten minutes of the CSE meeting (see IHO Decision at p. 14). The district argues that the regular education teacher's absence was de minimus, that the regular education teacher was filled in by other CSE participants upon arriving at the meeting, and that the absence did not deprive the student of a FAPE.

A regular education teacher of a student is to participate in the development, review, and revision of a student's IEP to the extent appropriate including a determination of "[a]ppropriate positive behavioral interventions and supports and other strategies for the child" (34 C.F.R. § 300.324[a][3][i]; 8 NYCRR 200.3[a][1][ii]). Here, the hearing record reflects that the regular education teacher arrived five to ten minutes late to the June 8, 2007 CSE meeting which lasted 45 minutes or longer (Tr. p. 199). The district's psychologist who also attended the June 2007 CSE meeting reported that upon the regular education teacher's arrival to the CSE meeting, she was filled in on what had transpired in the initial five or ten minutes of the meeting that she had missed (Tr. p. 199; Parent Ex. F at p. 2). There is no evidence in the hearing record reflecting that any concerns or questions regarding the student's academic needs related to his participation in general education were overlooked or not addressed as a result of the five to ten minute absence of the regular education teacher. Instead the hearing record reflects testimony by the special education teacher that would have been the student's teacher had he attended the proposed 12:1 special class placement for 2007-08 indicating that she uses a "standard curriculum" with modifications based on each student's learning and functioning styles (Tr. p. 255). The district psychologist testified that the CSE recommended a 12:1 special class placement primarily to address the student's attention, anxiety and social needs (Tr. pp. 201-02). The district's psychologist also testified that in evaluating and in participating in the development of the IEP for the student she spoke to one of the student's teachers and worked with the teacher on a reward system to positively reinforce the student's appropriate behavior (Tr. pp. 193, 204).

Based on the information before me, I find that the hearing record reflects that the regular education teacher attended the June 2007 CSE meeting. The parent failed to establish that the regular education teacher's late arrival to the CSE meeting impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits

⁶ 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. Accordingly, in the instant case, the burden of persuasion that the district failed to offer the student a FAPE rested with the parent (see Application of the Dep't. of Educ., Appeal No. 08-018). Although the impartial hearing officer correctly identifies the burden of persuasion to be on the parent (IHO Decision at p. 12), she frequently determined throughout her analysis that the district failed to establish the appropriateness of its recommended program (see IHO Decision at pp. 14-17). In general, a misapplication of the burden of persuasion is reversible error (see M.M. v. Special Sch. Dist. No. 1, 512 F.3d 455, 459 [8th Cir. 2008]).

(see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Accordingly, I find that the impartial hearing officer erred in concluding that the absence of the regular education teacher for the first five to ten minutes of the CSE meeting deprived the student of a FAPE.

Next, the district alleges that the impartial hearing officer erred in finding that the June 8, 2007 IEP is deficient because the district did not conduct a psychological evaluation as part of the student's triennial reevaluation when it was requested by the parent (see IHO Decision at pp. 16-17). An initial evaluation must include an individual psychological evaluation "except when a school psychologist determines after an assessment of a school-age student . . . that a further evaluation is unnecessary" (8 NYCRR 200.4[b][1][ii], [b][2]). A reevaluation "shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.305[a][2][iii][B]). As part of a reevaluation, the CSE and other qualified professionals as appropriate, must review existing evaluation data on the student (34 C.F.R. § 300.305[a][2]; 8 NYCRR 200.4[b][5][i], [ii][a]). On the basis of that review, and input from the parents, the group must determine what additional evaluation data, if any, are needed (34 C.F.R. § 300.305[a][2]; 8 NYCRR 200.4[b][5][i], [ii][a]). If additional data are not needed, the district must notify the parents of that determination and the reasons for such determination (34 C.F.R. § 300.305[d][1][i], [ii]; 8 NYCRR 200.4[b][5][iv]). The district must also notify the parents of their right "to request an assessment to determine whether . . . the student continues to be a student with a disability and to determine the student's educational needs" (34 C.F.R. § 300.305[d][1][i], [ii]; 8 NYCRR 200.4[b][5][iv]). However, "[t]he school district is not required to conduct the assessment unless requested to do so by the student's parents" (8 NYCRR 200.4[b][5][iv]; see 34 C.F.R. § 300.305[d][2]).

In the instant case, the hearing record reflects that a psychological evaluation of the student was conducted as part of the initial evaluation (Dist. Ex. 13). The parent did request in writing that the district complete a psychological evaluation of the student as part of the triennial evaluation (Parent Ex. T). The district's psychologist testified that she was uncertain if the parent had requested a psychological evaluation, but that there was no need to repeat cognitive testing of the student (Tr. pp. 214-15). She reached this determination after reviewing the student's April 2003 psychological evaluation that revealed the student's "intelligence was basically in the average range" (Tr. pp. 205, 226), and administering academic testing to the student in June 2007 which reflected that the student was at or above grade level in all areas (Tr. pp. 205, 224-25; Parent Ex. G at p. 2). The psychologist testified that although the student appeared to struggle, seemed visually frustrated during the educational evaluation, and was distracted by any noise; he did not completely disengage from the evaluation process, but continued to participate in the evaluation and did not need the process to stop at any point (Tr. p. 219).

The hearing record reflects that the district's psychologist viewed existing data and determined an additional psychological evaluation with cognitive testing was not needed. The psychologist testified that among other reports, she reviewed the student's April 2003 psychological evaluation, OT reports, and the March 2007 ACC evaluation (Tr. p. 197). In addition, the district's psychologist reported that in evaluating the student and in participating in the development of the June 8, 2007 IEP she spoke to the student's teacher and to his occupational

therapist (Tr. pp. 193, 226). Pursuant to State regulations, an individual psychological evaluation is defined as:

a process by which a New York State certified school psychologist or licensed psychologist uses, to the extent deemed necessary for purposes of educational planning, a variety of psychological and educational techniques and examinations in the student's native language, to study and describe a student's developmental, learning, behavioral, and other personality characteristics

(8 NYCRR 200.1[bb]).

The psychologist conducted a classroom observation of the student on January 12, 2007 to see how he fit into his classroom, how he compared to other students, and if any unusual behaviors stood out (Tr. p. 193; Dist. Ex. 22). The observation report and testimony by the psychologist indicates that the student was focused (Dist. Ex. 22). Overall, he behaved appropriately despite another class joining his class that day and the student being unexpectedly asked to volunteer to read aloud in front of the entire group (Tr. p. 195; Dist. Ex. 22). The psychologist stated that after the observation she spoke with the student's teacher who indicated that she was "not too surprised" by the student's behavior that day because he could be appropriate (Tr. pp. 195-96). Although the psychologist did observe the student to fidget and she saw some anxiety in the student, overall she felt he behaved appropriately and did not stand out in any way from any of the other students (Tr. p. 196). As noted above, the psychologist also administered a formal standardized instrument to assess the student's reading, math, written language, and oral language skills (Parent Ex. G).

The hearing record suggests that the parent may have been seeking cognitive testing of the student when she was requesting a psychological evaluation of the student. As indicated above, a psychological evaluation of the student was conducted that was consistent with State regulations (8 NYCRR 200.1[bb]). The hearing record demonstrates that updated cognitive testing was not required to identify current needs and develop an appropriate program for the student. I note however that it is not clear from the hearing record that the district was aware that the parent may have been seeking cognitive testing of the student. Moreover, there is no showing that the district's failure to conduct cognitive testing rendered the district's evaluative data insufficient to the extent that a FAPE was denied. The hearing record reflects that a private cognitive assessment of the student conducted in September 2006 was consistent with the district's previous assessment in April 2003 of the student's average cognitive abilities (compare Dist. Ex. 13, with Parent Ex. N).⁷ Accordingly, the impartial hearing officer erred in finding that the district failed to offer the student a FAPE because it did not conduct a psychological evaluation.

The district asserts that the impartial hearing officer erred in finding that the student was denied a FAPE because it did not conduct an FBA or develop a BIP (see IHO Decision at pp. 15-16). An FBA should be completed if a student's behavior "impedes his learning or that of others,

⁷ The hearing record is unclear whether the parent shared the private evaluation reports with the CSE.

as necessary to ascertain the physical, mental, behavioral, and emotional factors which contribute to the suspected disabilities" (8 NYCRR 200.4[b][1][v]; see 34 C.F.R. § 300.324[a][2][i]).⁸

In the present case, the district psychologist testified that the student's teacher would be able to address the student's behavior (Tr. p. 222). The psychologist explained that the teacher had definite coping skills in dealing with the student (id.). The psychologist and the teacher reportedly discussed the teacher's strategies for addressing the student's behavior, as well as motivational systems to use for the student (id.). Therefore, the psychologist did not feel that an FBA was necessary at the time of the CSE meeting in June 2007 (id.). Additional testimony revealed that the district psychologist had been in the student's classroom many times, and on at least two or three occasions she had the opportunity to observe him (Tr. p. 225). She indicated that although those evaluations were not formally written up, and that the student did display fidgeting of his body, at no time did the student stand out from the rest of the class (id.). The district's psychologist reported that the CSE addressed the student's anxiety, low frustration and organization needs through discussion about a reward system that the psychologist and the student's teacher created involving a computer program that the student enjoyed and that motivated him to work in a small group as needed (Tr. p. 204; Parent Ex. F at p. 3).

In consideration of the January 12, 2007 classroom observation conducted by the district psychologist that reflected the student's appropriate behavior in a classroom situation, his ability to persevere during the June 6, 2007 educational evaluation despite his anxiety and fidgeting, and the psychologist's testimony regarding her observations of the student in his classroom and how the CSE addressed the student's attention, anxiety and social needs, the hearing record does not support that the district was required to conduct an FBA or develop a BIP for the student (IHO Decision at pp. 15-16).

The district contends that the impartial hearing officer erred in finding that the student could not negotiate the halls in its recommended school (see IHO Decision at p. 15). However, in contrast to this finding, the hearing record specifies how the student would transition between various school environments. Testimony by the assistant principal of the recommended school indicates that the building contains approximately 450 students (Tr. p. 237). She stated that the 450 students never change classes at the same time (Tr. p. 238). The lower school, the part of the school that includes the student's recommended class, does not change classes and lunch times in the lower school vary by class (Tr. pp. 238, 263). The assistant principal testified that there is "never, at any time, that many students in the hallway" (Tr. p. 238). In addition, the special education program consists of 31 students divided among three self-contained classrooms: a kindergarten class, a class consisting of students in grades three, four and five, and another class consisting of students in grades six, seven and eight (Tr. p. 240). Testimony by the assistant principal reported that the students in the self-contained classes never leave their classes without

⁸ In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and New York State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][iii], 300.530[f][1][i]) and New York State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, as presented in the instant case, New York State regulations (8 NYCRR 200.4[d][3][i], 200.22[a],[b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

being escorted in the hallways (Tr. p. 239). The assistant principal indicated that there is supervision in the hallways and the halls are neither crowded nor noisy (Tr. p. 237).⁹ The guidance counselor and dean supervise specific floors and the assistant principal walks the hallways approximately three or four times a day (Tr. p. 238). The special education teacher of the recommended class reported that the entire school does not transition in and out of class at the same time (Tr. p. 263). Testimony by the assistant principal and the special education teacher reflect that the teacher escorts students whenever they leave the classroom, whether it be walking in the hallways to lunch, to physical education, specials, transitioning to academic subject classes, or to go home (Tr. pp. 242, 262, 275-76). The special education teacher stated that the class negotiates the hallways in a double-file line under her supervision and when she escorts the students to lunch she leaves her classroom five minutes before the other classes do so that there are no other students in the hallway (Tr. pp. 262, 275).

The hearing record also does not support a finding that the student would be unable to negotiate the hallways in a large school. A March 2003 OT evaluation indicates that the parent reported at that time that the student bumped into objects and people (Dist. Ex. 15 at p. 1). An October 2006 private OT evaluation also indicates that the parent described him as "clumsy" but the evaluation report makes no indication that the student bumped into people or things (Parent Ex. L at p. 5). A January 19, 2007 OT progress note conducted by the district indicates that the student was able to transition between activities throughout the school day and that he fully participated within the school setting including physical education and recess (Dist. Ex. 10 at p. 1). Furthermore, the January 12, 2007 classroom observation conducted by the district's psychologist makes no mention of the student bumping into objects or people (Dist. Ex. 22). The classroom observation report indicates that the psychologist observed the student as he was walking back from his computer class to his CTT class, and that upon entering the classroom he sat down at his desk (*id.*). Based on the foregoing, the hearing record does not support the conclusion that the student would not be able to negotiate the hallways in the district's recommended school.

The district contends that the impartial hearing officer erred in finding that the chronological age range of the students exceeded 36 months and therefore deprived the student of a FAPE (*see* IHO Decision at pp. 14-15). The chronological age range of students under the age of 16 years of age shall not exceed 36 months (8 NYCRR 200.6[h][5]). However, the chronological age range of the students is not a sole determiner as a range outside of 36 months has been found acceptable if the children appear to be appropriately grouped for instructional purposes (*see Application of the Bd. of Educ.*, Appeal No. 06-023; *Application of a Child with a Disability*, Appeal No. 06-019). Students with disabilities are to be placed together for the purposes of special education and shall be grouped together so that the range of academic or educational achievement allows for individual students to achieve individual goals (8 NYCRR 200.1[ww][3][i], 200.6[a][3][i]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the

⁹ The hearing record does not support the impartial hearing officer's finding that the assistant principal concluded that the halls of the school were noisy and crowded (IHO Decision at p. 6). Instead, the hearing record reflects that the assistant principal reported that the hallways are not noisy and crowded, and that 450 students never change classes at the same time (Tr. pp. 237-38).

management needs of students may vary and the modifications, adaptations and other resources are to be provided to student so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]).

In the instant case, if the student had attended the district's recommended program he would have attended a self-contained class for students in grades three, four and five (Tr. pp. 240-41). The 12:1 class profile indicates that the students' ages in the proposed class ranged from eight to eleven years old (Dist. Ex. 6 at p. 3). Two of the students in the class were eight years old, one student was nine years old, four students were ten years old, and two students were eleven years old (*id.* at p. 3). At the time of the impartial hearing, the student was ten years old, and the hearing record supports a finding that the four ten year old children in the class would have offered the student an appropriate age peer group within the class.¹⁰

Regarding academic grouping, the class profile indicates that instructional levels for reading and math ranged from the pre-primer level to the 5.5 grade level (Dist. Ex. 6 at p. 1). The educational evaluation report indicates that although the student was functioning at or above grade level in math and reading, his low frustration tolerance, reported lack of motivation in the larger class setting, and difficulty attending and concentrating may interfere with his ability to work to his optimum ability in the general education class setting (Parent Ex. G at p. 2). Anxiety and social awkwardness may also hamper his ability to do group work and make meaningful connections with same age peers (*id.*). According to the June 8, 2007 IEP, the CSE considered that the student functioned academically at grade level, and it recommended moving the student to a 12:1 special class because of his anxiety, low frustration tolerance, attention difficulties and need for consistency (Parent Ex. F at p. 11). The June 8, 2007 IEP reflects the results of the June 2007 administration of the WIAT-II when the student achieved scores within the average to above average range (*id.* at p. 3). Testimony by the special education teacher reported that she would have provided the student with additional work as necessary to academically challenge him (Tr. p. 278). The June 2007 IEP also reflects that the student's instructional level for listening comprehension and numerical operations was within the fourth grade level, and at the second grade level for writing (Parent Ex. F at p. 3). The instructional levels were well within the above noted instructional level range of the recommended class (see Application of the Dept. of Educ., Appeal No. 08-018).

The special education teacher testified that she breaks the class down into small groups and when she worked with one group the other students work independently (Tr. p. 266).¹¹ She also stated that since the student is strong in reading she would likely group him in her higher functioning group for that subject (Tr. p. 261). She opined that the student would benefit because he would not feel "so anxious" in a smaller group and he would be able to feel like a leader in the group (Tr. pp. 261-62). To address the student's reading the special education teacher would have used graphic organizers to organize the student's thoughts (Tr. p. 249). In writing, topics would

¹⁰ It is unclear from the hearing record that the chronological age range of the students in the proposed class exceeds 36 months because the class profile only indicates the students' ages by years and does not include months (Dist. Ex. 6 at p. 3).

¹¹ Testimony by the parent indicates that when she observed the recommended class in September 2007 she was impressed that the students in the class sat and read (Tr. p. 150).

be generated by the class from which for student would choose the subject of his writing (*id.*). Regarding math and multi-step problems, the student would use math organizers and underline and highlight relevant facts (Tr. pp. 249-50). Furthermore, the class profile indicates that two students in the class function intellectually in the above average range, five of the students in the class function below average ability specific to their written skills, four students need assistance socially, seven students receive assistance from the guidance counselor, eight students receive assistance from the speech therapist and one student receives assistance from the occupational therapist (Dist. Ex. 6 at pp. 1-3). Overall, the student's academic, cognitive and social/emotional functioning levels are similar to those described in the class profile (*id.*). Based on the foregoing, I find that the parent did not establish how the student's grouping would have resulted in a denial of a FAPE. Accordingly, I will reverse the impartial hearing officer's finding that the age range differences in the district's recommended program resulted in a denial of a FAPE.

The district contends that the impartial hearing officer erred in finding that the goals on the student's 2007-08 IEP were not sufficient (*see* IHO Decision at p. 16). An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

Here, the hearing record reflects that the CSE was responsive to the student's changing needs when it convened on January 19, 2007 (Dist. Ex. 3 at p. 13), April 24, 2007 (Dist. Ex. 9) and June 8, 2007 (Parent Ex. F). Each IEP reflects the recommendations of evaluations that were current for the student each time the CSE convened, as demonstrated by the CSE's recommendations to modify and increase the frequency of OT, speech-language therapy and counseling for the student (Parent Exs. F at pp. 2, 10-12; P at pp. 2, 11). The June 8, 2007 IEP accurately reflects the student's academic, social/emotional and physical management needs previously identified in various evaluation and progress reports which support the CSE's determination to change the student's placement to a 12:1 special class (Dist. Exs. 7; 8; 9; 10; 11; 13; 22; Parent. Exs. F at pp. 11-12; G; H; K; L).

The June 2007 IEP contained goals to address the student's reading and listening comprehension skills; math word problem solving skills; perceptual motor skills; written communication skills using writing instruments and/or a keyboard; communication and social skills; pragmatic, receptive, and narrative language skills; vocabulary; and his inferencing and problem solving needs (Parent Ex. F at pp. 6-9). I note that the IEP also contains goals and short term objectives related to areas in which the student demonstrates average abilities. Although not all the goals and short term objectives included in the IEP are measurable, the majority of the short term objectives clarify the annual goals to enable the student's teachers and the parent to understand the CSE's expectations with respect to each annual goal (*see* W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147 [S.D.N.Y. 2006]; Application of a Child with a Disability, Appeal No. 07-117; Application of a Child with a Disability, Appeal No. 06-102). Moreover, I find that the parent has

not sustained her burden to show that the goals contained in the June 2007 IEP do not adequately address the student's needs so as to enable him to receive educational benefit.

The district further contends that the impartial hearing officer erred in finding that the "DOE failed to establish that the parent was afforded the opportunity to meaningfully participate" in the formulation of the IEP (see IHO Decision at p. 16). The hearing record does not support such a finding. The impartial hearing officer erred as a matter of law in reaching this finding by improperly placing the burden of persuasion upon the school district. Moreover the hearing record factually shows that the parent did meaningfully participate in the formulation of her son's program for the 2007-08 school year. The parent testified that she had been to several CSE meetings since the student was in kindergarten and that she was familiar with the CSE process (Tr. pp. 146-48). The hearing record also reflects that the student's mother was asked by the CSE to read the goals at the June CSE meeting (Tr. pp. 140-41). There is no indication in the hearing record that the parent commented or questioned the goals presented to her. The hearing record reflects that the CSE was responsive to the student's needs as well as to the parent's requests over time, as demonstrated by the CSE's recommendations for initiating speech-language therapy in January 2007 (Dist. Ex. 3 at pp. 14, 23), adding assistive technology in April 2007 (Parent Ex. P at p. 2) and counseling in June 2007 (Parent Ex. F at pp. 2, 12), as well as changing the student's placement from a CTT class to a 12:1 special class at the June 8, 2007 CSE meeting (*id.* at pp. 2, 11). The hearing record reflects the parent's long term experience with the CSE process and the CSE's apparent willingness to work with the parent as a member of the CSE. Based on the foregoing, the hearing record does not support a finding that the CSE significantly impeded the parent's opportunity to participate in the formulation of the student's IEP (see *Cerra*, 427 F.3d 186; see also *Viola v. Arlington Cent. Sch. Dist.*, 414 F. Supp. 2d 366 [S.D.N.Y. 2006]).

The district contends that the impartial hearing officer erred in allowing the parent to raise the issue of an auditory processing evaluation for the first time in her closing argument (see IHO Decision at p. 16). The party requesting the impartial hearing shall not be allowed to raise issues at the impartial due process hearing that were not raised in the notice unless the original request is amended prior to the impartial hearing (20 U.S.C. § 1415[c][2][E]), the other party otherwise agrees (34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]). State regulations provide that an impartial hearing officer may grant permission for a party to amend a due process complaint notice, except that such permission may only be granted no later than five days before an impartial hearing commences (8 NYCRR 200.5[i][7][i][b]). In the present case, the parent raised the assertion that the CSE did not recommend an FM trainer for the first time in her closing argument (Tr. p. 285). Here, by permitting counsel for the parent to raise the issue of CSE composition in her closing argument, the impartial hearing officer erred in failing to confine the scope of the impartial hearing to the issues raised in the due process complaint notice (Tr. p. 211). Therefore, I decline to consider this issue (see *Application of the Dep't. of Educ.*, Appeal No. 08-018).

In consideration of the foregoing, I find that the parent did not meet her burden to demonstrate that the district failed to offer the student a FAPE for the 2007-08 school year. I find that the special education and related services recommended by the June 8, 2007 CSE addressed the student's academic, OT, speech-language, social/emotional, and behavioral needs. Therefore, I find that based on the information it had at the time of the June 8, 2007 CSE meeting, the district offered the student a FAPE in the LRE for the 2007-08 school year. Having determined that the district offered the student a FAPE for the 2007-08 school year, I need not address the

appropriateness of the parent's unilateral placement or the equitable considerations in this case (8 NYCRR 200.5[j][4][i], [ii]; see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-030).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the decision of the impartial hearing officer dated March 11, 2008 is annulled.

Dated: Albany, New York
May 27, 2008

PAUL F. KELLY
STATE REVIEW OFFICER