



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-074

### **Application of the BOARD OF EDUCATION OF THE AUBURN ENLARGED CITY SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., attorneys for petitioner, Susan T. Johns, Esq., of counsel

Law Office of Andrew K. Cuddy, attorneys for respondents, Andrew K. Cuddy, Esq. and Jason H. Sterne, Esq., of counsel

### **DECISION**

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that the educational program, placement and services recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2007-08 school year was not appropriate and awarded additional services and other relief. The appeal must be sustained in part.

At the outset, I will address a procedural issue arising on appeal. After pleadings and memoranda of law had been submitted, the district submitted a letter dated August 7, 2008 with an attached exhibit consisting of a list of strategies prepared by the student's special education teacher, asking that the list be accepted on appeal as additional documentary evidence. The parents responded by letter dated August 18, 2008 objecting to the additional evidence and making an additional legal argument. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child

with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, I decline to accept the attached exhibit because it is not necessary in order to render a decision. I have also not considered the parents additional arguments. I take note that a new special education program has been developed for the student, however the appropriateness of that program is not before me.

An impartial hearing was held on this matter on four dates between March 20, 2008 and April 24, 2008 and a decision was rendered dated July 23, 2008 (Tr. pp. 1, 216, 460; April 24, 2008 Tr. p. 658;<sup>1</sup> IHO Decision at p. 17). At the time of the impartial hearing, the student was eight years old and a patient at a New York State Office of Mental Health facility, the St. Lawrence Psychiatric Center (SLPC) (April 24, 2008 Tr. p. 709; Parent Ex. 39). The student's eligibility for special education services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 200.8[c][1]; 8 NYCRR 300.1[zz][1]).

At two years of age the student began receiving speech-language therapy through the Early Intervention Program for a language delay (Parent Ex. 128 at p. 1). In January 2002, when the student was two years old, his parents reported that their son began engaging in behaviors such as throwing objects, throwing objects into ceiling fans and property destruction (Parent Exs. 127 at pp. 1-2; 128 at pp. 1-2).<sup>2</sup> At the age of three years old, the district's Committee on Preschool Special Education (CPSE) determined that the student was eligible for special education services as a preschool student with a disability and he was recommended to receive speech-language therapy, occupational therapy (OT) and special education itinerant teacher (SEIT) services in addition to attending preschool part time (Parent Ex. 128 at p. 2). Beginning in 2003 the student was administered medications for a variety of reasons, including to "better control his impulsive outbursts" (Parent Ex. 99 at p. 1; see Parent Exs. 97 at p. 1; 102).

The parents reported that in February 2004 their son received a diagnosis of autism (Parent Ex. 128 at p. 3). In June 2004, the student was assigned a service coordinator through the Central New York (CNY) Developmental Disabilities Services Office (DSO)<sup>3</sup> of the Office of Mental Retardation and Developmental Disabilities (OMRDD) (id.; see April 24, 2008 Tr. p. 669; see Parent Ex. 48). During summer 2004, the student attended the district's kindergarten readiness program one to two hours per day for six weeks (Parent Ex. 128 at p. 3). He also attended a private camp where he was asked to leave for displaying "negative" behaviors (id.). The student's diagnosis of autism was confirmed in August 2004 by a pediatric neurologist (Parent Ex. 99 at pp. 1-2).

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<sup>1</sup> Due to transcription error, the April 24, 2008 transcript incorrectly begins at page number 658. All references to the hearing record from the April 24, 2008 impartial hearing date will include that date in the citations to avoid confusion.

<sup>2</sup> Parent Exs. 127 and 128 are essentially the same. For clarity of citations in this decision, Parent Ex. 128 is cited unless otherwise specified.

<sup>3</sup> The hearing record uses the terms "DDSO" and Developmental Services Office (DSO) interchangeably (Tr. p. 669; see Parent Ex. 128 at pp. 3-4). For the purpose of this decision, I will use "DSO" to refer to the agency that provided the student's service coordination.

For the 2004-05 school year, the district's (CSE) determined that the student was eligible for special education services as a student with autism and he entered a 12:1+1 kindergarten program (Tr. pp. 23-24; see Dist. Ex. 7 at pp. 1-4). During the school year, the student received 12:1+1 special class instruction in English language arts (ELA) and math for 60 and 30 minutes daily, respectively (see Dist. Ex. 7 at pp. 2, 4). He was "included" in a general education kindergarten classroom for the remainder of the day and received full-time additional shared adult support (see id.). The student received modified objectives, assignments, assessments and grading, preferred seating to reduce distractions, and special education staff support to provide program modifications and cues to facilitate participation, social interaction and safety (see id. at p. 3). He also received individual and group speech-language therapy and individual OT (see id. at p. 2). From September through November 2004, as part of an autism study, the parents received parent training and access to psychological services (Parent Exs. 123; 128 at p. 4).

In December 2004, the district's school psychologist conducted a psychological evaluation of the student (Dist. Ex. 1). Administration of the cognitive portion of the Differential Ability Scales (DAS) yielded verbal and nonverbal scores in the low and very low range, respectively, and a general conceptual ability score in the very low range (id. at p. 3). The school psychologist opined that the DAS results underestimated the student's ability due to his difficulty sustaining attention to the tasks presented to him (id. at pp. 2-3). The hearing record reflects that a DSO evaluation conducted in December 2004 using the Adaptive Behavior Assessment System suggested that the student exhibited functional skills greater than two standard deviations below the mean in social and practical areas (Dist. Ex. 2 at p. 1).

On December 15, 2004, a psychologist from the DSO began working with the student and his parents to develop behavior strategies to use with their son (Tr. pp. 464-65, 468-69, 496). By report, he visited the family on an as needed basis but at least once a week (Parent Ex. 128 at p. 4). In December 2004 and January 2005 the DSO psychologist conducted at-home functional behavioral assessments (FBA) of the student, and developed behavioral intervention plans (BIP) to address the student's property destruction and aggressive behaviors at home (Tr. pp. 502-08). Also in January 2005, the DSO psychologist referred the student to an environmental modification team who evaluated the parents' home for safety ideas, and accompanied the parents to their son's sensory evaluation conducted through the DSO (Dist. Ex. 3; Parent Ex.128 at p. 4).<sup>4</sup>

On January 18, 2005 the student was evaluated by a physician affiliated with the Kirch Developmental Services Center (Kirch Center) (Dist. Ex. 2). During the evaluation, the student engaged in some repetitive and stereotypical behaviors as well as disruptive behaviors (id. at p. 2). The Kirch Center physician agreed with the DSO psychologist's observation that the student's disruptive behaviors were "operant" in nature; stating that the student gained "apparent pleasure" from the attention he received (id.). She reported that despite the development of a "very nice behavior plan" generated by the DSO psychologist, the student's behaviors in the home were dangerous, and a direct result of his developmental disability (id. at pp. 2-3). The Kirch Center physician recommended that the student's diagnosis of autism be reevaluated, as she reported that he did not demonstrate deficits in social reciprocity or communicative intent (id. at p. 3). She

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<sup>4</sup> The sensory evaluation report provided strategies for the parents to use with their son at home (Dist. Ex. 3 at pp. 2-3).

stated that because there was no minimum number of criteria to "qualify" for a diagnosis of a pervasive developmental disorder - not otherwise specified (PDD-NOS), the student's repetitive behaviors suggested this diagnostic category (*id.*). She offered diagnoses of "cognitive limitation versus borderline cognition with superimposed language disorder," chronic tic disorder, stereotyped behaviors, and hyperkinesia with a developmental delay (*id.*).<sup>5</sup>

In February 2005, the student underwent a psychological evaluation to reassess the presence of an autism spectrum disorder (Parent Ex. 97 at p. 1). Administration of the Autism Diagnostic Observation Schedule and the Gilliam Autism Diagnostic Scale yielded results which indicated that the student's social, communication and stereotyped behaviors did not meet the criteria for an autism spectrum disorder (*id.* at p. 3). Rather, the psychologist offered diagnoses of a disruptive behavior disorder-NOS and a mild intellectual disability (*id.* at p. 4). The psychologist stressed that in addition to addressing the student's skill deficits identified in prior evaluations, an overriding concern was the need to implement effective behavioral interventions across home and school settings, which would reduce the likelihood that his behavior would interfere with learning functional academic and life skills (*id.*).

On June 8, 2005, the subcommittee of the CSE (CSE subcommittee) convened for the student's annual review (Dist. Ex. 7; *see* Dist. Ex. 6 at p. 19). The CSE subcommittee recommended an increase in speech-language therapy services for the 2005-06 school year and that the student repeat kindergarten in the program he attended during the 2004-05 school year (Dist. Ex. 6 at p. 3; Parent Ex. 128 at p. 5; *see* Tr. pp. 23-24). In the summer of 2005, the student received day habilitation (Day Hab) and residential habilitation (Res Hab) services through the Gavras Center, an OMRDD-approved program, and attended week long day camps with a 1:1 Day Hab provider (Dist. Ex. 6 at p. 3; Parent Exs. 60; 128 at p. 5).<sup>6</sup> Also in summer 2005, on separate occasions, the parents met with a nurse practitioner from the Kirch Center and the pediatric neurologist (Parent Exs. 94; 95). Both professionals discussed with the parents the difficulties they were experiencing with their son and offered pharmacological and behavioral resource suggestions (*id.*). The pediatric neurologist indicated that in spite of obtaining a "wide array" of services including a 1:1 aide that was with the student "a good part of each day" and 20 hours per month of respite care, the parents were frustrated by the lack of progress they had made with their son and the difficulty they had limiting his aggressive and destructive behavior (Parent Ex. 94). The pediatric neurologist's report indicated that it appeared to her that the parents were close to considering a long-term residential placement for their son (*id.*).

For the 2005-06 school year, the student repeated kindergarten in the district's 12:1+1 program which he had attended previously (Tr. pp. 23-24; Dist. Ex. 7; Parent Ex. 128 at p. 5). In September 2005 the student received Res Hab services three times per week after school (Parent Ex. 93 at p. 1). In addition to receipt of behavioral management training through the Res Hab service provider, the parents also attended behavioral training offered by an organization identified in the hearing record as "FEAT of CNY" (*id.*). In October 2005, although the teachers did not

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<sup>5</sup> In June 2005, a nurse practitioner from the Kirch Center offered diagnoses of an attention deficit hyperactivity disorder (ADHD) and PDD (Parent Ex. 96 at p. 1).

<sup>6</sup> Descriptions of Day Hab and Res Hab services are not provided in the hearing record.

report any "pressing concerns," the district's autism consultant observed the student in the school setting and provided suggestions for intervention (Parent Ex. 35). She reported that the student appeared to have made "much progress" from her observation of him the previous year (id.).

In January 2006, the Kirch Center physician indicated that she "conceptualized" the student as having a "mixed developmental disorder with global developmental delays, noncompliance and ADHD" (Parent Ex. 92 at p. 1). She reported that the district and the DSO psychologist were using different behavior plans with the student (id.). She also reported that district staff indicated that the student was making progress in speech-language skills, academic readiness skills and behavior (id.). She discussed with the parents the need for consistent behavioral approaches and informed the family that "ultimately, they will need to carry out a behavioral program in their home" for their son (id. at p. 2). The student continued to receive services from the DSO psychologist, Day Hab services during school breaks, Res Hab services and in February 2006 was enrolled in respite services through the Gavras Center, which were available one evening per week and Saturday afternoons (Parent Ex. 128 at p. 5).

The hearing record reveals that in spring 2006 the student continued to engage in non-compliant, impulsive, destructive and aggressive behaviors at home and while in respite (Dist. Ex. 11 at p. 1; Parent Exs. 91 at p. 1; 128 at p. 5). In February 2006 the district conducted an FBA due to the student's tantrum behavior at school (Dist. Ex. 11 at p. 1). In February 2006, the Kirch Center physician provided the parents with suggestions to modify their son's behavioral plan and in April 2006 a Kirch Center nurse practitioner recommended that the district's behavior plan be used by staff who provided the student's respite services (id. at p. 2; Parent Ex. 91 at p. 1).

In May 2006, at the parents' request, the district's occupational therapist conducted a sensory evaluation of the student for the purpose of comparing his home and school behaviors, determining what interested the student in each environment, and how he reacted to structure in each setting (Parent Ex. 27; see April 24, 2008 Tr. pp. 733-34; Parent Ex. 28). She noted that a sensory integration plan was being developed by a Board of Cooperative Educational Services (BOCES) occupational therapist (Parent Ex. 27 at p. 1; see Parent Exs. 86; 128 at p. 5). In her report, the district's occupational therapist described techniques district staff used with the student when he exhibited noncompliant, destructive or attention-seeking behaviors (Parent Ex. 27 at pp. 2-9). She recommended that a sensory program be implemented for the student at school and home on a consistent basis and to consider reducing facial and vocal reactions to the student's negative behaviors (id. at p. 10).

On May 31, 2006 the CSE subcommittee convened for the student's annual review (Dist. Exs. 12; 13; see Parent Ex. 13). The CSE subcommittee recommended that for the 2006-07 school year, the student advance to first grade and continue in the district's 12:1+1 inclusion program with related services (Dist. Exs. 12 at p. 3; 13 at p. 2).<sup>7</sup> CSE subcommittee notes indicate that the student enjoyed kindergarten, and recently increased his interaction with peers (Dist. Ex. 12 at p. 1).

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<sup>7</sup> The May 2006 CSE did not find the student eligible for extended school year (ESY) services for summer 2006 (Dist. Ex. 13 at p. 1).

In June 2006, the parents reported that their son's behavior had deteriorated since April 2006 at home, school and in respite care (Dist. Exs. 14 at p. 1; 15; 27; Parent Ex. 128 at p. 5). They indicated that their son's behavior was difficult for much of the day, every day and described him as significantly noncompliant (Dist. Ex. 14 at p. 1). In addition, he exhibited an increase in destructive and aggressive outbursts (throwing, breaking objects or impulsively acting out) at least three times per day (*id.*). The parents reported that their son's respite services were suspended due to his behavior, and that they were overwhelmed by the prospect of implementing his "extensive" OT program (*id.*; Parent Ex. 128 at p. 6; *see* Parent Ex. 86). On June 26, 2006 a Kirch Center nurse practitioner referred the family to crisis intervention services through the DSO because the student and his siblings were at risk due to his escalating aggressive, destructive and impulsive behaviors (Dist. Ex. 14 at p. 2). In August 2006, the DSO psychologist and service coordinator arranged for the student to attend an "emergency" overnight respite session at an OMRDD Individualized Residential Alternative (IRA) home due to an increase in his negative behaviors (April 24, 2008 Tr. p. 674; Parent Ex. 128 at p. 6).

During summer 2006, the student attended day camps and recreational programs with 1:1 Day Hab counselor assistance and he continued to receive Res Hab services (Dist. Ex. 14 at p. 1; Parent Ex. 128 at p. 6).

During the 2006-07 school year, the student attended first grade in the district's 12:1+1 program in accordance with his IEP (Tr. pp. 23-24; Dist. Ex. 13). In September, the parents indicated that since the commencement of the school year, their son's behavior was less destructive although he continued to have daily episodes of aggressive behavior (Dist. Ex. 16 at p. 1). He exhibited distractible, hyperactive and impulsive behavior, though more at home than at school (*id.*). A review of school reports by a Kirch Center nurse practitioner indicated that the student had several episodes of falling asleep<sup>8</sup> in school, but had experienced some good days and some "behavioral stabilization" since the school year began (*id.*). Also in September 2006 the student underwent an ocular motility evaluation that indicated he had difficulty with completing tasks that involved sustained convergence and divergence as well as left to right progression (Parent Ex. 26 at p. 3). Suggestions for home and school were provided, and a vision therapy home program was recommended (*id.*).

In November 2006, the student began receiving once weekly sensory integration therapy from an agency identified in the record as Enable (Tr. pp. 36-37; Parent Ex. 128 at p. 6). In December 2006 a Kirch Center nurse practitioner reported that the student exhibited more stable behavior, growth in his communication skills and developmental progress (Parent Ex. 90 at p. 1). In January 2007 a neurodevelopmental specialist evaluated the student to assist with medication monitoring (Parent Exs. 45 at p. 2; 128 at p. 6). The specialist reported that the student's behavior problems were much worse at home than they were at school and that his family was in "acute crisis" (Parent Ex. 45 at pp. 1-2). He referred the family to a university hospital's

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<sup>8</sup> The hearing record reveals that from a young age the student consistently experienced difficulties with sleeping through the night (*see, e.g.*, Dist. Exs. 2 at p. 3; 16; Parent Exs. 42 at p. 4; 43).

psychopharmacology program to consolidate the student's medication management (id. at p. 3; see Parent Exs. 43; 89 at p. 1).<sup>9</sup>

In February and March 2007, the student attended overnight respite sessions at an IRA (Parent Ex. 128 at p. 6). On March 26, 2007 an evaluator from the Institute for Basic Research (IBR) observed the student in his school program and consulted with his classroom teacher, aide, nurse and the district's assistant director of special programs (Tr. pp. 20, 85-87; Parent Ex. 42 at p. 3).<sup>10</sup> The IBR evaluator reported that the student was "barely able to keep his eyes open" during the observation (Parent Ex. 42 at p. 4). District staff reported that "for the most part" the student did well and was meeting his IEP goals; however, he had difficulty meeting his goals when he arrived at school so lethargic that he could not participate or be taught (id.). The IBR evaluator stated that the student could not meet his IEP goals because his medication, which was prescribed to ameliorate his behavior, rendered him so lethargic that it was "virtually impossible" for him to learn (id.).<sup>11</sup> She determined from her review of the DSO psychologist's notes that the student's behavior did not appear to be able to be controlled at home and that he engaged in dangerous, potentially life-threatening activities (id. at p. 5). The IBR evaluator diagnosed the student with oppositional defiant disorder, PDD and an unspecified cognitive delay, and recommended that the student be placed in a residential facility, "which can ensure his safety, the safety of others, control his behavior and monitor his medication without forfeiting his ability to learn" (id. at p. 4).

In March and April 2007, the CSE subcommittee convened for the student's annual review (Dist. Exs. 18-21; see Parent Exs. 9; 10). CSE subcommittee meeting notes indicate that the student's performance was inconsistent in that some days he required "a lot" of verbal and physical prompts to attend (Dist. Ex. 18 at p. 1). Adjustments were made to the math and reading IEP goals per the special education teacher's recommendation, due to the student's difficulty meeting his goals (Dist. Exs. 17; 18 at p. 1). The student's teachers and related service providers reported that the student exhibited some degree of behavioral difficulty, but they also reported that he completed work, was more verbal, was more independent in his interactions with peers and was making gains (Dist. Exs. 18 at pp. 1-3; 19 at pp. 1-4). The CSE subcommittee reported that the DSO psychologist indicated that the parents were unable to implement behavior plans at home (Dist. Ex. 18 at p. 3). District staff reported that they did not observe the behaviors seen at home at school (id. at pp. 3-4). Although the special education teacher reported that the classroom behavior management program was working for the student, the CSE subcommittee agreed to conduct an FBA to help

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<sup>9</sup> The hearing record reflects that the student continuously underwent medication adjustments that were recommended by many different professionals throughout the 2004-05, 2005-06 and 2006-07 school years (Parent Ex. 46 at pp. 1-2; see, e.g., Parent Exs. 46 at p. 4; 92; 96; 100; 104).

<sup>10</sup> A psychiatrist from the IBR initially conducted a psychiatric evaluation of the student in October 2006 (Parent Exs. 42 at p. 1; 46). The student received diagnoses of a mood/arousal regulation disorder (R/O bipolar disorder type II), anxiety disorder-NOS, stereotypic movement disorder, expressive language disorder, chronic tic disorder and R/O PDD-NOS (Parent Ex. 46 at p. 4).

<sup>11</sup> The student's 2006-07 teachers reported that on a few occasions they let him sleep in class and that he was often tired in the mornings (Tr. pp. 634-35; Dist. Exs. 18 at p. 1; 19 at p. 1). However, it is likely that the student's sleep issues were related to medication changes and/or not sleeping through the night, and the student's 2007-2008 teachers did not report any tiredness that may have interfered with the student's education (Dist. Exs. 18 at p. 2; 19 at p. 1).

the parents manage the student's object breaking behavior at home (Dist. Ex. 19 at p. 3; Parent Ex. 21 at p. 1). In addition, the district continued to recommend four hours per year of BOCES autism consultant services, and offered that the consultant could work with the parents at home (Dist. Ex. 19 at p. 4).<sup>12</sup> The district also offered a 20-week school-based play therapy program entitled Mobile Outreach Student Therapy (MOST), although this was a general education service (Tr. pp. 33-34; Dist. Ex. 19 at p. 4).

In April 2007, the Kirch Center physician concurred with the IBR evaluator's recommendation for an "out-of-home placement" for the student, where pharmacologic and behavioral interventions could be maximized (Parent Ex. 89 at p. 1). She stated that although the student has a developmental disability, "the most significant pathology is psychiatric" and that his family had accessed "maximal community services" (*id.* at pp. 1-2).

On May 29, 2007, the CSE convened to review the results of the FBA and the student's BIP (Dist. Exs. 22; 23; Parent Exs. 18; 21). The FBA report indicated that the student was "fairly compliant" with the structure and routine of his school day (Parent Ex. 21 at p. 1). The school psychologist observed the student completing work with the assistance of his aide and remaining on task when provided with redirection (*id.*). The target behavior of breaking items (crayons, pencils, plastic forks) and destroying personal property (ripping up assignments) occurred during academic "downtime" and with staff whom he viewed as less firm and consistent, in order to escape the situation or gain adult attention (*id.*). Data collected during the FBA from April 30 through May 25, 2007 indicated that the target behaviors occurred 11 times,<sup>13</sup> described by the school psychologist as "low" in intensity, and related to the characteristics of the staff present (*id.* at pp. 1-2). To determine whether the time of the day was problematic for the student, aide assignments were switched on May 21, 2007 (*id.* at p. 1). The results of the data indicated that the time of day was not problematic and that the student responded most appropriately to staff who offered him clear, consistent rules and expectations (*id.* at pp. 1-2). The student's BIP identified the behavior, motivation, settings, time of day, people and activities where the behavior occurred (Parent Ex. 18 at p. 1). It also identified strategies to prevent the behavior, what skills would be taught to replace the behavior and specific steps staff would take with the student when/if the behavior occurred (*id.*).

The resultant 2007-08 IEP recommended that the student attend a 12:1+1 special class and extended school year (ESY) related services for summer 2007 provided by Cayuga BOCES (Dist. Ex. 23 at pp. 1-2). For the 2007-08 school year the CSE recommended that the student attend second grade in its 12:1+1 special class ELA and math program as he had in prior school years, and receive one individual and one group OT session per week, and two individual and one group speech-language therapy sessions per week (Tr. pp. 23-24; Dist. Ex. 23 at pp. 1-2). The IEP specified that the student would receive modified objectives, assignments, assessments and grading, seating in close proximity to the teacher and a BIP (Dist. Ex. 23 at p. 3). The student also

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<sup>12</sup> For the 2005-06 and 2006-07 school years the CSE recommended four hours per year of BOCES autism consultant services for the student's team and parents (Dist. Exs. 7 at p. 2; 13 at p. 2).

<sup>13</sup> The FBA indicates that the target behavior occurred at an average frequency of 1.8 times per day; however, if as reported, the target behavior occurred 11 times in the 20 school days between April 30 and May 25, the average frequency per day would be .55 (Parent Ex. 21 at pp. 1-2).



received additional shared adult support when he was in groups larger than three students, for implementation of modifications (Tr. p. 39; Dist. Ex. 23 at p. 3). Support for school staff and the parents included four hours per year of BOCES autism consultant services (Tr. p. 33; Dist. Ex. 23 at p. 2). Annual goals and short-term objectives were provided to address the student's math and ELA (reading and communication) needs (Dist. Ex. 23 at pp. 11-13). The student's BIP was included in his IEP (id. at pp. 14-16).

In summer 2007 the student attended the recommended ESY program (Dist. Ex. 23 at pp. 1-2; Parent Ex. 128 at p. 7). In July 2007 the student attended one private vision therapy session, which was discontinued due to his "hyperactivity" and uncooperative behavior (Parent Ex. 128 at p. 7; see Dist. 25 at p. 4). From the end of the ESY program until the end of August 2007, the student attended a daily respite program from 9:00 a.m. to 3:00 p.m. (id.). In August 2007 occupational therapists from Enable conducted a home-based OT evaluation (Parent Ex. 20). The occupational therapists' report stated that there was limited indoor space, which limited the student's freedom of physical movement (id. at p. 1). Recommendations included that the parents continue to organize materials used for school and therapy, provide opportunities for their son's exploration and initiate use of a pictorial system for daily routines (id. at p. 2). It was also recommended that the parents initiate a structured routine with their son to increase predictability, and initiate use of a sensory diet (id.). The parents continued the private academic tutoring services they had obtained in spring 2007 through summer and fall 2007 (Parent Ex. 128 at p. 7).

At the beginning of the 2007-08 school year, the student attended the CSE's recommended program pursuant to his May 2007 IEP (Parent Ex. 128 at p. 7; see Dist. Ex. 23). On September 28, 2007 the parents attended a parent training session and requested that the district complete a psychoeducational evaluation of their son (Parent Ex. 128 at p. 7; see Dist. Ex. 24). The school psychologist conducted a multidisciplinary psychoeducational evaluation of the student over six days from October 1 to October 11, 2007 (Dist. Ex. 24 at p. 1).

In her multidisciplinary psychoeducational evaluation report dated November 1, 2007, the school psychologist indicated that she completed a review of the student's records, student and teacher interviews, classroom observation and a variety of cognitive, academic and adaptive behavior assessments (Dist. Ex. 24 at p. 1). The school psychologist's report reviewed the "many community agencies" that were providing services to the student and his family at the time of the evaluation, including: psychology and service coordination through the DSO; sensory-based OT; "STARS" program; an autism parent support group through Enable; and respite and program/agency services identified in the hearing record as EPIC, Champions For Life, CHANCES (respite) and Hillside Community (respite) (Dist. Exs. 24 at p. 1; 25 at pp. 1-2; Parent Ex. 38).<sup>14</sup>

The school psychologist reported that the student appeared responsive and worked "diligently" on a daily basis (Dist. Ex. 24 at p. 7). The special education teacher reported to the school psychologist that the student had made academic progress in accordance with his IEP goals and socially made "significant progress," in that he asked for help when needed, interacted with

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<sup>14</sup> The hearing record reveals that the parents have obtained services including parent support and training and recreational services for their son through numerous agencies since he was a young child (see Parent Ex. 128).

select peers and sought out peers to play with during free time (id.). General education classroom observations of the student conducted in October and November 2007 revealed that the student exhibited "self-directed" and stimulatory behaviors (rocking) that did not interfere with his ability to comply with teacher directives or interact with his peers with aide support (id. at p. 2). During formal testing, the school psychologist indicated that the student's self-directed behaviors interfered with his ability to maintain "engagement" in structured tasks (id.).

Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded index scores in the extremely low range with the exception of working memory, which yielded a low average score (Dist. Ex. 24 at p. 3). The school psychologist reported that although the student had verbal comprehension and perceptual reasoning deficits, his verbal abilities were a relative strength; and because his self-directed behaviors affected his full scale IQ score, the best estimate of his cognitive ability was his verbal ability (composite score 69; 2nd percentile) (id.). Completion of the Vineland Adaptive Behavior Scales-Classroom Edition by the student's special education teacher resulted in standard scores in the low range in the communication and daily living skills domain and in the moderately low range in the socialization domain (id. at p. 4). The student's adaptive behavior composite score was in the low range (id.). Although the special education teacher reported that the student's communication and daily living skills were weaker than his peers, she reported that he could adequately use play and leisure time in the school setting (id.).

Administration of the Woodcock-Johnson-III Tests of Achievement (WJ-III ACH) yielded cluster/test reading standard scores in the very low range for basic reading skills and letter word identification tasks (Dist. Ex. 24 at p. 4). Due to his difficulty with decoding, no score was obtained for the word attack and reading fluency subtests (id.). The student's inability to decode words in isolation or sound out nonsense words suggested to the school psychologist that his phonetic decoding skills were not yet developed (id.). He achieved a standard score in the average range on the picture vocabulary subtest (id.). To assess the student's early literacy skills, the school psychologist administered the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) (id. at p. 5). The student's performance on the DIBELS indicated that his pre-literacy skills were extremely weak in that he was still developing the ability to recognize the initial sounds in words, lacked alphabetic understanding of print and speech and although he recognized the initial sounds in words, he lacked the automaticity required to be considered fluent in that area (id.). The student was unable to segment individual sounds in a word and became frustrated when asked to blend letters and sounds in a word (id.). The school psychologist reported that the student developed these precursor-to-reading skills at a slower rate than his peers, and that they were essential to learning to read (id.). The student was unable to complete math subtests of the WJ-III ACH due to his inability to complete addition and subtraction problems at that time (id.). To assess the student's early numeracy skills, the school psychologist administered curriculum based measurements (CBM) in the areas of oral counting number identification, quantity discrimination and missing numbers (id. at pp. 5-6). According to the CBM's norms, the student's scores fell in the fall/winter kindergarten range (id. at p. 6). On the spelling subtest of the WJ-III ACH, the student achieved a score in the very low range (id.). He was able to produce single letters in response to an oral prompt, but did not spell any of the orally presented words (id.). The school psychologist reported that the student had difficulty with spacing and correctly placing his letters on the designated line (id.).

The school psychologist concluded that the student was a "likeable, cooperative and inquisitive" child whose extremely low cognitive skills were commensurate with his academic abilities and low adaptive skills (Dist. Ex. 24 at p. 6). She further reported that the student was a concrete visual learner with strengths in rote memory and ability to define words and environmental experiences (*id.* at p. 7). The student's very weak pre-literacy skills negatively affected his spelling, writing and reading skills (*id.*). The school psychologist stated that "expecting [the student] to be fluent in first or second grade reading material is not a realistic expectation at this time and may cause undue frustration" (*id.*). She further stated that "learning is extremely challenging for [the student] and based on this assessment, is likely to occur at a rate much slower than his peers" (*id.*). The school psychologist opined that setting realistic expectations for the student and lessening academic expectations at home may deter negative behaviors (*id.*). She reported that the student appeared to benefit from the consistency and structure of his current special education program, which in conjunction with parental support, enabled him to be reasonably successful in the classroom (*id.*).

On November 9, 2007, the CSE subcommittee convened to address the parents' concerns with their son's behaviors at home and to review the district's multidisciplinary psychoeducational evaluation results (Dist. Exs. 25; 27; Parent Exs. 4; 128 at p. 7). The CSE subcommittee notes indicate that the parents had contacted the police because their son attempted to hurt others (Dist. Ex. 25 at p. 1; Parent Ex. 113; *see* Parent Ex. 115). The parents stated that they needed help "dealing" with their son at home (Dist. Ex. 25 at p. 1). They recently began attending the STARS program through Enable, which included a socialization class for their son composed of other students with autism and a support group for themselves (*id.* at p. 2; Parent Ex. 38). The Enable occupational therapist reported that although it took some time to get the student to cooperate, he was making progress (Dist. Ex. 25 at p. 2). She reported that she was able to implement use of a PECS<sup>15</sup> chart and "hope[d]" for follow through with the PECS schedule at home (*id.*). The district's occupational therapist reported that sensory items had been offered to the student at school, but he had not accepted them (*id.*). She indicated that the student was very easily redirected and asked for what he needed despite having "explosive" days (*id.* at pp. 2-3). The district's speech-language therapist reported that the student had anxiety with his new routine and exhibited some refusal behaviors (*id.* at p. 4). The parents requested that the district implement an Orton-Gillingham reading program with their son (*id.* at p. 5). The district responded that it used two reading programs with the student, a sight-word program (Edmark)<sup>16</sup> and a direct instruction, phonics-based program (Reading Mastery) (Tr. p. 52; Dist. Ex. 25 at p. 4). District staff reported that the student socialized more and although he may need breaks and prompts, he had made progress (Dist. Ex. 25 at p. 4). The CSE subcommittee discussed the student's need for vision therapy and determined that the recommendation was for a home-based vision program, therefore vision therapy was not offered by the district (*id.*). During the meeting, the student's reading goal was reviewed and according to the CSE subcommittee notes, the parents approved the student's

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<sup>15</sup> This acronym is not defined in the hearing record, but it may refer to the Picture Exchange Communication System.

<sup>16</sup> The hearing record refers to the Edmark program as a "psych" based reading program (Tr. p. 52). Given the context of the sentence: "It is a program that teaches words in isolation ... it teaches students to read by just looking at the word and knowing it." (Tr. p. 52), it appears the word "psych" is a transcription error and the actual word intended was "sight" (*see* Tr. p. 605).

IEP goals (Tr. pp. 49-50; Dist. Ex. 25 at p. 2). The parents also signed consent to refer their son to the Cayuga Home for Children to participate in its Functional Family Therapy program, which consisted of weekly sessions in their home (Dist. Ex. 26). The special education program offered in the resultant November 9, 2007 IEP was not substantially different than the program contained in the May 2007 IEP (compare Dist. Ex. 23, with Dist. Ex. 27).<sup>17</sup>

The parents reported that their son continued to engage in dangerous and aggressive behavior in November and December 2007, which resulted in their contacting the police and taking their son to the emergency room of their local hospital (Parent Exs. 108-111; 128 at pp. 7-8; see Parent Exs. 112-13). In early December 2007 the parents were provided with information about the Comprehensive Psychiatric Emergency Program (CPEP) at a regional hospital and emergency crisis services (Parent Exs. 120; 124; 128 at p. 8). In mid-December 2007 the student was evaluated by a physician from the university hospital's psychopharmacology program who recommended that the parents take their son to the CPEP if his behavior was "uncontrollable" (Parent Ex. 128 at p. 8).

In the days prior to the district's December 2007-January 2008 holiday vacation, at the parents' request, the student's special education teacher and regular education teacher documented changes in the student's behavior that they observed subsequent to a change in his medication (Tr. pp. 413-14, 418-21, 543-544, 550-52; Parent Ex. 64). The teachers reported that the student exhibited an increase in work refusal, difficulty staying focused and refusal to follow the classroom routine; and required more reminders, occasionally ran around the room and on two occasions threw objects in the classrooms (Tr. pp. 418-19, 551-52; Parent Ex. 64). The student did not demonstrate aggressive behavior directed at other students during this timeframe (id.). The STARS clinicians reported that by the sixth session of its social skills group held at the end of December 2007, the student had demonstrated significant improvement in group participation, answered at least four questions appropriately, followed directions, took turns, had brief reciprocal conversations and accepted compliments (Parent Ex. 38). Although the student continued to exhibit difficulty with transitions at the beginning and the end of the sessions, the report indicated his frustration was primarily targeted at his parents or siblings (id. at p. 1).

According to his parents, on December 28 through December 30, 2007 their son threw objects at family members and a physician at CPEP, and was admitted to CPEP (Parent Ex. 128 at p. 8). On December 31, 2007 the student was transferred from CPEP and admitted to the St. Lawrence Psychiatric Hospital (SLPC) (Parent Exs. 39; 128 at p. 8). The inpatient screening admission note reported that according to the parents, over the past two months their son had become "more agitated and aggressive at home," including several instances of throwing objects at siblings causing injury (Parent Ex. 39 at p. 1). On the day of admission to SLPC, the psychiatrist reported that the student was "cooperative and directable" and after an examination of the student, offered diagnoses of ADHD-NOS, an autistic disorder and mild mental retardation; and also with

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<sup>17</sup> The November 2007 IEP added one session per week of group social skills training, described in the hearing record as a general education service conducted by the school psychologist (Tr. pp. 53-55; Dist. Ex. 27 at p. 2). Although not a special education service, the district placed the group social skills session on the student's IEP because it was a program used to supplement his social skills and the CSE believed he would benefit from that program (Tr. pp. 54-55).

education problems and problems with primary support group (*id.* at pp. 1, 4-5). The SLPC intake plan was to adjust the student's medications, have him undergo medical testing, participate in a psychoeducational treatment model to learn better coping strategies, continue his education, receive individual therapy to gain insight into his behavior and participate in recreational therapy to improve pro-social skills (*id.* at p. 5). While at SLPC, a special education teacher provided instruction to the student in language arts, reading, science and social studies for two periods per day in a group of four to six students (April 24, 2008 Tr. p. 719). A therapy aide assisted the student during instruction by keeping him focused (April 24, 2008 Tr. pp. 719-20).

By letter dated January 11, 2008 entitled "To Whom It May Concern," the SLPC psychiatrist and social worker informed the district that although the student "has been behaving well within the structured and consistent environment" that setting was able to provide, he had been demonstrating challenging and unmanageable behaviors at home for a long time (Dist. Ex. 28). The letter noted that the student reverted back to his challenging tantrums and unmanageable behaviors when he saw his family (*id.* at p. 1). The student was described as exhibiting extremely impulsive behavior and poor judgment when his mind was set on something (Dist. Ex. 28). SLPC staff reported that the student required constant supervision and 1:1 interaction with adults to assist him through the day (*id.*). The student's treatment team at SLPC agreed that because of the student's many needs, the behavior observed when with his parents, and display of unsafe behaviors at home despite the amount of support provided by other agencies, an out-of-home placement was deemed appropriate (*id.*).

On January 22, 2008 the CSE subcommittee convened to discuss the student's placement following discharge from SLPC (Dist. Exs. 29; 30; Parent Ex. 61). Participants included the district's assistant director of special programs/CSE chairperson, school psychologist, regular education teacher, the student's 2006-07 and 2007-08 school year special education teachers, the district's occupational therapist and two speech-language therapists, the parents, the student's DSO psychologist and service coordinator, the OMH Chief of Children and Youth Services, the Cayuga County Community Mental Health Center Children's Single Point of Access (SPOA) Coordinator, SLPC's social worker and special education teacher, a legal assistant to the parents' counsel, the student's uncle and grandfather and two other individuals identified as "CCSI" and "treatment team leader," respectively (Dist. Ex. 29 at pp. 1, 9; Parent Exs. 54; 56). According to CSE subcommittee notes, the parent reported that her son's "out of control" behavior preceding his admission to SLPC was due to over medication (Dist. Ex. 29 at p. 2). It was reported that the student became agitated, difficult to control and needed to be restrained during visits with his parents while at SLPC (*id.* at pp. 2-3). The CSE subcommittee reviewed the student's schedule and behavior while at SLPC and in the district's program (*id.*). Both district and SLPC staff reported that the student had exhibited some oppositional behaviors and "issues," but indicated with structure and behavioral modification techniques he was successful (Tr. pp. 66, 69; Dist. Ex. 29 at pp. 2-3; *see* Parent Ex. 107). The CSE subcommittee discussed the DSO service coordinator's attempts to locate an out-of-home placement for the student, including foster and family care settings and an IRA, which at the time

of the meeting, were unsuccessful (Dist. Ex. 29 at pp. 3-7).<sup>18</sup> The CSE subcommittee reviewed the letters the parents submitted which recommended either residential or out-of-home placement for the student and discussed the parents' desire for the CSE subcommittee to recommend a residential placement (*id.* at p. 4; *see* Parent Exs. 42 at p. 5; 52; 53; 55). The CSE subcommittee concluded that the student had been successful in its program, had made progress, and that it could not support the recommendation for a residential placement (Dist. Ex. 29 at p. 4).<sup>19</sup> The resultant January 2008 IEP continued to recommend that the student attend the district's 12:1+1 second grade program and receive related services as recommended in the November 2007 IEP (*compare* Dist. Ex. 23, *with* Dist. Ex. 30).

In a due process complaint notice dated January 27, 2008 the parents related the student's recent educational history, identified multiple problems they discerned with the January 2008 IEP and the district's program for the student and proposed terms for resolving the conflict (Parent Ex. 1). Specifically, the parents argued that the January 2008 IEP and the district's program for the student were flawed because: (1) the IEP did not provide for a residential placement, which the student needed to address his psychiatric, psychological, social and emotional needs, despite multiple professional recommendations that a residential placement was appropriate; (2) the district predetermined the student's program; (3) the 12:1+1 program that the district recommended for the student was inappropriate because the student to teacher ratio was too high; (4) the recommended speech-language services were inadequate and failed to comply with mandates for students with autism; (5) the IEP goals and objectives for speech-language services did not address all of the student's identified needs; (6) the IEP inappropriately mainstreamed the student in some academic areas; (7) the IEP failed to include adequate goals and objectives for OT and vision therapy services to address the student's identified needs; (8) the BIP contained in the IEP was inappropriate to address the student's needs;<sup>20</sup> (9) the IEP failed to include adequate goals and objectives for social skills deficits to address the student's identified needs and failed to specify the duration of social skills training; (10) the CSE eliminated one of only three IEP goals and substituted it for another without input from the parents and without prior written notice, which impeded the parents' right to equal participation in the decision-making process; and (11) the IEP failed to include adequate components addressing the student's therapeutic, psychiatric or psychological needs.

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<sup>18</sup> The hearing record indicates that subsequent to January 11, 2008 the DSO service coordinator located a foster home placement that was initially willing to take the student (Tr. pp. 61-62). Though the district's assistant director of special programs testified that the prospective foster family declined the placement because they were "concerned with working with the family", the hearing record provides conflicting reasons why the foster family ultimately declined to accept the student (Tr. pp. 61-62; April 24, 2008 Tr. pp. 684-85). Regardless, the parents stated that they would not accept a foster home placement for their son (April 24, 2008 Tr. pp. 675-76).

<sup>19</sup> Though the January 22, 2008 IEP does not state that residential placements were considered in the "Other Options Considered" section, it is clear from the CSE subcommittee meeting notes that the question of a residential placement was extensively discussed, but ultimately rejected (Dist. Exs. 29 at pp. 1-5; 30 at p. 7).

<sup>20</sup> The parents used the phrase "behavioral management plan" (BMP), in their due process complaint notice, but it appears that the parents were referring to the "behavioral intervention plan" (BIP) contained in the IEP (Parent Ex. 1 at p. 4).

After the filing of the due process complaint notice, but before the hearing began, SLPC's social worker and psychiatrist informed the district, by letter dated February 7, 2008 addressed "To Whom It May Concern," that the student was "stable and ready for discharge" and acknowledged that there were no IRAs, family care or foster care placements available at that time (Dist. Ex. 31). Therefore, the SLPC treatment team supported a referral of the student to a residential treatment center (RTC) (*id.*). As of the last day of the impartial hearing, the student remained at SLPC (April 24, 2008 Tr. p. 709).

Testimony was taken on four dates between March 20, 2008 and April 24, 2008 (Tr. pp. 1, 216, 460; April 24, 2008 Tr. p. 658). In support of its case, the district submitted documentary evidence and presented six witnesses, including the district's assistant director of special programs, the student's speech therapist, the school psychologist, the student's special education teacher, the student's regular education teacher and one of the student's former special education teachers (Tr. pp. 20, 220, 297, 413, 543). In support of their case, the parents submitted documentary evidence and presented seven witnesses including the DSO psychologist, the student's DSO service coordinator, the student's social worker at SLPC, the student's mother, the student's special education teacher at SLPC, the student's OT service provider and the student's father (Tr. p. 464; April 24, 2008 Tr. pp. 669, 688, 709, 718, 733, 770).

The impartial hearing officer rendered a decision on July 23, 2008 finding that the district failed to offer the student a free appropriate public education (FAPE) and ordering the district to provide the student with additional services (IHO Decision at p. 17). The impartial hearing officer further ordered the CSE to reconvene to recommend for the student, an appropriate program and a placement in a residential school (*id.*). Specifically, the impartial hearing officer found that the IEP goals were deficient in that they failed to address the student's identified needs in the areas of fine-motor, socialization, attention, noncompliance, sensory and self stimulatory behavior (IHO Decision at p. 9). He also found that the student's BIP was inadequate and "under-inclusive" (*id.*).

Regarding the need for a residential placement, the impartial hearing officer gave little weight to the testimony of the student's teachers wherein they described relatively minor behavioral issues at school and adequate educational progress, given the student's abilities (IHO Decision at pp. 9-13). Instead, the impartial hearing officer gave weight to testimony and evidence showing serious behavioral issues in the home, noting that he found it "difficult to imagine there is not some remnant of such extreme behavior which does not carry over into the classroom" (*id.* at p. 11). The impartial hearing officer also gave little weight to the district's testimony and evidence regarding class grades and educational progress, instead he found that because the student was afforded modified assignments, assessments and grading, there was a "subjective element" to the grades that limited their persuasiveness (*id.* at p. 12). The impartial hearing officer placed great emphasis on evidence from both parties showing a negative shift in the student's behavior following a change in medication shortly before he was admitted to SLPC (*id.* at pp. 12-13). Ultimately, the impartial hearing officer found that the student's medical, social and emotional problems were not segregable from the learning process and therefore, a full-time residential placement was necessary for educational purposes (*id.* at p. 16).

The impartial hearing officer also found that OT and speech-language therapy additional services were warranted due to the fact that the student had not received OT and speech-language services since his hospitalization on January 1, 2008 (*id.*).

The district appeals from the impartial hearing officer's decision, asserting that: (1) the impartial hearing officer erred in determining that the district did not offer the student a FAPE; (2) the impartial hearing officer erred in determining that a residential placement was required for the student to receive a FAPE; (3) the impartial hearing officer erred in disregarding evidence of the student's educational progress; (4) the parents failed to establish the need for a residential placement; (5) the impartial hearing officer erred in finding that the IEP did not address the student's needs; and (6) the impartial hearing officer erred in ordering additional related services.

The parents answer, contending that: (1) the impartial hearing officer's credibility determinations cannot be disturbed; (2) the district denied the student a FAPE by failing to recommend a residential placement that took into account the student's safety, psychological and psychiatric needs; (3) the district denied the student a FAPE by failing to provide goals and objectives for speech-language and OT services; (4) the district denied the student a FAPE by predetermining his program and methodologies; (5) the district failed to provide appropriate language services pursuant to 8 NYCRR 200.13; and (6) the impartial hearing officer properly awarded additional services.

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 student's educational program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]).

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] *aff'd* 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).



The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; 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).

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 Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The impartial hearing officer determined that the January 2008 IEP did not offer the student a FAPE in part because it lacked annual goals to address the areas of need identified by the CSE in the areas of socialization, fine-motor skills, distractibility, noncompliance, sensory needs and self-stimulatory behaviors (IHO Decision at p. 9). The impartial hearing officer also found that the student's BIP was "inadequate and under-inclusive" in that when the CSE reconvened in January 2008, it should have adapted the BIP to address the student's "shift in behavior" that occurred prior to his hospitalization (id.; see Parent Ex. 64).

As stated above, during the 2007-08 school year, the CSE recommended that the student attend second grade in its 12:1+1 special class ELA and math programs and receive one individual and one group OT sessions per week, and two individual and one group speech-language therapy sessions per week (Tr. pp. 23-24; Dist. Exs. 23 at pp. 1-2; 30 at pp. 1-2). The IEP specified that the student would receive modified assignments, assessments and grading, seating in close proximity to instruction and a BIP (Dist. Exs. 30 at p. 2). The student also received additional shared adult support when he was in groups larger than three students, for implementation of modifications (Tr. p. 39; Dist. Ex. 30 at p. 2). Support for school staff and the parents included four hours per year of BOCES autism consultant services (Dist. Ex. 30 at p. 2; see Tr. p. 33). With the exception of ELA and math instruction, and OT and speech-language therapy sessions, the student was educated in a general education second grade class (Tr. pp. 544-47; Dist. Ex. 30 at pp.

1-2). The district regular education teacher described how the aide assisted the student in her class and how his academic work was modified (Tr. pp. 555-56). The district special education teacher described how she provided the student's ELA and math instruction (Tr. pp. 421-27).

The January 2008 IEP provides extensive, detailed descriptions of the student's learning characteristics, classroom performance and behaviors, as well as math, reading, receptive and expressive language, self-help and social skills (Dist. Ex. 30 at pp. 3-7). It also thoroughly describes the student's learning, social development, physical and management needs (*id.* at pp. 5-7). For the following reasons, I disagree with the impartial hearing officer's determination regarding the annual goals and short-term objectives contained in the January 2008 IEP.

The assistant director of special programs, who was also the January 2008 CSE chairperson, testified that the district implements interdisciplinary goals (Tr. pp. 20, 40). The purpose of interdisciplinary goals is for students to develop and use skills across all settings (Tr. p. 40). Many of the district's related service providers do not work on isolated goals; rather they support the teacher's implementation of the goal (Tr. pp. 40-41). For example, the student's math goal involves the skills of legibly writing the math equation and solving it correctly (Dist. Ex. 30 at p. 8). The special education teacher teaches the student the process of solving the math problem, and the occupational therapist supports her effort by helping the student legibly write the numbers (Tr. pp. 41, 43). Both the teacher and the therapist are responsible for implementing the goal and they collaboratively track the student's progress toward the goal and write progress reports (Tr. p. 41).

The student's occupational therapist testified that she had worked with the student since January 2007 (April 24, 2008 Tr. pp. 733-34, 736). Her November 2007 OT reevaluation report stated that her sessions with the student addressed the development of his visual motor control, copy/drawing skills, self-care and sensory integration skills (Parent Ex. 19 at p. 1). She stated that the development of skills in those areas was necessary for the student to "best participate" in grade level activities such as coloring, cutting, writing and arts/crafts programs (*id.*). The student's performance on subtests of an assessment of visual-motor integration skills was in the low and very low range (*id.* at p. 2). Completion of sensory profiles provided to the student's family and classroom staff indicated multiple areas of concern, which the occupational therapist reported could sometimes be addressed by the preventive suggestions contained in the student's BIP (*id.* at p. 3). She further reported that the behaviors identified on the sensory profiles did not appear to be "of a strictly sensory nature" at that time, and that many reactions to situations began as sensory issues at a young age, and become more behavior-related as the student ages (*id.*). Her report provided sensory and behavioral techniques that could be used throughout the day, at home and in school, to decrease the student's difficult behaviors (*id.* at pp. 3-4). She recommended that the student continue to receive OT services to develop his visual control, copying/drawing skills, visual perception and sensory integration skills "to support his continued success in his academic performance" (*id.* at p. 4).

The January 2008 IEP states that the student did not consistently write legibly and that the accuracy of his cutting and coloring skills was improving (Dist. Ex. 30 at p. 4). Due to fine-motor skill delays, he needed modification of written assignments to reflect his skill level and at times, supervision to cue appropriate, safe use of scissors and materials (*id.* at p. 5). Regarding the

students sensory needs and self-stimulatory behaviors, the IEP reflects that the student may rock, look away from the focus of instruction and self-stimulate with light touch to his arms and legs, tighten his body, hunch his shoulders and grimace while looking at his hands and pressing his fingertips together (*id.* at p. 3). In addition, he also enjoyed flexing his arms/legs, visual stimulation (blinking, spinning and rolling/dropping/throwing objects and lights), sitting in a beanbag chair, listening to music, watching fans, dropping/breaking objects and playing with cars and keys (*id.* at p. 5). Provision of sensory input (hand squeezes, arm walking) sometimes improved the student's active participation and he needed support to use objects appropriately rather than for sensory stimulation (*id.*). The January 2008 CSE recommended OT to address the student's visual-motor control and sensory processing needs in order to participate in grade-level coloring, cutting and writing tasks (*id.* at pp. 5, 7).

The impartial hearing officer determined that the January 2008 IEP was deficient in part because it did not contain annual goals and short-term objectives specifically relating to the student's fine-motor and sensory difficulties and self-stimulatory behavior (IHO Decision at p. 9). The student's occupational therapist testified that the purpose of the student's OT was to improve his visual-motor skills and monitor his self-care and sensory integration skills so that he could perform in school (Tr. p. 757). In OT the therapist addressed the areas of deficit identified by the November 2007 sensory profile including his emotional awareness, inattention, distractibility, fine-motor, visual-motor and perceptual skills, and self-care needs (April 24, 2008 Tr. pp. 742-43). She stated that during individual sessions she typically worked on crossing midline activities and fine-motor, visual-motor/perceptual, writing, reading and typing skills; and in group sessions she worked on social and communication skills (April 24, 2008 Tr. pp. 750-51, 754-56).

The occupational therapist reviewed how she supported the student's annual goals and addressed his visual perceptual needs by reinforcing his reading; going from left to right and following the words (April 24, 2008 Tr. pp. 746-47). She addressed his fine-motor needs by working on the legibility of his handwriting, and his communication needs by providing opportunities to make relevant comments about "Wh" questions (*id.*). She instructed the student how to respond to his feelings in an appropriate manner, provided hands-on activities for multisensory processing and worked with fine-motor manipulatives, visual-motor worksheets and the "Brain Gym" program, which was used in-part to improve hand-eye coordination and body awareness (April 24, 2008 Tr. pp. 742-43, 753-56). She also worked on the student's printing skills, copying from a board/near point as well as examination, orientation and placement of letters (April 24, 2008 Tr. p. 743). The occupational therapist monitored the student's self-care needs and "whatever sensory needs if they were to arise within school that affected his behavior" (*id.*). She indicated that the January 2008 IEP did not contain annual goals and short-term objectives specific to OT because her OT services supported the student's educational program and the goals that were already put in place by the special education teacher and speech therapist (April 24, 2008 Tr. p. 745). The occupational therapist measured the student's progress toward his annual goals through the use of her individual notes, daily notes sent home to the parents, and progress reports in conjunction with his report card (April 24, 2008 Tr. pp. 749, 754).

The occupational therapist testified that she did not use a specific "sensory diet" in school with the student, because strategies such as providing the student with breaks and "fidgets" were incorporated into his day on an as-needed basis (April 24, 2008 Tr. pp. 761-62). She testified that

she did not use hand-over-hand cues to support the student's writing, and that she did not see a need for use of a joint compression or brushing program for the student at school (April 24, 2008 Tr. pp. 751-53). I note that the January 2008 IEP indicates that providing the student with sensory input at times improves his participation and attention, but that many of his behaviors which appeared related to sensory problems could be controlled and prevented by consistency, reinforcements and a behavioral approach (Dist. Ex. 30 at pp. 5-7). The hearing record does not reflect that the student's self-stimulatory behavior interfered with his learning, in that he was easily redirected when he exhibited those behaviors (Tr. pp. 373-75, 417, 458-50; April 24, 2008 Tr. pp. 738-39). Therefore, for the reasons stated above, I find that the hearing record supports the district's claim that the services offered in the IEP appropriately address the student's fine-motor and sensory difficulties, self-stimulatory behaviors and that the IEP did not require OT-specific annual goals and short-term objectives.

Turning to the student's socialization needs, the January 2008 IEP states that although the student independently initiates social interactions with adults and peers, he has difficulty sustaining those interactions if the topic was not one he selected (Dist. Ex. 30 at p. 4). He continued to be successful terminating interactions, but may need prompts to do so (*id.*). The IEP indicates that the student benefited from the use of social stories to facilitate his understanding and generalization of appropriate social skills (*id.*). The student demonstrated limited independent socialization skills within classroom settings and he was most comfortable with peers from his 12:1+1 class (*id.* at p. 6). With verbal prompts, the student joined in playtime with toys and games (*id.*). The IEP listed designated services to meet these needs (*id.* at pp. 2-3, 7). For example, the IEP reflects that the student's shared aide's responsibilities included facilitating social interaction and prompting active participation in activities (*id.* at p. 3). The IEP also provided for adult supervision and support to pre-teach and model social skills, to engage in age-appropriate, popular games and to facilitate appropriate social interactions (*id.* at p. 7). In addition to the general education social skills training session recommended in the January 2008 IEP, the occupational therapist testified that during her group sessions she worked on greetings, appropriate interactions during transitions to therapy and peer interaction during play (April 24, 2008 Tr. p. 761; Dist. Ex. 30 at p. 2).

The January 2008 IEP states that the student needs the support of a speech-language therapist in part to address his pragmatic skills (Dist. Ex. 30 at p. 6). The IEP states that speech – language services were to be provided (*id.* at p. 2). The student's speech therapist, who provided the majority of his speech therapy from the time he entered the district's program, testified that during group sessions she worked on social skills such as following directions, taking turns, asking questions and topic maintenance (Tr. pp. 222, 224, 228-29).<sup>21</sup> She also worked on improving the student's social skills during his individual speech therapy sessions through the use of social stories, role play and rehearsal (Tr. p. 229). She facilitated carryover of skills into the 12:1+1 classroom by occasionally reviewing a social story with the whole class and providing the students with opportunities to role-play, act-out and engage in activities that had been completed during small group therapy sessions (Tr. p. 230). The social stories addressed upcoming events in school such as parties or school vacation and also difficulties the parents had with the student's behavior

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<sup>21</sup> The speech therapist provided three therapy sessions to the student during the 2007-08 school year due to her maternity leave and the student's hospitalization; however she was the student's therapist for the entire 2006-07 school year and most of the 2005-06 school year (Tr. pp. 269, 278-79).

at home (Tr. pp. 231-32). The speech therapist testified that she tracked the student's social skills progress through the use of data sheets,<sup>22</sup> and reported progress to the parents in quarterly progress reports (Tr. p. 269-71). In addition, the student's 2007-08 special education teacher testified that she addressed social skills in her classroom and used social stories (Tr. pp. 427-30). The student's regular education teacher testified that the student "benefitted greatly" from participation in the class with typical peers and that he was beginning to develop relationships in the class (Tr. pp. 543-44, 556-57). I find that the CSE's program and services offered in the January 2008 IEP appropriately address the student's social skill needs, such that specific annual goals and short-term objectives were not required.

Regarding language instructional services for students with autism, the regulations of the Commissioner of Education states "Instructional services shall be provide to meet the individual language needs of a student with autism for a minimum of 30 minutes daily in groups not to exceed two, or 60 minutes daily in groups not to exceed six" (8 NYCRR 200.13[a][4]). The hearing record reflects that in 2007-08 the student received two individual 30-minute sessions per week of speech therapy and one group 30-minute speech therapy session, composed of two students (Tr. pp. 227, 229; Dist. Ex. 30 at p. 2). In addition, he received 60-minutes daily of ELA instruction in a special class composed of 10 students, one special education teacher and four aides (Tr. pp. 423, 427). The special education teacher testified that she broke the students into groups during instruction; and that the student's group consisted of herself, an aide and five other students (Tr. p. 425). She further testified that the language program she implemented in the ELA special class was a piece of the direct instruction program that she used during reading instruction (Tr. pp. 425-27). Based on the information contained in the hearing record, the district provided language instruction to the student that was consistent with 8 NYCRR 200.13(a)(4).

The January 2008 IEP noted that the student frequently seemed "distant," was not engaged in classroom activities, and was at times distracted by environmental stimuli although he most often appeared to be internally distracted by his own thoughts (Dist. Ex. 30 at p. 3). He required multiple verbal/visual/physical prompts and reinforcement to attend and respond to instruction (id.). The IEP addressed these needs (id. at pp. 2-3, 6). The IEP states that incentives such as games competition, privileges, a point system, small toys, a computer software program and prizes improved the student's attention and participation (id. at pp. 3, 6). The student needed visual schedules and adult support in structured large groups to cue his attention to task (id. at p. 6). The regular education teacher testified that the student's shared aide was "very good" at providing him with cues and prompts to pay attention (Tr. pp. 548-49). The 2007-08 special education teacher testified that "for the most part" the student was very attentive compared to other students in the class (Tr. pp. 432). The student's former special education teacher testified that the student needed additional supervision to ensure that he followed directions and attended, which she was able to provide in school (Tr. p. 675). She testified she was able to bring the student back to task when he became internally distracted (Tr. 675). Based on the foregoing, I find that the January 2008 IEP appropriately provided additional adult support and strategies to manage the student's inattention and distractibility, and did not require annual goals and short-term objectives specific to those deficits.

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<sup>22</sup> The speech therapist's data sheets were not contained in the hearing record.

I now turn to the impartial hearing officer's finding that the January 2008 IEP was deficient in that it did not contain goals to address the student's noncompliant behavior and that his BIP was inadequate. The IEP documented the frequency and type of inappropriate behaviors exhibited by the student such as breaking crayons, turning lights on/off, playing with off-limit objects, difficulty with hallway transitions and teasing teachers/staff (Dist. Ex. 30 at pp. 3-4). The student's BIP, as contained in his November 2007 IEP, describes his destructive behavior including snapping pencils, crayons and forks at lunch; and breaking or ripping classroom objects (Dist. Ex. 27 at p. 10). The January 2008 IEP and November 2007 BIP stress the importance of setting routines, high behavioral expectations and consistent behavior management strategies, as well as providing positive reinforcement and feedback (Dist. Exs. 27 at p. 10; 30 at pp. 4-5). The BIP also lists strategies to prevent behaviors from occurring such as presenting changes in scheduling with a visual cue and social story, using physical prompts to help the student initiate seatwork, repeating directions to ensure understanding, avoiding academic "downtime," using a stern, calm and consistent approach, and not responding emotionally to negative behaviors (Dist. Ex. 27 at p. 10). For instances when the student engaged in destructive behavior, the BIP identified taking away the broken item and returning the student to his classroom for a time-out as his management plan (id.).

The impartial hearing officer determined that the BIP was inadequate largely because the district did not modify it in response to the change in the student's behavior in December 2007 (IHO Decision at pp. 9, 12-13). However, the record clearly and consistently indicates that the majority of negative behaviors observed at school and reported by school staff were limited to a short span of a few days just prior to the district's winter holiday break, and not suggestive of the student's in-school behavior since September 2007 (Tr. pp. 418-21, 550-54, 595; Parent Exs. 21; 64). I also note that both the district and the parents attribute the change in the student's behavior to a medication adjustment conducted during late December 2007 (April 24, 2008 Tr. pp. 770, 775-76; Parent Ex. 64). In addition, district staff testified that the student did not require an individual BIP, and they were able to manage his behavior with the existing classroom behavior management plan (Tr. pp. 149, 309-10, 313, 331, 417-18, 428-30, 432, 550-54, 590-91). Under these circumstances, and in light of the strategies contained in the January 2008 IEP and the BIP<sup>23</sup> to manage the student's inappropriate behaviors, the CSE was not required to add specific goals to address the student's noncompliance.

Even if one concluded that additional annual goals and short-term objectives should have been incorporated into the January 2008 IEP, or that the BIP should have been modified to address the short-term increase in management needs related to medication changes, given that the hearing record shows that the student demonstrated prior improvement in these areas as set forth in more detail below, and that the content of the written IEP is adequate, I find that on a review of the entire record, any deficiency did not rise to the level of a significant procedural or substantive violation causing substantive harm such that a FAPE was denied. Moreover, the hearing record contains an uncontested reference that the student's IEP goals were reviewed at the November 9, 2007 CSE subcommittee meeting and the parents approved them (Dist. Ex. 25 at p. 2; see Tr. pp. 709-714, 770-81; Parents Exs. 127; 128). The CSE subcommittee did not substantially alter the November

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<sup>23</sup> Although the BIP addressed the student's destructive behavior, most of the strategies provided were general enough to be used to manage other types of negative behaviors such as noncompliance (Dist. Ex. 27 at p. 10).

2007 annual goals or short-term objectives in the January 2008 IEP (compare Dist. 27 at pp. 8-9, with Dist. Ex. 30 at pp. 8-9). In addition, the hearing record reflects that the parents were significantly involved in the development of both IEPs and had adequate opportunity to participate in the development of the IEPs (Dist. Exs. 25; 29; see Cerra, 427 F.3d at 192-94).

In light of the above, and based upon a preponderance of the evidence (see Matrejek v. Brewster Cent. Sch. Dist., 2008 WL 3852180 \*1 [2d Cir. 2008]), I find that the student's January 2008 IEP, at the time it was crafted, was developed in a manner that comported with required procedures and that any procedural deficiencies did not rise to the level of a denial of a FAPE. I also find that the IEP was reasonably calculated to provide meaningful educational benefit and that it accurately reflects the results of evaluations to properly identify the student's needs, establishes adequate annual goals related to those needs, provides for the use of appropriate special education services and that the parents had an adequate opportunity to participate its development (see Cerra, 427 F.3d at 192-94; Thompson R2-J Sch. Dist. v. Luke P., 2008 WL 3984361 \* 4 [10th Cir. 2008]; J.R. v. Bd. of Educ., 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004]).

I also find that the student made educational progress commensurate with his abilities since he has been receiving services from the district (see Walczak, 142 F.3d at 130). When considering the rate of the student's progress, I am mindful that in November 2007 the district's school psychologist reported that the student's extremely low cognitive skills are commensurate with his academic abilities, and that learning is likely to occur at a rate much slower than his peers (Dist. Ex. 24 at pp. 6-7). The fact that the student continued to exhibit significant cognitive and academic deficits did not preclude him from making educational progress. Despite the "positive tenor" of the testimony of the district's witnesses regarding the student's demonstrated progress, the impartial hearing officer found that the written evaluative materials "tell a different story" and he therefore rejected the district's "positive tenor" "position" (IHO Decision at pp. 9-10, 12). In particular, the impartial hearing officer looked to the student's performance documented in the November 2007 OT evaluation report and the November 2007 multidisciplinary psychoeducational evaluation report, to support his determination (id. at pp. 10-12; see Dist. Ex. 24; Parent Ex. 19). I am not persuaded that the two evaluation reports cited by the impartial hearing officer reflect information contrary to the testimony of district staff.

In his analysis of the student's November 2007 OT evaluation report, the impartial hearing officer noted the student's low and very low scores on standardized testing, his inability to complete one of the subtests, and listed behaviors that district staff reported were "frequently" exhibited by the student including not "tuning-in" to what is said, looking intensely at objects/people, difficulty standing in line, difficulty paying attention, lack of perception of body language/facial expressions, poor frustration tolerance and seeming anxious/overly serious (IHO Decision at pp. 10-11). However, the student's OT deficits identified by the standardized testing and his difficulties with attention, pragmatic and social skills, frustration tolerance and following classroom rules are documented in the January 2008 IEP (Dist. Ex. 30 at pp. 3-5, 7). Therefore, the record shows that when the district witnesses described the student's progress, they did so with an accurate understanding of the student's performance levels as they had previously documented (id.). Similarly, the impartial hearing officer found that the November 2007 multidisciplinary psychoeducational evaluation report of the student's social progress was inconsistent with evaluative findings that he also exhibited very low reading and spelling abilities, and very weak

pre-literacy and math skills (IHO Decision at p. 12). However, descriptions of the student's academic abilities contained in his January 2008 IEP are consistent with the November 2007 multidisciplinary psychoeducational evaluation report (compare Dist. Ex. 24, with Dist. Ex. 30 at pp. 3-7). It appears that the impartial hearing officer discounted the testimony of the district's witnesses in part because he interpreted the student's continued performance deficits documented in the November 2007 evaluation reports to show that the student had not demonstrated sufficient progress. As described above, the hearing record revealed that the district was fully aware of the student's significant needs and documented them in the January 2008 IEP (Dist. Ex. 30 at pp. 3-7). District staff testified regarding the student's performance and demonstrated progress with the knowledge and understanding of his cognitive and academic deficits.

Additionally I note that the impartial hearing officer, when looking at the student's progress, found that he "could not meaningfully evaluate" his grades because the student received modifications to his assignments, assessments and grading (IHO Decision at pp. 11-12). However, the student's receipt of these modifications reflects the district's provision of specialized instruction to a student with significant cognitive and academic needs. The impartial hearing officer therefore erred in finding that he could not use grades as objective evidence to measure the student's progress in a modified curriculum (see e.g. K.C. v. Fulton County Sch. Dist., 2006 WL 1868348 at \*14 [N.D.Ga. 2006]; see also Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112 [2d Cir. 2007]; Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 381 [S.D.N.Y. 2006]).

Moreover, the impartial hearing officer's decision ignores both the student's demonstrated progress reported by the CSE (Dist. Exs. 6 at pp. 1, 3; 9 at pp. 1; 12 at pp. 1-2) and testimony from the student's former special education teacher that reflects the student's upward progression through specific levels of instruction. The district utilized two reading methodologies with the student; the Reading Mastery program, described as a phonics program, and the Edmark sight word program (Tr. pp. 605). Both reading programs are researched-based (Tr. pp. 606-07). At the beginning of the 2006-07 school year the special education teacher stated that the student was able to identify many sounds, blend sounds into simple one-syllable words and was able to use sounds to spell simple words using sounds that he knew (Tr. pp. 630-31). Although the special education teacher characterized the rate of the student's reading progress as "inconsistent," she stated that had made progress and that he had learned 60-70 Edmark sight words during the three years that she worked with him (Tr. pp. 605, 607-08). She stated that she used sight words to work on reading fluency and comprehension, and through the use of picture cards, determined that the student understood what he read (Tr. pp. 631-32). Regarding the student's language instruction, at the beginning of the 2006-07 school year he was at language lesson "Level 50" (Tr. p. 629). By the end of that school year, the student was at "Level 94," indicating that he could listen to a language rule and make a prediction about what would happen (Tr. pp. 629-30). For the student's math instruction, the district used a research-based math program entitled Arithmetic 1 (Tr. p. 608). When the student entered kindergarten, his special education teacher stated that he knew some numbers and did "pretty well" counting with 1:1 correspondence (Tr. pp. 608-09). During the course of the 2006-07 school year in his math program, the student progressed from lesson number 57 or 58 to 95 and "learned the addition process" in that he learned to write and solve an addition equation (Tr. pp. 628-29). IEP progress notes from the 2006-07 school year indicate that



the student increased his sight word knowledge, mastered a math objective related to addition, and began working on subtraction skills (Dist. Ex. 33 at pp. 9-10).<sup>24</sup>

In addition, the special education teacher who worked with the student in December 2007 testified that the student "kept up" with his reading group peers and that she was pleased with his ability to complete math activities (Tr. pp. 430-31).

The impartial hearing officer found the testimony of some of the district staff to be unpersuasive because they "anecdotally related the student's progress" (IHO Decision at p. 10).<sup>25</sup> I find that the hearing record reflects specific examples of demonstrated progress given by professionals who were thoroughly familiar with the student that are persuasive. The speech therapist testified that when the student entered the district's 12:1+1 kindergarten program he did not verbally request assistance from adults, spoke with a very low vocal volume, did not seek out adult interaction or make eye contact and inconsistently responded to adult conversational overtures with prompts (Tr. pp. 225-26). By the end of the 2006-07 school year, the student's communication skills had come "very, very far" in that he interacted independently with adults by responding to greetings and telling stories without adult support (Tr. pp. 230, 253). He used an appropriate vocal volume and his sentence length consisted of five to seven intelligible words (Tr. pp. 231, 603-04). At the end of the 2006-07 school year the student had achieved all of his speech-language therapy IEP objectives (Dist. Ex. 33 at p. 11). The speech therapist testified that the student made "a lot" of progress during the 2006-07 school year in his social skills and that he really liked being social, and enjoyed having conversations with his aides, other students and teachers (Tr. p. 288). The occupational therapist reported that since January 2007 the student's behavior in OT improved and he demonstrated "minimal to no" sensory needs/concerns (Dist. Ex. 33 at p. 12). She also reported that he displayed consistent ability in tracing, copying and generating letters upon request and testified that he did very well during the time she worked with him (April 24, 2008 Tr. p. 762; Dist. Ex. 33 at p. 12). Socially, in kindergarten the student did not interact with other students (Tr. pp. 600-01). By the 2006-07 school year the student was "somewhat" more social in that he was more interested in being around his peers and watching what they did (Tr. p. 604). The regular education teacher testified that although the student continued to need encouragement to initiate and maintain conversations with peers, he appeared to develop a relationship with another student and was "out there running around the playground and interacting with the other kids. I mean he wasn't sitting on the bench by himself" (Tr. pp. 556-57). I note that the January 2008 IEP states that the student made "outstanding gains" in 2007-08 in his ability to verbally respond in a social situation spontaneously, appropriately and audibly (Dist. Ex. 30 at p. 4).

In sum, a careful review of the hearing record leads to the conclusion that the impartial hearing officer's findings regarding progress are inconsistent with a reading of the hearing record

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<sup>24</sup> In addition, prior to the 2007-08 school year, the student received approximately ten minutes per day of individualized, computer-based discrete trial training, a component of applied behavioral analysis, in subject areas that included sight words, 1:1 correspondence and money concepts (Tr. pp. 643-45).

<sup>25</sup> The comments that the impartial hearing officer discounted included statements such as the student has "come very, very far", "he did great on sounds" and "that by thanksgiving 2007 he seemed to be developing a friendship with another student" (IHO Decision at p. 10).

as a whole, and the impartial hearing officer erred in his interpretation of the documentary evidence. He then compounded his error by using the erroneous interpretation to discount witness testimony. Based upon my review of the entire hearing record, I find that the student's progress was commensurate with his skills (Dist. Exs. 12 at p. 1; 18 at pp. 1-3; 19 at pp. 1-4; 24 at pp. 6-7; Parent Ex. 35), that the January 2008 IEP was formulated based upon prior programming that provided meaningful educational benefit, and that the preponderance of evidence demonstrates that the January 2008 IEP was itself reasonably calculated to provide educational benefit.

Before turning to the issue of whether the student needed a residential placement, a brief discussion of the parents' argument regarding credibility determinations purportedly made by the impartial hearing officer is warranted. A State Review Officer is required, *inter alia*, to conduct an impartial review of the findings and decision appealed, examine the entire hearing record, ensure that the procedures at the hearing were consistent with the requirements of due process and make an independent decision upon review on completion of that review (see 34 C.F.R. § 300.514[b][2]). A State Review Officer may modify any determination of the impartial hearing officer the review officer deems necessary to effectuate the purposes of the IDEA and Education Law Article 89 relating to the determination of the nature of the child's disability, selection of an appropriate special education program or service and the failure to provide such a program or service (Educ. Law 4404[2]). In addition State Review Officers give due deference to the findings of witness credibility of an impartial hearing officer, unless non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion (Carlisle Area School v. Scott P., 62 F. 3d 520, 524 [3d Cir. 1995]; Application of the Dep't of Educ., Appeal No. 08-037; Application of the Bd. of Educ., Appeal No. 04-091; Application of the Bd. of Educ., Appeal No. 03-062; Application of the Bd. of Educ., Appeal No. 03-038; Application of a Child with a Disability, Appeal No. 03-025; Application of a Child with a Disability, Appeal No. 01-019).<sup>26</sup>

In the present case, the impartial hearing officer made few if any explicit credibility determinations, but rather made weight of the evidence determinations. However, one statement in the Decision could be read as a credibility determination. In discussing the testimony of the student's teachers describing relatively minor behavioral issues at school, the impartial hearing officer noted that he found it "difficult to imagine there is not some remnant of such extreme behavior [in the home] which does not carry over into the classroom" (*id.* at p. 11). However, to the extent that this statement was a credibility determination,<sup>27</sup> I find that the hearing record, including non-testimonial evidence, read in its entirety compels a contrary conclusion, for the reasons set forth below.

Turning to the impartial hearing officer's determination that the student required a residential placement, a board of education may provide a residential placement to a student with a disability if the placement is necessary to provide special education and related services to the

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<sup>26</sup> It is important to keep in mind the distinction between credibility determinations and weight of the evidence or persuasiveness determinations (see e.g. Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 429 [S.D.N.Y. 2007]).

<sup>27</sup> This purported credibility determination is particularly questionable because the impartial hearing officer did not identify the basis in the record for his determination.

student (34 C.F.R. 300.114). However, a residential placement is one of the most restrictive educational placements available for a student and it is well settled that a residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (Walczak, 142 F.3d at 122; Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121-22 [2d Cir. 1997]; Application of the Bd. Of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 06-017; Application of the Bd. of Educ., Appeal No. 05-081; Application of a Child with a Disability, Appeal No. 03-066; Application of a Child with a Disability, Appeal No. 03-062; Application of a Child with a Disability, Appeal No. 03-051; Application of a Child with a Disability, Appeal No. 01-083; c.f. N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 545 [S.D.N.Y. 2007]).

According to the continuum of services in the State regulations, where a CSE recommends a residential placement it must provide "documentation that residential services are necessary to meet the student's educational needs as identified in the student's IEP" (8 NYCRR 200.6[j][iii][d] [emphasis added]; see also Office of Vocational and Educational Services for Individuals with Disabilities [VESID], guidance on "Continuum of Special Education Services for School-Age Students with Disabilities" [April 28, 2008]).

Regarding the need for a residential placement, district staff—including the assistant director of special programs (Tr. p. 141, 143), speech therapist (Tr. p. 237-39), school psychologist (Tr. p. 335-36), occupational therapist (April 24, 2008 Tr. p. 767) and the special education teachers (Tr. pp. 445-46; April 24, 2008 Tr. p. 674)—testified that the district's program was able to meet the student's special education needs. Their testimony is supported by evidence, including testimony, derived from non-district sources. The student's DSO service coordinator testified that she had no reason to believe that the district could not provide the student with an appropriate education (April 24, 2008 Tr. p. 680). The DSO psychologist acknowledged that in conversations with the student's teachers they expressed that the student's behaviors were "manageable" at school and that the district was able to meet his sensory, academic and social needs; and his need for structure and a consistent behavior management system (Tr. pp. 501-02). The DSO psychologist opined that the student also needed a psychiatric/psychological component to his educational program, but this witness did not have much contact with the district and never observed the student at school (Tr. pp. 476, 500). Although the DSO psychologist predicted that school staff would eventually begin to observe the highly negative behaviors the student displays at home, they have not in the four years that they have educated the student (Tr. pp. 45-46, 484-85). The student's SLPC social worker testified that if the student was placed in a supervised group home setting, it was possible that he could "go into the community to school" (April 24, 2008 Tr. pp. 689, 702). Importantly, the student's SLPC special education teacher, who has approximately 25 years of experience at SLPC and worked with the student daily for four months, testified that the student "educationally" could be "maintained" in a public school setting without a residential component (April 24, 2008 Tr. pp. 718-19, 722). The SLPC special education teacher further testified that "regardless where [the student] lives, the school component should be a public school setting, like a 12:1+1 or an 8:1+1. [The student] would need a teaching assistant to work with him to keep him focused . . . It's mainly to keep him focused on academics" (April 24, 2008 Tr. pp. 726-27). The SLPC special education teacher stated that other components of the student's program should include OT, the support of a special education teacher and "social skills building" (April 24, 2008

Tr. p. 727). All of these educational components were offered by the district in its January 2008 IEP (Dist. Ex. 30 at pp. 1-2, 6).

The impartial hearing officer determined that in this case, the distinction between referrals for an out-of-home placement and a residential placement was "semantic" (IHO Decision at p. 13). However, it is important to note that prior to and after the parents requested that the CSE place their son residentially, the residential options explored and recommended by DSO and SLPC staff were foster and family care homes, IRA and RTC facilities, placements that may have been appropriate, but that a CSE could not recommend for a student (Tr. pp. 64-65, 171-73; Dist. Ex. 31; see 8 NYCRR 200.6[j]). I disagree with the impartial hearing officer's determination and find instead that the hearing record does not support a determination that the student required a residential placement recommended by the CSE for educational purposes. The DSO psychologist testified that the student required a residential placement to monitor his medication, develop behavioral strategies and teach alternative behaviors (Tr. pp. 465, 479, 484-85). The student's father testified that the reason his son was making progress at SLPC was due to its ability to monitor his medication and behaviors, offer 24-hour supervision and limit his access to dangers (April 24, 2008 Tr. pp. 772-73). While I am sympathetic to the parents' circumstances, the primary reasons set forth in the hearing record that support their son's need for residential placement are not educationally-based, but reflect their need for additional support to manage his behaviors at home. Based on the information in the hearing record stated above, I find that the CSE was not required to offer the student a residential placement to meet his educational needs for the 2007-08 school year. Moreover, I find that the January 2008 IEP was reasonably calculated to confer educational benefit and offered the student a placement in the least restrictive environment.

Lastly, I turn to the impartial hearing officer's award of OT and speech-language additional services. Compensatory education is instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It may be awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 2008 WL 3474735, at \*1 [2d Cir. Aug. 14, 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). While compensatory education is a remedy that is available to students who are no longer eligible for instruction, State Review Officers have awarded "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (see Application of the Bd. of Educ., Appeal No. 08-060; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

The impartial hearing officer ordered OT and speech-language additional services for the student on the ground that "[t]he [p]arents assert that the student has not received OT or [speech-language therapy] since his hospitalization on January 1, 2008" (IHO Decision at p. 16). However, the district had no notice of this argument because the parents' due process complaint notice requested additional services on different grounds, namely that services were not provided

pursuant to 8 NYCRR 200.13 and there were inadequate goals and objectives on the January 2008 IEP (Parent Ex. 1 at p. 7). As set forth above, I found those arguments without merit. Moreover, when parents are seeking compensatory education as relief, the hearing record must reflect that there was a deprivation of services that caused harm that could be rectified by additional services, and such proof is lacking in the hearing record (see Reid v. District of Columbia, 401 F.3d 516, 524 [DC Cir. 2005] [holding regarding compensatory awards that "the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]). This matter simply has not been developed in the record and the amount of additional services awarded has no foundation in the record. Accordingly, I will vacate the impartial hearing officer's finding that additional services were warranted, and I vacate the impartial hearing officer's determination of the type and amount of additional services required. I will remand this matter to the impartial hearing officer to develop a record and determine: (1) whether there was a deprivation of OT and/or speech-language services from January 1, 2008 to the date of the impartial hearing officer's decision, July 23, 2008; (2) whether the deprivation, if any, denied the student a FAPE; and (3) what amount of additional services, based upon evidence in the record, is appropriate to remedy the deprivation.

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that this matter is remanded to the same impartial hearing officer who issued the decision that is the subject of this appeal for a new impartial hearing to determine the following:

- (1) whether there was a deprivation of OT and/or speech-language services from January 1, 2008 to the date of the impartial hearing officer's decision, July 23, 2008;
- (2) whether the deprivation, if any, denied the student a FAPE; and
- (3) what amount of additional services, based upon evidence in the record, is appropriate to remedy any such deprivation.

**IT IS FURTHER ORDERED**, unless the parties otherwise agree, that the new impartial hearing be held within 30 days from the date of this decision and a written decision shall be issued by the impartial hearing officer within 45 days of the date of the instant decision, and

**IT IS FURTHER ORDERED**, that if the impartial hearing officer who issued the July 23, 2008 decision is not available to conduct the new impartial hearing, a new impartial hearing officer be appointed.

**Dated:**            **Albany, New York**  
                      **September 5, 2008**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**