



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-088

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

#### **Appearances:**

Skyer, Castro, Foley & Gersten, attorneys for petitioners, Jesse Cole Foley, Esq., of counsel

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

#### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Aaron School for the 2007-08 school year. The appeal must be sustained.

At the time of the impartial hearing in May 2008, the student was attending the Aaron School where his parents had unilaterally enrolled him since kindergarten (Tr. p. 252; Parent Ex. D at p. 1). The Aaron School is not approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with a speech or language impairment is not in dispute in this appeal (Tr. p. 150; Parent Ex. D at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

A discussion of the student's educational history is appropriate. A 2005 psychoeducational update report describes the student as engaging, motivated and cooperative, and indicates average intellectual potential (Dist. Ex. 1 at p. 6). Some difficulties with attention and concentration were noted during the evaluation that led to the student's referral for a trial of medication (id.).<sup>1</sup> The psychoeducational update report indicates that the student demonstrates continued difficulties with fine-motor skills that likely impact the student's performance on writing tasks, and require

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<sup>1</sup> The hearing record indicates that the student is taking medications for attention and anxiety (Parent Ex. D at p. 5).

continued support (id.). With regard to the student's academic achievement, the update report indicates some improvement, but that the student continues to exhibit difficulty with acquisition and mastery of some basic academic skills, including difficulty with phonological awareness and sound-symbol correspondence, and requires continued intense, special education support in those areas (id.). While the student demonstrated difficulties, the update report notes progress in skill development since the previous March 2004 psychoeducational evaluation (id. at pp. 1, 6). The student was described as "clearly benefitting" from the intensive support at the Aaron School (id. at p. 6).

As noted in the student's psychoeducational update report, results of the student's previous evaluation conducted in 2004 reflect an average IQ as assessed by the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III) with significant variability noted across domains (Dist. Ex. 1 at p. 2). Specifically, the student obtained a verbal IQ score of 86 (18th percentile, low average range), and a performance IQ score of 100 (50th percentile, average range) (id.). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition in 2005 yielded a full scale IQ score of 92 (30th percentile, average range), a verbal comprehension index score of 98 (45th percentile, average range), a perceptual reasoning index score of 104 (61st percentile, average range), a working memory index score of 88 (21st percentile, low average range), and a processing speed index score of 83 (13th percentile, low average range) (id.). Some inter-and intra-test scatter was noted among the component subtests with scores ranging from the 5th to the 75th percentiles, rendering the student's full scale IQ score an underestimate of his cognitive potential (id.).

On June 14, 2007, the Committee on Special Education (CSE) convened to review the student's educational program and to develop the student's individualized education program (IEP) for the 2007-08 school year (Parent Ex. D). Meeting attendees included the parent, a district representative, a school psychologist, a social worker, a special education teacher and an additional parent member (id. at p. 2). A special education teacher from the Aaron School participated in the CSE meeting via telephone (id.).

The resultant June 14, 2007 IEP describes the student as medically healthy with a sensory integration disorder (Parent Ex. D at p. 5). In assessing the student's performance, the June 14, 2007 IEP indicates that the student was making progress in managing the higher academic and language demands of his classroom (id. at p. 4). The student tried hard to engage in classroom activities, but tired easily, was impulsive and easily distracted (id.). The student required frequent redirection to task (id.). The student could become easily overwhelmed by external stimuli (id.). Socially, the June 14, 2007 IEP indicates that the student sought out interactions, but required teacher intervention to sustain interactions and problem solve peer conflicts (id.). The student benefitted from teacher support and modeling of appropriate social interactions and communication (id.). The student was also working on improving his self-regulation and sensory processing skills (id.). Social emotional management needs were described as redirection to task, use of visual and verbal cues, repetition and redirection, teacher modeling of appropriate social interactions and communication (id.). Personnel responsible for providing behavioral support included the student's teacher, occupational therapist and speech-language therapists (id.).

The June 14, 2007 IEP indicates that the student was making progress in reading (Parent Ex. D at p. 3). He was learning digraph sounds and two letter consonant blends (id.). He was less consistent at spelling and reading three letter consonant blends (id.). The student required

constant review of learned spelling rules and practice to increase his fluency (id.). The student was learning to read with expression, locate details and find the main idea (id.). The student was able to sequence events with teacher support (id.). The student had become an avid independent reader (id.). The June 14, 2007 IEP indicates that the student was an enthusiastic math learner with good calculation skills and used effective strategies for problem solving and computation (id.). The student was transitioning from manipulative to symbolic work (id.). The student's area of difficulty was a poor memory for facts (id.). The student was an enthusiastic writer, but difficulty was noted in expression of his words on paper, while incorporating rules of grammar and punctuation (id.).

The student was estimated to be on a second grade instructional level (2.0) in the area of decoding, at the upper first grade instructional level (1.9) in reading comprehension, at the upper third grade instructional level (3.9) in computation, and at the beginning first grade instructional level (1.0) for problem solving (Tr. p. 130; Parent Ex. D at p. 3). The hearing record indicates that performance levels were based upon the input of the student's special education teacher at the Aaron School who participated at the CSE meeting (Tr. pp. 129-30; Parent Ex. D. at p. 3). Academic management needs were described as graphic organizers, use of manipulatives and visual aids for math, repetition and reinforcement, redirection to task and verbal prompts (Parent Ex. D at p. 3).

The June 2007 CSE continued the student's classification as a student with a speech or language impairment. The CSE learned that the student attended a 12:1+1 program at the Aaron School (Tr. pp. 125-26, 149). The CSE recommended that the student continue in a 12:1+1 program in a special class at a district community school (Parent Ex. D at p. 1; Tr. p. 125). The CSE also recommended related services including two group sessions and two individual sessions of speech-language therapy weekly, and three individual sessions of occupational therapy (OT) weekly (Tr. p. 128; Parent Ex. D at pp. 13, 15). The duration of each session was 30 minutes (Tr. p. 128; Parent Ex. D at p. 15).

The June 2007 CSE recommended the 12:1+1 special class environment for all areas of instruction (Tr. p. 161; Parent Ex. D at p. 13). The CSE did not recommend the student's participation in the general education environment because the student required a small structured special education program to address his language, academic and social delays (id.). While the CSE did not recommend mainstreaming for the student in any academic areas, the hearing record indicates that the CSE expected that the student would have been mainstreamed for gym, lunch and assemblies (Tr. p. 161).

The CSE considered and rejected a collaborative team teaching (CTT)<sup>2</sup> class for the student because his high level of anxiety as well as attention deficits would impact on academic performance (Tr. pp. 143-44, 148, 162; Parent Ex. D at p. 14). Likewise, the CSE considered and

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<sup>2</sup> "Collaborative team teaching," also referred to in the State regulations as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

rejected a special class in a community school with a 12:1 teacher to student ratio as inadequate to address the student's deficits because he required additional adult support in the classroom (Parent Ex. D at p. 14).

The CSE considered offering the student counseling services because the student "may need teacher assistance to help him initiate, maintain, and problem-solve during social times," and has difficulty negotiating peer conflicts, voicing his feelings and communicating his needs within the classroom (Tr. pp. 132-33). Recognizing that the student was already scheduled to be pulled out of the classroom numerous times during the week for speech-language therapy and OT, and that his primary social and emotional problems occurred within the classroom, the CSE created social and emotional goals to be implemented by his classroom teacher and paraprofessional (Tr. pp. 132-33; Parent Ex. D at p. 12).

On August 20, 2007, the parents, by their attorney, sent the CSE chairperson a "Notice of Unilateral Placement" advising of their intent to place the student at the Aaron School for the 2007-08 school year at public expense (Parent Ex. C). The notice makes general allegations that the IEP and placement denied the student a free appropriate public education (FAPE) on procedural and substantive grounds, that the parents were denied meaningful participation in the development of the IEP, and that the CSE failed to recommend an appropriate placement for the student that would provide suitable and functional grouping (*id.*). The notice indicated that "[f]urther details describing the nature of the problem(s) with the IEP and/or placement will follow in a hearing request under separate cover" (*id.*).<sup>3</sup>

A Final Notice of Recommendation (FNR) was subsequently sent to the parents recommending that the student attend a 12:1+1 special class at one of the district's community schools (Parent Ex. E at p. 2). The FNR is dated "August 2007" (*id.*). A copy of the envelope containing the FNR, postmarked August 28, 2007, was received in evidence at the impartial hearing (IHO Decision at p. 10; Tr. p. 11; Parent Ex. E at p. 3). The placement officer testified that she sent the FNR to the mailroom on August 23, 2007 and she believed that the first day of school was September 4, 2007 (Tr. pp. 190, 196, 207-08, 215). The father testified that he received the FNR after returning from a Labor Day weekend vacation on Monday, September 3, 2007 (Tr. p. 255). The father testified that he telephoned the district the following day but was unable to speak to anyone, and that it was not until September 10, 2007 that he was able to speak to someone from the district about the proposed school (Tr. p. 256). The student's father also testified that for the prior school year a 12:1+1 special class was also recommended, but that the district did not recommend a specific school for the student to attend (Tr. p. 254).

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<sup>3</sup> Counsel for the parents apparently utilize a standard form to provide notice to districts of parental unilateral placement. The form used in this matter informed the district that the unilateral placement is intended to be at district expense, but it did not state, except in general terms, the parents' concerns with the district's recommended IEP (*see* 20 U.S.C. § 1412[a][10][C][iii][I][aa]). The notice requirement of 20 U.S.C. § 1412 "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (*Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 160 [1st Cir. 2004]). The notice in this matter provided the district notice of the unilateral placement intended at public expense, but it did not give adequate notice of the parents' procedural or substantive concerns with the proposed IEP. Whether under 20 USC § 1412 notice requirements, or general equity principles regarding notice (*see* Frank G. 459 F. 3d. 356, 376), the notice did not adequately inform the district of the parents' concerns.

On January 29, 2007, the parents signed a contract for the student to attend the Aaron School for the 2007-08 school year (Parent Ex. F). The parents submitted payments to the Aaron School of \$7,000 on February 8, 2007; \$10,500 on May 24, 2007; \$10,500 on September 6, 2007; and \$10,000 on December 13, 2007 (Parent Ex. H at p. 1). Total tuition paid to the Aaron School was \$38,000 (id.).

By due process complaint notice dated October 29, 2007, the parents requested an impartial hearing seeking reimbursement for the student's tuition at the Aaron School for the 2007-08 school year (Parent Ex. A). The parents alleged that the district failed to offer the student a FAPE on procedural and substantive grounds (id. at p. 1). Specifically, the parents alleged the following procedural flaws: (1) no regular education teacher was present at the June 14, 2007 CSE meeting; (2) the special education teacher from the student's current school participated for only a portion of the CSE meeting and the district did not have another special education teacher present at the CSE meeting; and (3) in early September 2007, the parents received an FNR referring them to the district's community school (id. at p. 2). Substantively, the parents alleged that the district did not offer the student a suitable and functional peer group for instructional and social/emotional purposes (id. at pp. 2-3). On January 24, 2008, the parents filed an "Addendum to Request for Impartial Hearing, Disputed Issues and Proposed Resolution" (Parent Ex. B). The addendum raised issues concerning counseling, social/emotional goals, inappropriate academic goals, measurable standards and methods of measurement (id. at pp. 1-2).

The impartial hearing convened on May 16, 2008 and testimony concluded on the second day of the impartial hearing, June 11, 2008 (IHO Decision at p. 2; Tr. pp. 4, 184).

At the impartial hearing, in its opening statement the district disclosed that it did not have a seat available for the student at the beginning of the 2007-08 school year (Tr. p. 33). The district's placement officer testified that at the time the placement was offered, she believed that there was space available in the classroom for the student (Tr. pp. 191, 200). The teacher of the recommended 12:1+1 class at the district's community school testified that on the first day of school, her classroom had 12 students, ranging from 9 to 11 years of age and in grades three through five (Tr. pp. 51-52, 54). The placement officer testified that she believed the first day of school was September 4, 2007 (Tr. pp. 207-208). She further testified that had the parents accepted the placement, and had she been made aware that there were 12 students in the class, she would have applied for a variance from the State Education Department to place a thirteenth child in the classroom, and that she followed this procedure before and never had a problem securing the variance (Tr. pp. 192-93, 206). The placement officer testified that when a variance is needed to allow an extra student in the class, the student may not attend the class until the variance is approved (Tr. p. 207).

The teacher of the proposed class testified that, although "not ideal," she believed that having an additional student in her classroom would not have adversely impacted her ability to appropriately educate the students (Tr. p. 55). In reading, the class ranged from kindergarten to mid-third grade level (Tr. p. 51; Parent Ex. N at p. 1). Math levels ranged from kindergarten to about halfway through fifth grade, with two of the students performing significantly higher in math (id.). The teacher testified that she believed the range in academic functioning in her classroom did not hinder her ability to meet the educational needs of the students because she does a lot of small group work with the students (Tr. p. 73). The teacher also testified that the student would likely have been educated with the third grade students for reading, as they utilize the Wilson

reading program that focuses heavily on decoding, phonics and comprehension (Tr. pp. 55-56, 95). Wilson reading or a similar program was also employed by the speech and language therapist to ensure continuity and reinforcement (Tr. p. 90). Struggling students additionally received one-on-one support from the classroom paraprofessional to ensure greater comprehension (Tr. pp. 74-75).

The hearing record indicates that the student was considered a fourth grade student by the district and that fourth graders in the proposed special class were mainstreamed into a CTT class for science, library and computers (Tr. pp. 80, 82-83; Parent Ex. D at p. 1). The teacher normally walked her students to the mainstream classes and made sure they were alright before leaving (Tr. p. 83). The teacher testified that her fourth grade students were "self-sufficient," in that they have been able to be in the mainstream classes without an extra adult (Tr. pp. 83-84). The CTT class has about 25 students, two teachers and two paraprofessionals, assigned to specific students in the CTT class (Tr. p. 84). The paraprofessional from the 12:1+1 class does not remain with the students in the mainstream classes (Tr. p. 83).

For distractible students, the teacher of the proposed district 12:1+1 class utilized preferential seating, frequent reminders and redirection, separate seating areas which limit visual distractions and permitting the students to tactilely play with an object or listen to classical music while working (Tr. pp. 60-63, 75). Socially, the teacher reminds the students to listen to the speaker with their whole body, to look at the speaker, to maintain their hands in an appropriate manner, to express their feelings when they are in distress or anxiety, and to use their words rather than act out physically (Tr. pp. 63, 67-68). The students work on having positive two way conversations with one another as well as with a group, sustaining eye contact, social reasoning and problem solving skills (Tr. p. 67). The students are alerted five minutes and occasionally one minute before transition periods to reduce anxiety (Tr. p. 68). According to the teacher, the guidance counselor is available for consultation, instruction and intervention, as needed (*id.*). In the 2006-07 school year, she was consulted about five times, but was available to come in more frequently if necessary (Tr. pp. 68-69).

At the impartial hearing, the parents presented as a witness the student's special education teacher at the Aaron School who is certified in early childhood and in special education (Tr. p. 221). The student's Aaron School teacher testified that the Aaron School is a "special education private school" for children with learning disabilities and speech delays (*id.*). The Aaron School was described as a small private school for about 100 students with learning differences, with about 12 students per class (Tr. p. 222). The school provides students with OT, speech-language therapy, and counseling, in addition to gym, music, computers, art and library (*id.*).

The student's class at the Aaron School has 12 students, one head teacher and one assistant teacher (Tr. p. 223). The Aaron School does not designate grade levels, so the students are broken up by age range (*id.*). The student was in a class with seven and eight year olds (*id.*). The student's teacher testified that the students in the class had similar academic functioning levels and were split into smaller groups for math and reading throughout the day (Tr. p. 224). The curriculum, modified from the New York State standards, was modified based upon the individual needs of the students (Tr. p. 225). A multi-sensory approach was used throughout the academic day at the Aaron School (Tr. p. 226). Before classes began in September 2007, the student's teacher participated in formal and informal discussions with a team assembled by the administration to detail the student's needs and successes (Tr. pp. 227-28). The student presented with language needs, anxiety and social issues and some attention issues (Tr. p. 228). Academically, the student

presented with memory issues as well as a carryover of anxiety issues that affected his ability to learn (*id.*). The student's class relies upon a significant amount of review and repetition (Tr. pp. 228-29). Information is presented visually throughout the classroom environment, assisting the student in the recall of information (Tr. p. 229). A behavior plan, 1-2-3-Magic is used throughout the school environment and has been shared with the parents (Tr. pp. 229-30). The teacher testified that the consistency and carryover was important for the student who requires that everyone have similar expectations of him (*id.*). At the Aaron School, the student received one individual period of speech-language therapy and one individual period of OT per week; and one group period of speech-language therapy and one group period of OT per week (Tr. pp. 230, 245; Dist. Ex. M at p. 1). Each individual therapy session was 30 minutes (Tr. p. 245; Dist. Ex. p. 1).

At the Aaron School, the related service providers and teachers meet weekly along with a psychologist and a supervisor (Tr. p. 230). Modifications are consistently made to the academic work to allow the student to gain an educational benefit (Tr. p. 231). For example, the student's grapho-motor difficulties and his anxiety make writing a difficult process (Tr. p. 231). The teachers break down the writing assignments for him and work individually to pre-teach concepts and ideas before he begins putting words to paper (Tr. pp. 231-32). The student is in a reading group of five or six students (Tr. p. 233). The group works on taking books apart to understand the main idea and details (Tr. pp. 232-35). The Wilson program is used to work on reading and encoding/spelling rules (Tr. pp. 225, 234-35). The student has done well at the Aaron School and has made progress (Tr. pp. 235-39). The student has shown improvement in spelling and encoding (Tr. pp. 235-36). The student has also shown improvement in his ability to sequence events, answer questions and understand what is happening in text (Tr. pp. 235-36). In addition, the student has also shown progress socially (Tr. p. 235). The school issued a progress report in February 2008 discussing the student's progress to date (Tr. pp. 236-37; Parent Ex. M). The teacher testified that the report was an accurate picture of where the student presented in February 2008 and the student has continued to make progress (Tr. pp. 237-38). The school and classroom teacher modify the environment and the amount of support provided to the student in response to the student's needs (Tr. pp. 238-39). The special education teacher at the Aaron School testified that her class uses a modified second grade curriculum for social studies and science (Tr. pp. 248-49). The student's transition into other classes for reading and math where they are grouped by functioning levels (Tr. pp. 224, 233).

By decision dated July 7, 2008, the impartial hearing officer determined that the district offered the student a FAPE for the 2007-08 school year (IHO Decision at p. 12). The impartial hearing officer found that the parents' January 24, 2008 due process complaint addendum was a "nullity" because it constituted an attempted amendment of the October 29, 2007 initial due process complaint notice (*id.* at pp. 2-4). The impartial hearing officer limited his decision to those issues raised in the October 29, 2007 due process complaint notice, noting that the parents did not seek his permission to amend the due process complaint notice nor did the parents obtain signed consent from the other party to amend (*id.* at p. 3). The impartial hearing officer also found that the absence of a regular education teacher at the CSE meeting on June 14, 2007 did not affect the student's right to a FAPE, nor did it affect the parents' opportunity to participate in the decision making process (*id.* at p. 9). Nor did the absence of the regular education teacher at the CSE meeting on June 14, 2007 cause any deprivation of educational benefit to student (*id.*). The impartial hearing officer found inadequate testimony in the hearing record to substantiate the parents' allegation that the special education teacher from the student's school participated for only a portion of the meeting and that another special education teacher was not present (*id.*). The

impartial hearing officer also found that the recommendation by the CSE that the student be placed in a 12:1+1 special class in a community school was appropriate and the specific program offered the student was an appropriate placement, that included a suitable and functional peer group for instruction as well as for social/emotional purposes (id. at p. 11). The impartial hearing officer also found that the parents' contention that the district failed to offer a valid placement at the start of the school year was beyond the scope of the October 29, 2007 due process complaint notice (id. at p. 12).

The parents appeal, asserting that the impartial hearing officer erred in finding that the district offered the student a FAPE for the 2007-08 school year. The parents allege that the impartial hearing officer improperly refused to consider allegations contained within the addendum to the due process complaint notice, filed on January 24, 2008, and improperly refused to consider the parents' claim that the proposed class had no space for the student. The parents also allege that the impartial hearing officer improperly determined that the absence of a regular education teacher and the absence of a qualified special education teacher did not significantly impede the parents' opportunity to participate in the decision making process. The parents assert that the CSE met before the IEP meeting and impermissibly predetermined that the student would not be offered a placement in a general education setting. The parents further assert that the CSE determination and the student's individualized needs require a placement that is incompatible with the approach to mainstreaming taken by the proposed placement and that the proposed class violates the three year range requirement. In addition, the parents assert that the impartial hearing officer mistakenly placed the burden of proving the inappropriateness of the district's recommendation on the parents. Ultimately, the parents contend that it was reasonable for the parents to believe that the Aaron School would confer an educational benefit upon the student; the Aaron School conveyed an educational benefit upon the student; and equitable considerations weighed in favor of the parents' reimbursement request.

In their answer, the district maintains that the impartial hearing officer correctly decided that the district offered the student a FAPE for the 2007-08 school year and applied the correct burden of proof. The district alleges that the impartial hearing officer properly refused to consider allegations contained within the January 24, 2008 addendum, and properly refused to consider the parents' claim, first raised at hearing, that the proposed class had no space for the student. The district further alleges that the CSE was properly constituted and that the CSE offered an appropriate program within the least restrictive environment (LRE). The district adds that the parents' unilateral placement was not appropriate and that equitable considerations weighed against the parents' reimbursement request.

Initially, I will address the parents' contention that the impartial hearing officer erred in declining to consider the issues raised by the January 24, 2008 amended due process complaint notice. A party may amend its due process complaint notice if the other party consents in writing to such amendment or if the impartial hearing officer grants permission, except that the impartial hearing officer may only grant such permission at any time not later than five days before an impartial hearing occurs (20 U.S.C. § 1415[c][2][E][i]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][i]). Here the parents' did not seek permission from the impartial hearing officer to amend their due process complaint notice. The district did not consent to the amendment and the impartial hearing officer did not grant permission for an amendment. As to the impartial hearing officer's decision, it appears from a discussion that took place on the first day of the impartial hearing that the impartial hearing officer saw the January 24, 2008 amended due process complaint



for the first time that day (see Tr. pp. 23-31). By notification dated October 30, 2007, the impartial hearing officer was appointed by the district to hear this matter (Tr. p. 4). It is not clear from the hearing record when the impartial hearing officer, the parents, the district, or the parents' attorney were notified of the appointment of the impartial hearing officer.<sup>4</sup> The amended notice was sent by the parents' counsel to the district's CSE chairperson, with a copy sent to the district's impartial hearing office. The hearing record does not show that the January 24, 2008 amended due process complaint was sent by parents' counsel to the impartial hearing officer or district's counsel. I concur with the impartial hearing officer that the district should have made a request directly to him for permission to amend the due process complaint notice. Because the parents failed to make such a request in a timely manner, I decline to disturb the impartial hearing officer's decision not to allow the amendment and conclude that the impartial hearing officer did not err in declining to consider the issues identified in the January 24, 2008 addendum.

I will next consider the parents' claim that the district failed to offer the student a FAPE for the 2007-08 school year. Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are 1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and 2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent.

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<sup>4</sup> The hearing record also does not contain any documents, testimony, or statements explaining why testimony in the impartial hearing did not begin for almost seven months after the filing of the October 29, 2007 due process complaint notice. Federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30 day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Compliance with the federal and State 45-day requirement is mandatory (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]). Impartial hearing officers must also comply with State regulations requiring the careful granting and written documentation of any extensions of time and the reasons why extensions were granted, as well as the inclusion of such documentation as part of the hearing record on appeal (see 8 NYCRR 200.5[j][5][i]-[iv]). In the present case, there is no documentation in the hearing record or his decision about any extensions that may have been granted and the reasons why they were granted. The timing of the due process complaint notice, the date of the impartial hearing and the date of the decision suggests that multiple extensions were granted. I encourage the impartial hearing officer to ensure that the impartial hearings, over which he presides, comply with federal and State regulations.

Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at \*7 [2d Cir. Oct. 9, 2008]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). As a general rule, at the beginning of each school year, a district must have a student's IEP in effect (34 C.F.R. § 300.323).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

On August 15, 2007, New York State amended its Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016), and therefore applies to the present case.

Returning now to the instant case, I will first address the parents' argument that the impartial hearing officer erred in failing to address the parents' assertion that the proposed class did not have an available space for the student. The parents specifically allege that the 12:1+1 special class proposed by the district had no space for the student because the class had 12 children in attendance on the first day of school. The district maintained that the impartial hearing officer properly refused to consider the parents' assertion because it was first raised at the impartial hearing. The October 29, 2007 due process complaint notice did not allege that the proposed class did not have an available space for the student (Parent Exs. A; B). However, the district, in its opening statement at the hearing, stated that the district offered the student a placement at a district community school, and that the district would have obtained a variance to allow the student to attend the class as the thirteenth student (Tr. p. 33). Pursuant to the IDEA, a party requesting an impartial hearing may not raise issues at an impartial hearing that were not raised in its original due process complaint notice unless the original complaint is amended with permission from the impartial hearing officer prior to the impartial hearing (20 U.S.C. § 1415[c][2][E]), or the other party otherwise agrees (20 U.S.C. § 1415[f][3][B]). "[T]he purpose of the sufficiency requirement is to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint" (S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-185, "Notice of Complaint," [November 3, 2003]; see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5 [i][7][i], [j][1][ii]). In this case, however, the district was on notice as to whether space was available for the student at the beginning of the 2007-08 school year. After first raising the issue, the district then presented direct evidence on the issue. In addition, this issue was fully explored on direct and cross examination of the district's placement officer, without objection (Tr. pp. 190-93, 200-201, 206, 207-08; see also Parent Ex. N). Under the circumstances, I find that the impartial hearing officer should have considered whether the district had a classroom seat available for the student at the beginning of the 2007-08 school year, and if not, he should have determined whether the failure to do so rose to the level of denying the student a FAPE.

I will now consider the parents' assertion that the district's proposed 12:1+1 class did not have an available space for the student at the beginning of the school year. The hearing record reflects that (1) a placement offer of a 12:1+1 class at a district community school was issued by an FNR dated "August 2007"; (2) the envelope containing the FNR was postmarked August 28 2007; (3) the placement officer believed that there was an opening at the time she prepared the FNR on August 23, 2007; (4) the placement officer believed the FNR was mailed on August 23, 2007; (5) the 12:1+1 special class had 12 students in attendance at the beginning of the school year on September 4, 2007; (6) the placement officer indicated that she would apply for a variance if she found out there were 12 students in the class; (7) a variance application would not be done by the placement officer until the parents accepted the placement; (8) a variance application takes 7 to 10 days for approval; (9) previous requests for variances by the placement officer have always been granted; and (10) students must wait for approval of a variance before attending class (Tr.

pp. 48-49, 54, 190-93, 196, 200, 206, 207-08, 215; Parent Exs. E at pp. 2-3; N). After full consideration of the facts adduced at the impartial hearing, the hearing record shows that the district failed to have a classroom seat available for the student in place at the beginning of the school year in September in which to implement the IEP. Had the student shown up for class the first day, there would have been no space for the student on that day, and, under the district's description of the best case scenario, a space would not have been available for the next 7 to 10 days. Therefore, the student would have been denied access to education for beyond a de minimus period of time.<sup>5</sup> Accordingly, I find that the district's offer of a 12:1+1 special class at a community school within the district, where no space was available for the student at the beginning of the school year, under the facts of this case, impeded the student's right to a FAPE and caused a deprivation of educational benefits as afforded under the IDEA (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.4[e][1][i]; Matrejek, 471 F. Supp. 2d at 419 [stating "procedural inadequacies that cause substantive harm to the child or his parents – meaning that they individually or cumulatively result in the loss of educational opportunity . . . – constitute a denial of a FAPE"]; Grim, 346 F.3d at 381 [stating "[i]t is no doubt true that administrative delays, in certain circumstances, can violate the IDEA by depriving a student of his right to a 'free appropriate public education'"]).

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each student in its jurisdiction with a disability (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe v. New York City Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"]). In this case, it is undisputed that the IEP itself was formulated in a timely fashion on June 14, 2007 (Parent Ex. D). However, the district failed to offer the student a FAPE because it did not offer a special 12:1+1 class at a school where the IEP could be implemented at the beginning of the school year. Accordingly, and based on the above, I find that the district did not offer the student a FAPE for the 2007-08 school year because the IEP could not be implemented in a timely manner.

I must now consider whether the parents established that the Aaron School offered an educational program that would meet the student's special educational needs during the 2007-08 school year. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and

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<sup>5</sup> There is no evidence in the record that the district would have provided the student with alternative instruction pending receipt of a variance.

criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement..." (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [citing Frank G., 459 F.3d at 365 [quoting Rowley, 458 U.S. at 188-89] [emphasis added])).

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

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

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

The district contends that the parents failed to sustain their burden to show that the Aaron School was appropriate to meet the student's special education needs. In support of its contention, the district argues that (1) the school does not employ grades; (2) the parents failed to produce evidence that the school kept track of the student's progress; (3) the student's "report card" for 2007 indicates the skills the student already possesses; (4) the student's mid-year progress report merely lists the areas of development in which the student is still delayed; (5) only the student's past OT and speech-language therapy reports reference any specific areas of progress; (6) testimony on the student's progress was extremely limited; (7) the Aaron School does not provide the necessary related services to the student; (8) although the Aaron School provides the student with OT and speech-language therapy, it is in significantly lower levels than recommended by the CSE; (9) although the student experiences difficulty negotiating peer conflicts, voicing his feelings and communicating his needs within the classroom, he is not provided with any sort of counseling

support at the Aaron School; and (10) the student is being educated in a restrictive special education school without any opportunities to interact with his mainstream peers.

After a thorough review of the hearing record, I find that the program provided to the student at the Aaron School appropriately addressed the student's academic, social/emotional, language/speech, and attention needs through consistency in the classroom and related service environments. Unlike the record developed in Application of a Student with a Disability, Appeal No. 08-092, the hearing record in the instant case provides details and explanations regarding programming for the student implemented in the classroom and/or throughout the Aaron School. As described below, progress reports and testimony by the student's teacher at the Aaron School were explicit and informative, and amply demonstrate how the Aaron School modified academic, behavioral, and social/emotional content and instruction specific to the student's individual needs to enable him to receive meaningful educational benefits.

Initially, I address the district's assertions that the Aaron School is not appropriate because it does not employ grades, the student's report card only indicates skills already possessed, the Aaron School does not keep track of progress, the student's mid-year progress report merely lists his areas of developmental delay and testimony of progress is extremely limited, and find such assertions to be unsupported by the hearing record. A review of the report card indicates four levels of progress: independently mastered, in progress, emerging skill, and needs improvement (Parent Ex. L at p. 2). The student is graded on one of those levels in the areas of social development, language, calendar, writing, reading readiness, reading, spelling (encoding), and listening comprehension (id. at pp. 2-10). I find that the report card, in conjunction with testimony of the student's special education teacher at the Aaron School (referenced above), the student's February 2007 and 2008 mid-year reports, April 2007 speech and language progress report, and April 2007 OT progress report (discussed below) demonstrate the student's actual progress at the Aaron School (see Parent Exs. I; J; K; L; M).

The February 2008 mid-year report indicates that the student has made progress in reading (Parent Ex. M at p. 3). The report notes that the student made more of an effort to participate appropriately when he felt that he was doing a good job (id.). Decoding skills were noted to be improving and the student was further developing his sight word vocabulary (id.). Overall, the student was described as having shown progress in his ability to think critically about material read (id.). In math, progress was reported in the student's ability to memorize facts and in understanding place value (id.). The February 2008 mid-year report also notes improvement in the student's ability to play appropriately for longer periods of time during choice time, with less impulsivity and need for teacher intervention (id. at p. 2).

The February 2008 mid-year report details that the student's struggles in school could be attributed to poor memory and anxious feelings (Parent Ex. M at p. 1). The report indicates that the student benefited from the multisensory approach to learning that his teacher uses when introducing and practicing new skills (id.). The report notes that the collaborative work of the student's school team helps to ensure that interventions are carried out consistently throughout his school day (id.). The student was described as benefitting from clear behavioral expectations that remain consistent during therapy sessions, which help the student generalize rules, with the goal of the interventions being that the student would feel more comfortable in school and begin to advocate for himself (id. at pp. 1-2).

The February 2008 mid-year report details that the student benefitted from adult support and modeling to help him gain the attention of a peer and to reciprocate appropriately to peers during conversations (Parent Ex. M at p. 2). The student also benefitted from teachers' reminders and assistance to use his words with peers (id.). Teachers assist the student by helping him to generate topics that he can use during play in school, as well as reiterate to him the topics that are not acceptable (id.). The report notes that since September 2007 the team saw progress in the student's ability to play appropriately for longer periods of time during choice time, with less impulsivity and need for teacher intervention (id.).

Regarding the student's poor memory and anxious thoughts that affect the student's academic achievement in school, the February 2008 mid-year report details that the student benefitted from having the agenda for an academic period written on the board to allow anticipation of transitions and expectations (Parent Ex. M at p. 2). Visual reminders are posted in the classroom (id.). When the student has difficulty answering a question or completing an assignment, he is reminded to use clues in his environment to assist him (id.). The student also benefitted from review and repetition when learning about new concepts (id.). Other techniques noted to have been used in social studies were direct teaching, listening to books on the topic studied, reading and highlighting information during lessons, analyzing maps and pictures on the overhead projector, using the computer to further knowledge, and completing arts and crafts projects (id.).

To address anxious behaviors and weak memory, the February 2008 mid-year report details that classroom rules and consequences explicitly explained and consistently implemented are important for the student, as he may become confused and upset if there are any variations (Parent Ex. M at p. 2). Frequent communication between home and school served to reinforce the rules in school (id.). The student was supported in monitoring his own behavior through the use of 1-2-3 Magic, a school-wide behavior management program whereby the student may earn tokens for demonstrating positive behaviors and then use them for classroom rewards (id. at p. 3). In addition, the student may receive a "role model marble" from a teacher with accompanying praise for positive behaviors in groups (id.). All teachers and therapists use praise and encouragement and try to make a collaborative team effort to "catch him doing something good" (id.).

The February 2008 mid-year report details that successful interventions addressing the student's preoccupation with the schedule include transition warnings and a written schedule of activities (Parent Ex. M at p. 3). Comprehension skills are developed through extensive multisensory practice through character maps, vocabulary study, written responses, wh-questions, games, and illustration (id.). To address reading/decoding skills, the student participates in use of the Wilson Foundations, Level 2 (id.). Also, explicit teaching and modeling of reading for comprehension help the student with his comprehension skills (id.). The student has made progress in reading through the use of individual attention, sincere compliments, and encouragements (id.). The report notes that the student made more of an effort to participate appropriately when he felt that he was doing a good job and that his contributions were important (id.). Decoding skills were noted to be improving and the student was further developing his sight word vocabulary (id.). Overall, the student was described as having shown progress in his ability to think critically about material read (id.).

When writing stories, the student follows the writing process, which the February 2008 mid-year report describes as planning prior to writing (Parent Ex. M at p. 4). In science and social

studies, the student used graphic organizers such as Venn diagrams, webs, and other visual supports (id.).

In math, the February 2008 mid-year report details that the student had difficulty transitioning into class (Parent Ex. M at p. 3). Progress was reported in his ability to memorize facts and in understanding place value (id.). When feeling confident the student enjoys sharing his knowledge with the group (id.). Teachers teach strategies that help segment information sequentially (id.). An approach called TINS (thought, information, number sentence, and sentence solution) helps to organize the student's thoughts when solving word problems (id.). Use of visual supports such as highlighting important information, drawing pictures, and having complex problems broken down into manageable steps have been successful in helping the student organize his work (id. at pp. 3-4).

A review of the student's April 2007 speech and language progress report and April 2007 OT progress report provides additional insight into the student's progress at the Aaron School and additionally addresses the district's contention that the Aaron School does not provide the necessary related services to the student. At the Aaron School, the student received 30 minute therapy sessions consisting of one individual period of speech-language therapy and one individual period of OT per week; and one group period of speech-language therapy and one group period of OT per week (Tr. pp. 230, 245; Dist. Ex. M at p. 1). The student did not receive counseling services (Tr. p. 246). Notably, the student's June 2007 IEP did not recommend counseling services (Parent Ex. D).

The April 2007 speech and language progress report indicates that the student was markedly delayed in the areas of expressive/receptive language, auditory processing, phonological, articulation, and pragmatic language (Dist. Ex. 2 at p. 3). The progress report indicates that the student's speech-language therapy focused on receptively and expressively increasing his awareness in becoming an advocate for recognizing visual and auditory distractions in his environment, as well as increasing his ability to recognize internal distractions (id. at p. 1). During therapy sessions, background noise was introduced to increase the student's awareness and ability to tune out distractions during lessons (id.). The student made gains in responding to questions based on information available to him in his immediate environment, and was in the process of expanding upon his ideas and responding to open-ended questions (id.). Improvement was seen in his ability to follow directives that included linguistic concepts, especially when directives were provided in "parts" and with visual support (id. at pp. 1-2). The student was also described as displaying emerging ability to ask questions for clarification (Dist. Ex. 2 at p. 2). Furthermore, improvement was noted in the student's ability to provide details when describing and categorizing items, using word trees with the therapist's support to classify words in terms of definition, category, synonym/antonym, and parts of speech, in an effort to increase the student's word finding skills (id.). He continued to benefit from models in producing complex sentences in structured and unstructured tasks (id.). The student also benefited from visual support with key phrases and questions posed by the therapist, as well as from the use of manipulatives (e.g., picture cards) in recalling events from a story (id.).

The April 2007 speech and language progress report indicates that, to address the student's articulation needs, he participated in oral-motor exercises to increase lingual elevation and retraction with a stabilized jaw (Dist. Ex. 2 at p. 2). He also participated in mirror work and tactile



cues<sup>6</sup> to increase consistency of his target sound productions (id.). The student's phonological awareness was addressed informally during speech-language therapy sessions, and "significant gains" were noted in the student's ability to segment sounds in "C-V-C" words<sup>7</sup> (id. at p. 3).

The April 2007 speech and language progress report indicates that the student participated in a social skills lesson in the classroom once a week (Dist. Ex. 2 at p. 3). Consistent with this, the February 2008 mid-year progress report from the 2007-08 school year indicates that during social skills lessons, facilitated by the student's speech therapist, the student practiced pragmatic skills, such as problem solving with peers (Parent Ex. M at p. 2). The report stated that the student was learning to "stop, plot, and go," an apparent strategy that encourages him to stop when there is a problem, plot another possible response, and then implement his plan to see how his idea works (id.). He is also assisted in determining the severity of an upsetting event and he categorizes problems with terms such as "glitch," "medium problem," and "big problem," so that he can put his upsets in perspective and gauge his reactions to them (id. at p. 2). Teachers reinforce strategies the student learns in social skills in the classroom (id.).

The April 2007 OT progress report indicates that the student participated in sensory gym activities that promoted improved praxis (improved ideation, motor planning, and execution of new motor tasks) (Dist. Ex. 3 at p. 1). To improve the student's fine motor and graphomotor skills, the focus of OT sessions was on strengthening and endurance building of the student's bilateral upper extremities for increased stamina and dexterity (id.). The student benefited from use of a slant board during writing tasks as well as verbal cues for using his left "helper" hand as an assist (id.). Other hand strengthening tasks included the use of putty, squeezing stress balls, and playing catch with weighted and tactile items (id. at pp. 1-2). Individual support was provided to him during cutting and coloring activities (id. at p. 2). The Handwriting Without Tears Curriculum was used in the classroom and embedded into OT sessions to address graphomotor skills (id.). During gross motor tasks the student demonstrated gains in his endurance and coordination skills and was working on improving his tolerance for rigorous gross motor tasks (id.). Regarding self-care skills, OT addressed shoe tying and the student's attention and focus to self-care tasks (id. at pp. 2-3).

Although the frequency of the student's related services at the Aaron School was less than what the June 2007 CSE recommended had the student attended the district's proposed program, the speech and language progress report, the OT progress report, the 2008 mid-year progress report, and the testimony by the student's classroom teacher for 2007-08 support a finding that the Aaron School comprehensively addressed the student's speech-language and OT needs both in the individual therapy sessions and in the classroom environment, and that the student made progress. Therefore, I am not persuaded that the Aaron School did not provide the necessary related services to the student as alleged by the district.

Moreover, I am not persuaded by the district's contention that the Aaron School is not appropriate because the district placement is a less restrictive setting. Parents are not held as strictly to the standard of placement in the LRE as school districts; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an

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<sup>6</sup> Use of the "PROMPT" program was alluded to but not explained (Dist. Ex. 2 at p. 2).

<sup>7</sup> Presumably, C-V-C words refer to Consonant-Vowel-Consonant words.

award of tuition reimbursement, and this must be balanced against the requirement that each student with a disability receive an appropriate education (see M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]; see also Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]); Briggs v. Bd. of Educ., 882 F.2d 688, 692 [2d Cir. 1989]). I have considered the restrictiveness of the Aaron School placement and the requirement that the student receive an appropriate education, and find that, under the facts, here, the private placement selected by the parents for the student for the 2007-08 school year was appropriate to meet the student's special education needs.

The final criterion for a reimbursement award is that the parent's claim be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"]). Such considerations "include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters" (Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001], citing Town of Burlington v. Dep't of Educ., 736 F.2d at 773, 801-02 [1st Cir. 1984], aff'd, 471 U.S. 359 [1985]). With respect to equitable considerations, the IDEA provides that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, fail to engage with potential placements offered by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see Frank G., 459 F.3d at 363-64, 376; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181 at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; see also Voluntown, 226 F.3d at n.9).

I have given the parties equitable arguments due consideration. Given that the record shows that the parents were offered no placement for the 2006-07 school year for their son, I find that equities do not preclude tuition reimbursement because the parents secured a placement for their son at a private school prior to the start of the 2007-08 school year. In addition, contrary to the district's contention, the hearing record does not support a finding that the inadequacy in the parents' notice of unilateral placement "prevented" the district from addressing the parents' concerns. Accordingly, I find that equitable considerations support the parents' claim for tuition reimbursement.

As a final note, the record indicates that the student can be appropriately educated in a public school setting and the evidence does not show that the district cannot meet the student's special education needs in the least restrictive. Accordingly, a CSE should reconvene in a timely manner in the spring of 2009 and the parties should work cooperatively to fashion an appropriate special education program and placement for the 2009-10 school year consistent with the requirements of the IDEA and Article 89 of the Education Law. I encourage the parents to raise any concerns they may have with a subsequent IEP at the CSE meeting or as soon as possible thereafter. I remind the district of their affirmative obligation to offer a FAPE and encourage the district to respond to any identified parental concerns in a timely manner and with due consideration.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision is hereby annulled to the extent that it found that the district's Committee on Special Education offered the student a free appropriate public education and denied the parents' request for tuition reimbursement; and

**IT IS FURTHER ORDERED** that respondent shall reimburse the parents for the cost of the student's tuition at the Aaron School for the 2007-08 school year, upon the parent's submission to the district of proof of such payment.

**Dated:**           **Albany, New York**  
                          **October 29, 2008**

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