



The University of the State of New York

The State Education Department State Review Officer

No. 08-095

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

Appearances:

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

Skyer, Castro, Foley & Gersten, attorneys for respondents, Sonia Mendez-Castro, Esq., of counsel

DECISION

Petitioner (the district), appeals from the decision of an impartial hearing officer which ordered it to reimburse respondents (the parents) for their son's tuition costs at the Aaron School for the 2007-08 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending the Aaron School. The Aaron School has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Parent Ex. J; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

When the student was in nursery school, his teachers raised concerns about his language, social skills and fine motor development (Parent Ex. E at p. 1). At that time the student began to receive speech-language therapy, occupational therapy (OT), and assistance from a paraprofessional both at school and for several hours at home (Tr. p. 277). In October 2002, the student was evaluated by the McCarton Center and was noted to have developmental deficits (id.). Recommendations were made for a special education itinerant teacher (SEIT), as well as for speech-language therapy and OT which the student subsequently received (id.). The student began attending the Aaron School during the 2003-04 school year, his kindergarten year (Dist. Ex. 13 at p. 1). He has attended the Aaron School since that date (Dist. Ex. 6 at p. 1). During the 2007-08 school year, he attended the Aaron School in a combined third/fourth grade classroom (Parent Ex. E at p. 4).

The hearing record provides information about the student's performance levels during the 2006-07 and 2007-08 school years. The hearing record indicates that the student has deficits in processing language, reading comprehension and written expression (Tr. pp. 245, 254). The student also has low self-esteem, difficulties with his attention or self-direction skills, and a tendency to tune out when he meets with difficulty (Tr. pp. 245, 253, 356).

In preparation for an annual review of the student for the upcoming 2007-08 school year, the district obtained educational reports from the Aaron School (Tr. p. 15; see also Dist. Exs. 6; 7; 8; 9; 10).

A speech-language therapy plan from the Aaron School dated October 2006 stated that the student was receiving two 30-minute speech-language therapy sessions per week in a 2:1 setting to improve the student's language processing skills and expressive language skills (Parent Ex. 8). The plan focused on developing receptive language strategies, improving the student's use of descriptive language and vocabulary, developing strategies for word retrieval, improving his thinking and verbal reasoning skills, improving his narrative and summarizing skills, and improving his syntactic knowledge (id.).

An OT plan from the Aaron School dated October 2006 stated that the student was receiving one session of OT per week in a 2:1 setting (Dist. Ex. 10).¹ The OT plan contained goals indicating that the student would improve his awareness of his regulatory state by accurately and consistently labeling his level of alertness (i.e. low, just right, high or overload) (id.). The plan was designed to help the student improve his ability to integrate sensory information to interact with peers and adults (id.). The plan provided further that the student would demonstrate increased physical endurance to facilitate safe mobility and improved gross motor coordination (id.). The OT plan also focused on improving the student's fine motor and graphomotor tasks and in developing a consistent use of a mature tripod grasp for increased writing control (id.). These goals were designed to assist the student with his penmanship in the areas of capitalization, letter size and letter placement, and adequate use of spacing between words (id.). The plan also focused on teaching the student the ability to self-edit writing mistakes (id.).

An educational mid-year report from the Aaron School dated February 2007 reported that during the 2006-07 school year, the student received instruction in a class comprised of eleven boys and one girl (Dist. Ex. 6 at p. 1). The student also received speech-language therapy twice per week and OT once per week for 30-minute sessions (id.). The report noted that the student could lose focus and miss content material at times and would sometimes attempt to begin activities without completely processing all the directions (id.). The report also noted that the student could become anxious about making mistakes and was nervous about taking academic risks for fear of being wrong (id. at p. 2). The student participated in a daily reading group with six other students that addressed comprehension skills such as recalling details, cause and effect, determining the main idea, using context clues, character development, fact versus opinion, summarizing and sequencing events, inferring from the text, and interpreting the use of figurative language such as similes, metaphors, idioms, irony, sarcasm, and hyperbole (id. at p. 3). The report indicated that the student was practicing sounds, segmenting, blending, rhyming words, dictating sounds and words, and learning phonetic principles (id.). The report noted that fluency remained

¹ The October 2006 OT plan did not indicate the duration of the OT session.

a challenge for the student who had difficulty blending sounds together when reading (id.). Regarding his writing, the student was noted to have difficulty in organizing his thoughts and in generating words (id. at p. 4). These difficulties were reportedly caused by the student's spelling difficulties which stemmed from his "phonic" skill weaknesses (id.). The student was also noted to have difficulty with capitalization and punctuation (id.). The student exhibited difficulty forming his letters, needed reminders to monitor proper spacing between his words, and reminders to help him to apply capitalization and punctuation (id. at p. 5). The report also indicated that the student participated in a math group consisting of six students that met daily for a 45-minute session (id.). The student exhibited difficulty solving word problems, processing details, maintaining his focus, and needed to have information broken down into smaller increments (id. at pp. 5-6). The student was noted to benefit from repetition, teacher modeling, and guided practice to help him retain the concepts being taught (id. at p. 7).

A speech-language therapy progress report from the Aaron School dated April 2007 indicated that the student exhibited difficulty organizing and retrieving spoken language (Parent Ex. 7 at p. 1). The report noted that the student had learned several strategies to improve his comprehension of spoken language and his expression of language including breaking down information into smaller parts, repeating information verbally to himself, visualizing the information, asking that the material be repeated, developing word retrieval strategies, using descriptive attributes, and identifying and generating word/concept associations and verbal analogies (id. at p. 1).² The report also noted that the student had difficulty organizing and sequencing information when responding and often included non-specific word choices such as "thing" or "stuff" in his speech (id.). All of the speech-language goals put forth in the October 2006 plan were noted to be "in progress" (compare Parent Ex. 7, with Parent Ex. 8).

An OT progress report from the Aaron School dated April 2007 reported that in addition to his weekly 30-minute OT session, the student participated in an "alert group" adapted from the program "How Does Your Engine Run?" (Parent Ex. 9 at p. 1). The report noted that at the alert group, the student learned to identify and describe his levels of arousal (i.e., low, just right, high or overload) (id.). The student was reported to have difficulties in the area of sensory regulation and typically had a low level of arousal that required him to engage in sensory based activities to acquire and sustain an optimal level of arousal (id.).

On May 29, 2007, the Committee on Special Education (CSE) met for the student's annual review and to develop his individualized education program (IEP) for the 2007-08 school year (Dist. Ex. 3 at p. 1). The CSE meeting was attended by the student's parents, the district's school psychologist who also acted as the district representative, a special education teacher, and an additional parent member (id. at p. 2). Additionally, two teachers from the Aaron School participated via telephone (id.). The CSE determined that the student was eligible for special education services as a student with a speech or language impairment (id. at p. 1). The CSE recommended a special class placement in a community school with a staffing ratio of 12:1+1 (id.). The CSE also recommended two 30-minute sessions of 3:1 speech-language therapy per week, one 30-minute session of individual speech-language therapy per week, and three 30-minute

² Although this report was entered into evidence and numbered as a two-page document, from the disconnected manner in which the report reads from page one to page two, it appears to have a page missing (see Dist. Ex. 7 at pp. 1-2).

sessions of individual OT per week, all to occur in a separate location (*id.* at p. 15). The recommendation for three sessions of OT reflected an increase from the prior year's recommendation (*id.* at p. 2). The CSE rejected a 12:1 special class placement considering such a program to be inadequate to address the student's language, academic and social delays (*id.* at p. 14).

By Final Notice of Recommendation (FNR) dated August 1, 2007, the district summarized the recommendations on the May 29, 2007 IEP and recommended a placement at one of the district's schools (Dist. Ex. 5). The parents visited the recommended school on August 10, 2007 and the student's father returned a copy of the FNR to the district by facsimile indicating that the school was inappropriate for the student and that the parent did not accept the placement (*id.*).

By letter dated August 20, 2007, the parents, through their attorney, sent a notice of unilateral placement to the CSE chairperson (Parent Ex. B). The notice stated that the parents were placing the student at the Aaron School as of the first day of school for the 2007-08 school year, and that they intended to seek public funding for the placement (*id.*). The parents also informed the district that they rejected the IEP and placement proposed by the CSE (*id.*). They stated that the IEP and recommended placement denied the student a free appropriate public education (FAPE) on both procedural and substantive grounds, "no valid IEP was created," the parents were denied meaningful participation in the development of the IEP, and the CSE did not recommend an appropriate placement for the student that would provide him with suitable and functional grouping (*id.*). The parents also stated that further details would follow under separate cover in a due process complaint notice (*id.*).

By due process complaint notice dated October 19, 2007, the parents' attorney requested an impartial hearing alleging that the district had failed to offer a FAPE to the student for the 2007-08 school year (Dist. Ex. 1 at p. 1). The due process complaint notice stated that the parents had unilaterally enrolled the student at the Aaron School for the 2007-08 school year and requested reimbursement for this placement (*id.* at pp. 1, 4). The parents' due process complaint notice alleged that the district failed to offer a FAPE on the following grounds: (1) defective composition of the CSE due to the absence of a regular education teacher; (2) inadequate inclusion of the student's two Aaron school teachers at the CSE meeting; (3) goals and short-term objectives on the IEP were generic, vague and did not provide a baseline; (4) failure of the CSE to consider school counseling as a related service for the student; and (5) a general failure to offer a program and school setting which was appropriate to meet the student's "myriad needs" (*id.* at pp. 2-3).³

The impartial hearing began on February 27, 2008 and concluded on June 4, 2008, after four days of testimony (Tr. pp. 1, 238).⁴ The impartial hearing officer rendered his decision on July 31, 2008 (IHO Decision at p. 11). The impartial hearing officer determined that the district's

³ The district answered the parents' due process complaint notice on November 14, 2007, denying the allegations and alleging that the program and recommended placement were reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 2).

⁴ The hearing record does not explain the delay in conducting the impartial hearing. While the parents' due process complaint notice is dated October 19, 2007, the impartial hearing did not convene for more than four months. The impartial hearing officer is reminded to comply with State regulations with regard to convening the impartial hearing (*see* 8 NYCRR 200.5[j][3][iii], [j][5][i]).

recommended placement was not appropriate because he found that the recommended class had an age range of four years and performance levels that varied by as much as five years (*id.* at p. 10). The impartial hearing officer also determined that the Aaron School was an appropriate placement for the student and that equitable considerations supported an award of tuition reimbursement (*id.* at pp. 10-11). The impartial hearing officer ordered that the parents be reimbursed for the cost of the student's tuition at the Aaron School for the 2007-08 school year, upon proof of payment (*id.* at p. 11).⁵

The district appeals, contending that the impartial hearing officer erred in finding that the age range and the range of the performance levels of the students in the proposed class denied the student a FAPE. The district asserts that the students in the proposed class were functionally grouped for instructional purposes with other students having similar needs. The district further argues that the parents abandoned at the impartial hearing the two procedural claims raised in their due process complaint notice regarding the improper composition of the CSE and the alleged inability of the Aaron School teachers to participate at the CSE meeting. In the alternative, the district further argues that neither of these procedural errors amounted to the denial of a FAPE. The district also asserts that the IEP goals were appropriate and that the adequacy of the goals was discussed with the parents at the CSE meeting. The district contends that the Aaron School is inappropriate because the school is overly restrictive for the student in that it only educates special education students, has no opportunities for mainstreaming, and fails to provide sufficient OT to the student. The district also contends that the equities bar reimbursement to the parents because they failed to provide the district with timely notice that they were enrolling the student at the Aaron School and that the parents' payment of non-refundable monies to the Aaron School prior to their visit of the proposed placement in September 2007 indicated that they did not seriously intend to enroll the student at the district's proposed placement.

The parents assert in their answer that they did not abandon any of their procedural claims at the impartial hearing; that the Aaron School teachers were precluded from assisting in the development of the IEP goals at the CSE meeting; that the age range and the range of the functional levels of the students in the proposed class were too large; that the teacher of the proposed class did not provide enough specific information regarding the behavioral plan he utilizes to address the behavioral needs of the students in his class; that the district's teacher's testimony supported the parent's assertion that the proposed placement was not appropriate to address the student's social-emotional needs; and that the district's teacher's testimony demonstrated that the proposed placement was inappropriate to meet the student's special education needs. The parents further contend that student progressed at the Aaron School. Regarding equitable considerations, the parents assert that they entered into a contract with the Aaron school only to ensure that they could educate the student in the event that the public school placement did not work out.⁶

⁵ I note that the hearing record contains several reports that were prepared subsequent to the May 29, 2007 CSE meeting, including reports from the Aaron School and a November 2007 private psychoeducational reevaluation (Parent Exs. E; G-J).

⁶ As part of their answer, the parents ask, without further explanation, that I recuse myself (Answer ¶ 3). I have considered the parent's request and my obligations pursuant to State regulations (8 NYCRR 279.1). There is no basis in this case for recusal and I am able to impartially review the appeal. Therefore, I decline to recuse myself.

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. 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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (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 Bd. of Educ., Appeal No. 08-070; 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).

In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at *7 [2d Cir. Oct. 9, 2008]; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968 at 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

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, and therefore applies to the present case.

Turning to the instant case, the impartial hearing officer determined that the district had denied the student a FAPE because the district's proposed class exceeded the chronological age range and performance/instructional range for students in special classes as established by State regulations (IHO Decision at p. 10).

State regulations provide that the chronological age range of students under the age of 16 years of age shall not exceed 36 months for students in special classes (8 NYCRR 200.6[h][5]). However, the chronological age range of the students is not necessarily determinative of whether a FAPE was offered. In prior decisions, a range outside of 36 months has been found not to rise to the level of a denial of a FAPE if the students are appropriately grouped within the class for instructional purposes (see Application of the Dep't of Educ., Appeal No. 08-034; Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-023; Application of a Child with a Disability, Appeal No. 06-019; Application of the Bd. of Educ., Appeal No. 06-010); Application of a Child with a Disability, Appeal No. 05-102; Application of a Child with a Disability, Appeal No. 00-065; see also Application of a Child with a Disability, Appeal No. 98-21.

In the instant case, if the student had attended the district's recommended program he would have attended a self-contained 12:1+1 class for students in grades three, four and five (Tr. p. 126; Dist. Exs. 4 at p. 3; 14 at p. 3). The two undated class profiles contained in the hearing record indicate that the students' ages in the proposed class ranged from nine to eleven in the first profile (two students were nine, three students were ten, and two students were eleven), and from eight to eleven in the second profile (two students were eight, four students were nine, three students were ten, and three students were eleven) (Tr. p. 126; compare Dist. Ex. 4 at p. 3, with Dist. Ex. 14 at p. 3). The student's IEP reveals that the student was nine years old during the 2007-08 school year (Dist. Ex. 3 at p. 1). Therefore, the hearing record supports a finding that the student would have had an appropriate age peer group within the proposed class.⁷

State regulations further require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][i], 200.6[a][3]; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). The similarity of abilities and needs may be demonstrated through the

⁷ It is unclear from the hearing record that the chronological age range of the students in the proposed class exceeds 36 months because the class profiles only indicate the students' ages by years and do not include months (Dist. Exs. 4 at p. 3; 14 at p. 3).

use of a proposed class profile or by the testimony of a witness who is familiar with the children in the proposed class (Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068). The regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. Of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In addressing the instructional ranges/academic grouping, upon reviewing the student's IEP, the principal of the proposed district placement and the special education teacher of the proposed district class both opined that the student had a similar profile and was functioning at similar math and reading levels as the students in the proposed class (Tr. pp. 92-94, 136-37). The special education teacher of the proposed class testified that he functionally grouped his students for instruction (Tr. p. 129). In mathematics, all the students use the same curriculum, which includes the first to the fifth grade (Tr. p. 130). He indicated that the units in the curriculum "parallel each other" and that he teaches the same concept, for example fractions, but provides problems of different complexity to the students (Tr. pp. 130; 147-49). The classroom paraprofessional assists the students at the lower instructional level (Tr. p. 130). Regarding reading instruction, the special education teacher testified that reading instruction in his class begins as a "mini lesson" with the whole class on a topic that spans the curriculum such as "main idea" (Tr. p. 145). Students are then placed into small groups to reinforce the introduced topic and to do independent reading in books selected at their own reading level (Tr. pp. 131, 145). The special education teacher typically groups students according to either their comprehension or decoding levels and does extra work with them on the texts they are reading (id.). He also groups students who have similar needs or deficits such as understanding a main idea, organizing information, or sequencing (Tr. pp. 131, 145-46). The special education teacher further testified that he assessed his students' reading levels based on his observations during independent reading and formally assessed students at the end of each month (Tr. p. 133). Students move up to the next reading level based on the results of this formal assessment process (id.). The special education teacher testified that he used a similar format for teaching writing (Tr. p. 131). He indicated that students who are more skilled in writing could be expected to write a minimum of five paragraphs while those students who are functioning at a lower level might only be expected to write one or two paragraphs (id.).

With regard to reading levels, the May 2007 IEP indicates that by teacher estimate the student's reading ability was at the 2.6 grade level (Dist. Ex. 3 at p. 3). The Aaron School head teacher testified that the student's decoding skills were at a late second grade level and his comprehension skills were at an early third grade level (Tr. p. 187). The hearing record reflects that the reading instructional levels of the students in the proposed class changed over the course of the 2007-08 school year (Tr. pp.141-49; compare Dist. Ex. 4, with Dist. Ex. 14). Of the two undated class profiles in the hearing record, one class profile reflects that in reading, at some point during the 2007-08 school year, the proposed class included two students at the 1.6-2.5 instructional level, and five students at the 2.5-3.5 instructional level (Dist. Ex. 4 at p. 1). The other class profile reflects that at another point during the same school year, the proposed class included one student at the 0.5-1.5 instructional level in reading, five students at the 1.6-2.5 instructional level, five students at the 2.6-3.5 instructional level, and one student at the 3.6-4.5 instructional level (Dist. Ex. 14 at p. 1). Testimony from the special education teacher of the proposed class indicates that at the time of the impartial hearing, the reading instructional levels

of the students in the proposed class ranged from the 0.5-1.5 grade level (one student) to the 4.6-5.5 grade level (two students) (Tr. pp. 143-44). A comparison of the student's instructional level in reading, as noted on the May 2007 IEP and by the Aaron school head teacher, with the various instructional levels reported in the two class profiles and with the description of instructional levels testified to by the special education teacher of the proposed class, reflects that the student would have been functionally grouped for reading instruction with other students in the proposed class both at the start of the 2007-08 school year as well as throughout the school year (compare Dist. Ex. 4 at p. 1 and Dist. Ex. 14 at p. 1 and Tr. pp. 142-44, with Tr. pp. 187-89 and Dist. Ex. 3 at p. 3).

With regard to instructional levels in math, the May 2007 IEP reflects that based on teacher estimate the student's math skills were at a 3.0 grade level (Dist. Ex. 3 at p. 3). At the time of the impartial hearing, the Aaron School head teacher testified that the student's math skills were at a late third grade to early fourth grade level (Tr. p. 189). In both class profiles introduced into evidence at the impartial hearing the students in the proposed class had instructional levels in math that ranged from 1.6-4.5 (Dist. Exs. 4 at p. 1; 14 at p. 1). Hearing testimony elicited from the special education teacher of the proposed class revealed that the instructional levels of the students in math ranged from a 1.6-2.5 grade level to a 3.6-4.5 grade level (Tr. pp. 146-147). By comparing the student's estimated 3.0 instructional level in math as stated in the May 2007 IEP with the range of math instructional levels reported on the two undated class profiles and as indicated by the testimony of the special education teacher of the proposed class, the student would have been functionally grouped for math instruction regardless of the class profile considered both at the start and throughout the 2007-08 school year (compare Dist. Ex. 3 at p. 3 and Dist. Ex. 4 at p. 1, with Tr. p. 189). If the same comparison is made using the Aaron School head teacher's estimate of the student's late third grade to early fourth grade math instructional level, the student would have been placed in a higher level instructional group in the proposed classroom with either two or four other students (compare Tr. p. 189, with Dist. Ex. 4 at p. 1 and Dist. Ex. 14 at p. 1 and Tr. pp. 147-49). Therefore, the hearing record reflects that he would have would have been functionally grouped for math instruction with other students in the proposed class both at the start of the 2007-08 school year as well as throughout the school year.

Moreover, the hearing record reflects that the student had a similar profile to the students in the proposed class in terms of cognitive abilities, communication and language skills, and social skills (Tr. pp. 92-94, 129-31, 144-46). As reflected in the November 2007 psychoeducational evaluation the student is of average cognitive ability, able to function appropriately among his peers, not prone to behavioral acting out, and exhibits a relative weakness in complex language skills (Parent Ex. E at pp. 3, 5). The hearing record reflects that throughout the 2007-08 school year nearly half of the students in the proposed class were in the average age of cognitive functioning and only one student occasionally exhibited acting out behavior (Tr. pp. 157-58; Dist. Exs. 4 at p. 1; 14 at p.1). The special education teacher testified that although he utilized a formal classroom behavior plan at the start of the 2007-08 school year it was no longer necessary for him to do so (Tr. pp. 157-58). He indicated that he addressed inappropriate behavior by explaining why the behavior was inappropriate and by providing the students with rewards such as free time to play a game before lunch or additional minutes of recess on the playground (Tr. p. 157). Testimony elicited from the district's school psychologist and the special education teacher reflects that four to five students in the proposed class are eligible for special education services as students with a speech or language impairment and that the 12:1+1 recommended program is "geared

toward" children with speech and language needs and would have provided the student with the stimulation that he required in that area (Tr. pp. 29, 151). Given the hearing record in this case, more specifically the class profiles and the testimony of the special education teacher in the proposed class described above, I find that the student would have been functionally grouped with other similarly-aged students who had sufficiently similar instructional needs and abilities in both reading and math.

The district argues on appeal that at the impartial hearing, the parents abandoned their claims regarding the procedural validity of the IEP that were raised in their due process complaint notice. The record shows otherwise. As discussed below, the procedural issues raised in the parents' due process complaint notice were further developed at the impartial hearing. The hearing record reveals that the district's attorney elicited testimony from district witnesses regarding those very issues. Therefore, I will address the merits of the parents' procedural claims that were identified in their due process complaint notice.

The parents argue that the district inappropriately failed to offer counseling to the student as a related service on his May 2007 IEP. The IEP noted the student's tendency to lose focus, impulsively start activities before completely processing directions, become frustrated upon making mistakes, anxiety about being wrong, and his difficulty with self-regulating his sensory processing needs (Dist. Ex. 3 at p. 4). The CSE developed goals and objectives to address these needs (*id.* at pp. 11-12). The special education teacher in the proposed class testified that he would address the student's impulsiveness and loss of focus by redirecting, supporting, and reassuring the student to let him know that "it's okay to try" (Tr. pp. 163-64). He further testified that he would encourage the student to take academic risks by building up his academic confidence and developing trust with the student by providing him with work that gave him a sense of accomplishment before increasing the complexity of the student's assigned tasks (Tr. pp. 163-66). I find the parents' assertion that the CSE failed to consider counseling to address the student's anxieties to be without merit. The district's school psychologist testified that the CSE determined that the student did not require counseling as a related service because of the progress the student had made and that the placement being recommended for the 2007-08 school year was sufficiently small enough to provide a therapeutic setting (Tr. p. 22). She indicated that students who have some "social awkwardness" need to develop the ability to identify their own feelings, express those feelings with words, and discuss what is disturbing them (*id.*). The district's school psychologist opined that the student's social emotional needs could best be addressed in the classroom with peer interaction and teacher modeling and that it was unnecessary to pull him out for an additional related service (Tr. pp. 22, 39).

I now turn to the parents' argument that the composition of the May 2007 CSE was defective because of a lack of a regular education teacher. Federal and State regulations require that a CSE must include not less than one regular education teacher of the child if the child is, or may be, participating in the general education environment (20 U.S.C. § 1414[d][1][B][ii]; 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel (20 U.S.C. § 1414[d][3][C]; 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]). The district's school psychologist who participated in the May 2007 CSE testified that a regular education teacher did

not participate in the CSE meeting because the CSE did not consider placing the student in a general education environment because they did not believe that the student would be ready for general education (Tr. pp. 16-17; see Tr. pp. 54-55). The hearing record reveals that neither the parents nor the teachers from the Aaron School indicated at any point during the May 2007 CSE meeting that they thought the student was ready for a general education program (Tr. p. 17). The school psychologist further testified that if anyone at the CSE meeting had indicated that they thought the student should be considered for general education, the district would have called in a regular education teacher to participate in the CSE meeting (id.). Therefore, there was no necessity for a regular education teacher at the May 2007 CSE meeting because the student was not participating in a general education program at the time and was not being considered for placement in a general education program during the 2007-08 school year. Even assuming a regular education teacher should have participated, the parents have not persuasively developed the record to show that there was educational harm to the student or parent participation resulting from the absence of a regular education teacher. As such, the parents have not demonstrated that the lack of a regular education teacher at the May 2007 CSE meeting impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

I now turn to the parents' argument that the May 2007 IEP was defective because the goals were inadequate. The goals in the student's May 2007 IEP focused on the student improving his communication and pragmatic language skills; his mathematics calculation, applied problems, and word problem solving skills to the next grade level; his encoding, decoding, and reading comprehension skills; demonstrating an understanding of the mechanics of expressive writing; improving graphomotor and fine motor skills; sensory processing and self-regulation; and improving his social/emotional development (Dist. Ex. 3 at pp. 6-12). In the due process complaint notice, the parents asserted that these IEP goals were vague, generic and did not provide a baseline (Dist. Ex. 1 at p. 2). Although I find that the goals alone could have been more specific, I find that the 46 short-term objectives included in the IEP clarified these goals, comprehensively addressed the student's needs, and were sufficiently detailed and measurable (Dist. Ex. 3 at pp. 6-12). Examples include a goal indicating that the student will solve calculation and applied problems at the next grade level and corresponding objectives that stated the student will use manipulatives to illustrate and aid in understanding and solving addition examples with 80 percent accuracy; will use manipulatives to aid in understanding and solving subtraction examples with 80 percent accuracy; will add two digit numbers with regrouping with 80 percent accuracy; and will subtract two digit numbers with regrouping with 80 percent accuracy (id. at p. 7). In addition, another goal indicates that the student will demonstrate improvement in graphomotor and fine motor skills (id. at p. 10). The corresponding objectives indicate that the student will apply appropriate pressure when writing letters in at least seven out of ten consecutive lessons; will use appropriate spacing within and between words over at least seven out of ten consecutive lessons; will write words and sentences on the correct line at least at a 70 percent level of accuracy on each assignment; will show improved manual dexterity while cutting outlines with a scissor seven out of ten times; and will use a tripod grasp while writing letters seven out of ten times (id.). Based on the foregoing, I find that the short-term objectives contained in the May 2007 IEP were adequate and made up for deficiencies in the annual goals such that the student was not denied a FAPE (see M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *11 [S.D.N.Y. September 29, 2008]). I do caution

the district that it must comply with federal and State regulations (see 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]) in developing measurable annual goals for a student's IEP.

The parents further argue that the two Aaron School teachers who participated in the May 2007 CSE were precluded from adequately participating in the CSE meeting (Dist. Ex. 1 at pp. 1-2). The district's special education teacher testified that the two Aaron School teachers participated by telephone during the entire meeting, and that they agreed with the recommendations made by the CSE (Tr. pp. 19, 60; see also Tr. p. 53). Although the student's mother testified that the goals were not discussed at the CSE meeting (Tr. p. 283, 284), she also testified that one of the student's teachers from the Aaron School participated in the CSE meeting and spoke about what the student needed in the classroom (Tr. pp. 282-83). The student's mother further testified that she did not raise any objections to a lack of discussion of the goals at the CSE meeting (Tr. p. 305). Both the district's school psychologist and the district's special education teacher who participated in the CSE meeting testified that the goals were discussed with the Aaron School teachers at the CSE meeting and that the Aaron School teachers assisted in the development of the goals (Tr. pp. 43, 60, 65). Moreover, both the district's psychologist and the district's special education teacher testified that the goals and objectives in the IEP, and the recommendations in the IEP in general, were actually derived from the Aaron School's reports and/or from the input from the two Aaron School teachers who participated at the CSE meeting (Tr. pp. 33, 38, 60, 66-68; compare Dist. Ex. 3 at pp. 6-12, with Dist. Exs. 7 at pp. 1, 2; 8 at p. 1; 9 at p. 2). Thus, the hearing record shows that the Aaron school teachers participated in the IEP formulation by attending and actively participating in the meeting, and by having submitted written reports that were considered and relied upon by the CSE. Therefore, the hearing record shows that the Aaron school teachers' participation was appropriate and that the student was not denied a FAPE by the amount of participation by the Aaron School teachers.

The parents have asserted that the method of measurement of the annual goals in the IEP was flawed because the columns for the coding system were left blank for every goal (Dist. Ex. 1 at p. 3). The hearing record shows that there was no denial of a FAPE as a result. According to the district's psychologist and the special education teacher of the proposed class, the teacher implementing the goal would fill out the method of measurement portion of the IEP when assessing the student's progress over the course of the school year (Tr. pp. 24, 170-71). The IEP indicated that progress reports would be written four times per year, and listed methods of measurement options (Dist. Ex. 3 at pp. 6-12). Moreover, the special education teacher specifically testified that he assessed students to insure they were working at their goals and that these assessments would occur with each concept worked on (Tr. p. 171).

I find that the hearing record establishes that the special education programs and related services recommended by the district in the May 29, 2007 IEP were reasonably calculated to confer educational benefits to the student, and thus, offered a FAPE to the student for the 2007-08 school year. The evidence presented in this case indicates that the CSE properly reviewed, considered, and relied upon the student's 2006-07 Aaron School progress reports, therapy plans and the February 2007 mid-year report for an accurate assessment of the student's functioning and instructional levels to develop the 2007-08 IEP (Tr. pp. 30, 33-35, 38, 46, 66-68; Dist. Ex. 3 at pp. 3, 4). The hearing record also indicates that the parents participated at the CSE meeting, did not object to the CSE's reliance upon the information or materials considered, and did not request or provide additional evaluations to supplement the information about the student available at the

time of the CSE meeting (Tr. pp. 41-43, 53, 60, 63, 282, 288-89, 304). The IEP accurately reflects the information contained in the materials reviewed and considered by the CSE regarding the student's present levels of academic and social/emotional performance (Dist. Ex. 3 at pp. 3, 4). The hearing record also supports the conclusion that the May 29, 2007 IEP sufficiently identified the student's areas of need, including the student's encoding/decoding difficulties and reading comprehension deficits, his reading fluency problems, his difficulty with mathematics word problems, his deficits in punctuation, structure and organization, his tendency to lose focus and start activities impulsively without processing directions, and his sensory processing and self-regulation deficits, and how all of these deficits impacted the student's ability to function in the academic setting (Dist. Ex. 3 at pp. 3, 4, 6-11).

I find that the CSE sufficiently addressed the student's identified needs by recommending a small, structured 12:1+1 academic setting with small group instruction. Furthermore, the hearing record establishes that the recommended 12:1+1 special class would have met the student's needs and at the time of the recommendation, was reasonably calculated to confer educational benefits to the student. Of note, the special education teacher who taught the recommended 12:1+1 special class during the 2007-08 testified that he fostered a familial atmosphere in his class so that the age differences of the students did not negatively impact the class (Tr. p. 128). Moreover, the hearing record reflects that the CSE considered whether the placement was in the LRE. The IEP notes that the CSE considered a 12:1 special class in a community school, but deemed the program to be inadequate to address the student's language, academic and social delays (Dist. Ex. 3 at p. 14). The IEP noted that a smaller special education program with additional adult support was required in order to achieve the student's IEP goals (*id.*).

In conclusion, I find that the impartial hearing officer's determination that the district failed to offer the student a FAPE during the 2007-08 school year is not supported by the hearing record. Based upon the evidence in the hearing record, the IEP was formulated in a manner that adequately complied with procedural requirements and with significant involvement by the parent and the student's private school service providers, and at the time that it was formulated, the district's recommended special education programs and services were reasonably calculated to enable the student to receive educational benefit in the LRE (*Viola v. Arlington Cent. Sch. Dist.*, 414 F. Supp. 2d 366, 382 [S.D.N.Y.] [citing to *J.R. v. Bd. of Educ. of the City of Rye Sch. Dist.*, 345 F. Supp. 2d 386 at 395 n.13 [S.D.N.Y. 2004]; see *Cerra*, 427 F.3d at 195; see also *Mrs. B.*, 103 F.3d at 1120; *Application of a Student with a Disability*, Appeal No. 08-029; *Application of a Child with a Disability*, Appeal No. 06-112; *Application of a Child with a Disability*, Appeal No. 06-071; *Application of the Bd. of Educ.*, Appeal No. 06-010; *Application of a Child with a Disability*, Appeal No. 05-021). In light of the foregoing, I concur with the district that it offered the student an appropriate program for the 2007-08 school year. Having determined that the challenged IEP offered the student a FAPE for the 2007-08 school year, I need not reach the issue of whether the parent's unilateral placement of the student at the Aaron School was appropriate, and the necessary inquiry is at an end (*Mrs. C. v. Voluntown*, 226 F.3d 60, 66 [2d Cir. 2000]; *Walczak*, 142 F.3d at 134; *Application of a Child with a Disability*, Appeal No. 05-038; *Application of a Child with a Disability*, Appeal No. 03-058).

I have examined the parties' remaining contentions and find that they are without merit.

THE APPEAL IS SUSTAINED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled in its entirety.

Dated: **Albany, New York**
 October 17, 2008

PAUL F. KELLY
STATE REVIEW OFFICER