



The University of the State of New York

The State Education Department State Review Officer

No. 08-096

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, Tracy Siligmueller, 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 found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Aaron School for the 2007-08 school year. The appeal must be sustained.

The student is described in the hearing record as exhibiting delays in speech-language, as well as social development (Dist. Ex. 1; Parent Ex. A).¹ She has been diagnosed with celiac disease (*id.*). During the 2007-08 school year, the student attended the Aaron School (Tr. p. 200; Parent Exs. A at p. 1; B). The Aaron School is a private school which has not been 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 proceeding (Parent Ex. C; *see* 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The student's mother reported that she referred the student for early intervention (EI) services when the student was approximately 12 months of age (Tr. p. 182). The student received speech services at home through EI until she was three years old (Tr. pp. 182-83). At age three, the student began attending preschool in a class with 12 students, one teacher and three assistants

¹ I note that the hearing record contains multiple duplicative exhibits. I remind the impartial hearing officer that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious (*see* 200.5[j][3][xii][c]).

(Tr. pp. 183-84). The student continued to receive speech services in preschool, where she also received occupational therapy (OT) (Tr. pp. 184-85). She continued to attend preschool until she was five years old, at which time her parents unilaterally placed her at the Aaron School for kindergarten for the 2007-08 school year (Tr. pp. 184, 200).

A private psychoeducational evaluation of the student was conducted over the course of three days in August 2006 (Parent Ex. N). The evaluation reflected that the student was referred by her parents in order to assess her current cognitive and academic functioning, as well as to assist in appropriate educational and treatment planning (id. at p. 1). The parents reportedly described the student as "bright and socially interested," and as struggling with verbal expression despite demonstrating appropriate nonverbal and adaptive skills (id. at p. 2). Behaviorally, the student reportedly presented as "sweet and socially interested" during the evaluation (id.). She was said to have struggled to initiate casual conversation, but communicated appropriately and answered questions that were posed to her (id.). The report stated that the student's "[p]lay skills were assessed grossly within normal limits," although it was "occasionally difficult for the examiner to play along . . . as it was difficult to discern her language appropriately due to her significant articulation and expression difficulties" (id.). The student also reportedly "struggled with tasks that required increased verbal expression and decoding, and had particular issues tackling 'wh' questions" (id.). The student was noted to be difficult to understand at times (id.). Nonverbal tasks were perceived as more interesting to the student, who demonstrated "increased attention and frustration tolerance" for visual-motor tasks (id.). Although her pencil grasp was found to be "generally adequate," the student reportedly struggled to complete graphomotor tasks as the result of misunderstanding verbal directions and a decreased attention (id. at pp. 2-3). Redirection, repetition and visual or pictorial cues were stated to have helped the student maintain "adequate motivation" (id. at p. 3). The student, upon being observed in her classroom setting, was found to demonstrate "adequate attention and participation" in activities presented by the teacher (id.). She reportedly raised her hand, sat appropriately in her seat, and followed directions (id.). She was stated to appear comfortable and at ease in the classroom setting, despite the fact that she was the only girl in her class on the day she was observed (id.). The student appeared to transition appropriately between activities (id.).

Administration of the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III) yielded a verbal IQ composite score of 80 (9th percentile), a performance IQ composite score of 108 (70th percentile), and a prorated full scale IQ composite score of 91 (27th percentile) (Parent Ex. N at pp. 3, 8). The verbal IQ score was within the low average range while the performance IQ and prorated full scale IQ scores were within the average range (id.). The 28 point differential in the verbal IQ and performance IQ scores was described as suggestive of continued verbal processing and expressive difficulties (id.). The student's scores on the verbal subtests of the WPPSI-III ranged between "borderline and low average" (id.). The student was noted to have "significantly struggled" with discerning and answering "wh" questions, comprehending instructions, and word finding (id.). At the time of testing, the student was "only beginning to understand complex language and to answer open-ended questions appropriately" (id.). Although the psychoeducational evaluation report described the student as having made "considerable gains in language arenas relative to her earlier developmental years," at the time of the evaluation she was described as becoming a "functional communicator" (id. at p. 4). She was noted as still demonstrating "significant difficulties" with articulation, efficient and appropriate expression, and decoding (id.). The difficulties were stated to make the student's social interactions

and play with peers "challenging" (id.). The student's performance area skills were described as "variable, albeit more developed overall than her language skills, with scores ranging from borderline to high average" (id.). In general, "average to superior" visual-spatial reasoning abilities and problem solving skills were demonstrated for nonverbal tasks, and the student's nonverbal abilities were described as a "relative strength" (id. at pp. 4-5). Difficulties were noted with graphomotor skills and attention (id. at p. 4).

Administration of two tasks from the Woodcock-Johnson Tests of Academic Achievement – Third Edition (WJ-III) yielded scores at the prekindergarten level for both a letter identification task and a mathematical reasoning task (Parent Ex. N at pp. 5, 9). The student could identify most capital letters, but was unable to identify lower case letters (id. at p. 5). She could also count and do simple addition, but she could not do more complex addition or subtract (id.).

The evaluators opined that the scores attained from testing appeared to be an "adequate reflection of [the student's] current level of functioning" at the time of the evaluation (Parent Ex. N at p. 3).

Emotionally, the student was said to present as cooperative, well-related, and engaging (Parent Ex. N at p. 5). She was also said to be able to maintain conversational skills despite her articulation and language skills being significantly delayed, and her social skills were said to continue to emerge and develop (id.). The student was also stated to have a "tendency toward inattention and distractibility at times," but she reportedly responded appropriately to structure, limit-setting, and redirection (id.).

The evaluators opined that the student's "language goals should continue to target moving receptive and expressive language skills to age-appropriate levels," and that the student required strategies to improve processing difficulties and complex expression (Parent Ex. N at p. 5). The student was stated to benefit from information presented with a "visual referent" and "modeling a behavior" to enhance comprehension, sequencing, and processing of information (id.). The evaluators also opined that language use skills should be monitored closely to ensure continued positive socialization experiences with peers, and periodic evaluation of speech-language skills was recommended to monitor the student's progress and promote modification in the student's learning as her language skills developed (id.). The evaluators also opined that the student would benefit from continued OT to help the student "establish precision" in graphomotor skills (id.).

As a result of the psychoeducational evaluation, the evaluators made the following recommendations: (1) enrollment in a "smaller, structured, kindergarten class to help bolster her skills and give her the opportunity to work up to her cognitive and academic potential;" (2) tailored instructional delivery style (clear, animated and audible speaking; gestures that enhance messages; slower speaking rates; being aware that listening in a busy environment can be taxing for the student; instructions broken down into small sections; a variety of instructional strategies; and monitoring of the student's facial expressions and nonverbal gestures), preferential seating (seating where auditory and visual stimuli is optimally received), visual aids, participation in class discussions, and attention and concentration skills; (3) speech-language therapy in individual and dyad formats; (4) OT; (5) involvement in structured group activities that would give her opportunities to benefit from peer modeling and socialization as well as from adult facilitation and redirection; (6) close monitoring of reading acquisition skills and a multisensory approach to

reading and writing; and (7) periodic reevaluations in order to monitor progress and continued needs (Parent Ex. N at pp. 6-7).

An OT progress report to the Committee on Preschool Special Education (CPSE) dated January 11, 2007 described the student as a "sweet and friendly child who [wa]s attentive and cooperative in therapy," was "able to maintain her attention on each and every given task and follow 2 step commands," "independently and eagerly initiate[d] each task presented to her," and "assist[ed] in the setup and cleanup of activities" (Parent Ex. I at p. 1). She was further described as able to verbalize her needs and wants, and to display appropriate turn taking and sharing with the other children during group activities (id.). The student's sessions reportedly focused on improving fine motor skills, visual-perceptual skills, and self-help skills (id.). The student was said to have "made good progress in therapy" (id.). Despite the "good progress," the student was noted as having not mastered all of her goals and as missing some age appropriate skills (id. at p. 2). Accordingly, the occupational therapist "strongly recommended" that the student continue OT in order to "master the missing skills so that she can function more efficiently and independently in her environment" (id.).

An OT progress report to the Committee on Special Education (CSE) also dated January 11, 2007 and prepared by the same author, was identical to the OT progress report to the CPSE, except that the report to the CSE states that OT is not recommended when student transitions from the CPSE to the CSE (compare Dist. Ex. 9, with Parent Ex. I).

A speech-language progress report to the CPSE dated January 2007 identified the student as attending preschool in a "highly language based classroom with 12 children, 1 teacher, and 3 assistants" (Parent Ex. G at p. 1). The student was said to be receiving individual speech-language therapy three times per week for 30-minute sessions (id.). The report summarized the student as presenting with deficits in receptive and expressive abilities (id. at p. 2). It contained a recommendation that the student continue to receive speech-language services but, due to her progress, the frequency of her therapy be reduced from three times per week for 30-minute sessions to twice a week for 30-minute sessions (id.).

A speech-language progress report to the CSE also dated January 2007 and prepared by the same author, was identical to the speech-language progress report to the CPSE, except that the recommendation therein did not contain a modification of services and stated that therapy should focus on: (1) comprehension of negatives within directives; (2) comprehension of complex directions; (3) retelling a story in a sequential order; and (4) increasing conversation skills to include more turn taking opportunities (compare Dist. Ex. 10, with Parent Ex. G).

An educational progress report to the CPSE dated February 2007 reflected that the student presented with delays in the areas of communication, cognition, fine motor skills, and social/emotional skills, and that the student should benefit in a "structured environment with higher peer models" (Parent Ex. J).

An educational progress report to the CSE in the hearing record also dated February 2007 and prepared by the same author was identical to the educational progress report to the CPSE (compare Dist. Ex. 8, with Parent Ex. J).

A document titled "Preschool Interview For 'Turning 5' Students," reflected that the student's preschool teacher was interviewed by a district staff person on February 16, 2007 (Parent Ex. P). The teacher indicated that the student's behavior was typical, and that her language and reasoning skills had "improved greatly" over the previous year (id. at p. 1). The teacher further indicated that the student's speech intelligibility was emerging (id. at p. 4).

The district prepared a "Turning Five Summary Report" using a February 16, 2007 observation of the student (Dist. Ex. 7; Parent Ex. O). The Developmental Assessment of Young Children (DAYC), a tool that collects information about a student through direct observation, progress reports, and by interviewing the teacher and parent, was administered to assess the student's developmental levels for cognition, communication, social/emotional, physical and adaptive behaviors (Dist. Ex. 7 at p. 2; Parent Ex. O at p. 2). Administration of the DAYC yielded "below average" standard scores of 85 (16th percentile) for the cognitive domain and 87 (19th percentile) for the social/emotional domain; a "poor" standard score of 74 (4th percentile) for the communication domain; and "average" standard scores of 95 (37th percentile) for the physical development domain and 94 (34th percentile) for the adaptive behavior domain (Dist. Ex. 7 at p. 2; Parent Ex. O at pp. 2, 4). The student's general developmental quotient was reported at a "below average" standard score of 85 (16th percentile) (id.). The report indicated that the student was easily distractible, but could be redirected (Dist. Ex. 7 at p. 3; Parent Ex. O at p. 3). Although the student was described as having made gains in her abilities since a previous 2004 evaluation, there continued to be "mild delays" in her cognitive, communication, and socialization skills (id.). Based on observation, teacher interview, and reports, the student was described in the Turning Five Summary Report as a student that would benefit from an environment with "higher peer models to increase her socialization and communication skills," and an environment where there was "an extra adult to help her with redirection" (id.).

A related services student progress report dated February 28, 2007 stated that the student had made "great strides in speech-language therapy" (Dist. Ex. 11 at p. 1; Parent Ex. H at p. 1). The student reportedly had started to use novel utterances during pretend play and while commenting, her ability to attend activities had "significantly improved," she had become more aware of making eye contact during greetings and conversations with less prompting, and she had improved in her ability to participate in turn taking activities (Dist. Ex. 11 at pp. 1-2; Parent Ex. H at pp. 1-2). The student was also said to have benefited from minimum to moderate cues to follow two step directions and to recall events, and was beginning to answer simple "what questions" without visual cues (Dist. Ex. 11 at p. 2; Parent Ex. H at p. 2). The report recommended that services be continued in order to meet speech-language goals included in the report (id.; see Parent Ex. D).²

In a document dated February 2007, the student's preschool special education teacher wrote an "Educational Rationale" requesting an extension of CPSE services from 10 months to 12 months for the student (Parent Ex. F). The teacher described the student as presenting with delays in the areas of communication, cognition, fine motor skills, and social/emotional skills (id.). The teacher noted that the student required "consistency in services to help support newly developing age-

² The hearing record reveals that the goals in the February 28, 2008 related services progress report were taken from the student's CPSE individualized education program (IEP) (Dist. Ex. 11; Parent Ex. D).

appropriate skills" (id.) The teacher also stated that the student would benefit from having extended services because they "would continue to provide her the academic support she needs for newly developing skills that would also support what she has already learned" (id.).

A "Turning Five Assessment Summary" was prepared by the student's preschool special education teacher on March 13, 2007 (Parent Ex. K). The summary, based upon a classroom observation of the student, stated that the student relied on visuals including pictures, gestures and modeling to reinforce new academic concepts (id.).

An undated student progress report reflected that the student's ability to cooperate in class was "good" and the student's performance in the areas of class participation, ability to stay focused in class, ability to work independently and ability to follow directions were all "average" (Parent Ex. L). With respect to communication and socialization skills, the report noted that the student was not able to be clearly understood when speaking and that the student did not use grammatically correct sentences when speaking (id.). Relating to her gross and fine motor skills, the report stated that the student was able to draw with increasing detail, was learning to trace her name, had appropriate "pincher grasp," and had age appropriate gross motor skills (id.).

The CPSE convened for the student's annual review on March 19, 2007 (Parent Ex. D). The student's mother attended the meeting (id. at p. 2). The individualized education program (IEP) developed at that meeting noted that the student was eligible for services as a preschool student with a disability (id. at p. 1). The CPSE recommended 12-month programming in a 12:1+3 class with related services of speech-language therapy, as well as OT (id. at p. 27). The recommended speech-language therapy consisted of two individual sessions per week for 30 minutes each in school and two individual sessions per week for 30 minutes each outside of school (id.). The recommended OT services consisted of two sessions per week for 30 minutes each in school in a group of four (id.). The IEP contained nine pages of annual goals and short-term objectives for the student (id. at pp. 16-24). It did not contain instructional levels for the student's academic performance, but did contain two different narratives describing the student's present performance at that time (id. at pp. 12, 13).

A letter from a pediatric gastroenterologist dated May 16, 2007 stated that the student had developmental delays, receptive and expressive speech difficulties, and oral motor weaknesses for which she required a special education class (Parent Ex. M). The doctor opined that the student needed "extensive therapy and continued special education" (id.).

The CSE convened for a review of the student on May 30, 2007 (Dist. Ex. 2; Parent Ex. C).³ The student's mother, a school psychologist who acted as a district representative, a regular education teacher and an additional parent member attended the meeting (Tr. p. 130; Dist. Ex. 2 at

³ The resultant May 30, 2007 IEP noted that the CSE meeting occurred as the result of a "Requested Review," but did not indicate who made the request (Dist. Ex. 2 at p. 2; Parent Ex. C at p. 2).

p. 2; Parent Ex. C at p. 2).⁴ A special education teacher from the student's preschool participated in the meeting by telephone (Dist. Ex. 2 at p. 2; Parent Ex. C at p. 2). The hearing record reflects that the meeting lasted for approximately 30 or 40 minutes (Tr. p. 130).

The May 30, 2007 CSE determined that the student was eligible for special education services as a student with a speech or language impairment, and recommended a 12:1+1 class for a 10-month school year, plus related services of speech-language therapy and OT (Dist. Ex. 2; Parent Ex. C). The recommended speech-language therapy consisted of one 30-minute session per week in a group of three and two individual 30-minute sessions per week (Dist. Ex. 2 at pp. 15, 17; Parent Ex. C at pp. 15, 17). The recommended OT consisted of two sessions per week for 30 minutes each in a group of four students (*id.*). The IEP reflected, without any description or explanation, that modified criteria should be used for promotion (Dist. Ex. 2 at p. 17; Parent Ex. C at p. 17).⁵ The IEP also stated, without any description or explanation, that the student would receive "Adaptive Phys. Ed." (Dist. Ex. 2 at p. 1; Parent Ex. C at p. 1).

Regarding the student's present levels of academic performance, the IEP stated that the student's instructional levels in reading and writing⁶ and in math⁷ were below grade level (Dist. Ex. 2 at p. 3; Parent Ex. C at p. 3). The levels were noted to have been based on the results of the DAYC as reported in the Turning Five Summary Report, and teacher reports (*id.*). The IEP contained a narrative⁸ on the student's present performance in the area of speech-language that described the student as an "adorable young girl who presents with a moderate speech-language disorder" (*id.*). The student was stated to have some difficulty transitioning to therapy and between therapy materials, require "cues and some coaxing to participate in novel activities," and require "moderate cues to follow 1 and 2 step directives" (*id.*). She was noted to have more difficulty as the complexity of directions increased, and to benefit from "phonemic cues, repetition, redirection, and a latency time to follow directions and answer simple questions" (*id.*). The student's ability to

⁴ Testimony by the special education teacher for the district assigned to the CSE in this case reflects that, although she signed in at the May 30, 2007 CSE meeting as the special education teacher, she actually served in the capacity of the regular education teacher and was dually certified in both special and general education (Tr. pp. 128-29, 170; Dist. Ex. 2; Parent Ex. C). Similarly, the district's special education teacher testified that she erroneously signed the special education teacher from the student's preschool, who participated by telephone, in as the regular education teacher (Tr. p. 170; Dist. Ex. 2; Parent Ex. C). Neither party has raised the qualifications of the CSE meeting members as an issue in this matter.

⁵ Testimony reflects that a blank page relating to modified criteria for promotion was inadvertently included in the student's IEP rather than a completed page (Tr. pp. 136, 155). A completed page was included as an exhibit in the hearing record and reflects that the student was to meet 50 percent of the indicators for the kindergarten ELA standards and 50 percent of the indicators for kindergarten math standards in order to be promoted to the first grade (Dist. Ex. 3).

⁶ Reading and writing was noted on the IEP to include the areas of decoding, reading comprehension, listening comprehension, and writing (Dist. Ex. 2 at p. 3; Parent Ex. C at p. 3).

⁷ Math was noted on the IEP to include the areas of computation and problem solving (Dist. Ex. 2 at p. 3; Parent Ex. C at p. 3).

⁸ The present performance narrative in the May 30, 2007 IEP is identical to the present performance narrative contained in the preschool IEP developed by the CPSE at a March 19, 2007 meeting (compare Dist. Ex. 2 and Parent Ex. C, with Parent Ex. D).

answer "what questions" was stated to have significantly improved and she was noted to require minimum cues to sustain appropriate eye gaze (id.). With respect to expressive language, the student was said to require moderate cues to expand the length of utterances (id.). She was described as being able to easily pick up on new strategies and novel utterances during pretend play and turn taking activities (id.). The student was noted to require moderate cues to decrease her overall rate of speech and was said to be unintelligible at times (id.). She was also said to be able to achieve individual words and phonemes with good accuracy although her overall intelligibility decreased in connected speech (id.). She was described as having difficulty using language and her "excellent vocabulary" when tasks became more abstract, and as presenting with "word finding difficulties and executive functioning difficulties" (id.).

The May 30, 2007 IEP contained nine pages of annual goals with short-term objectives (Dist. Ex. 2 at pp. 6-14; Parent Ex. C at p. 6-14). The goals and objectives were identical to those contained in the preschool IEP developed by the CPSE at the March 19, 2007 meeting (compare Dist. Ex. 2 and Parent Ex. C, with Parent Ex. D).

The student was stated to present with "significant academic and language processing delays which impact[ed] on her ability to perform within the general education setting" (Dist. Ex. 2 at p. 15; Parent Ex. C at p. 15). The May 30, 2007 IEP further noted that general education without services was considered but rejected as not being sufficient to meet the student's academic needs (Dist. Ex. 2 at p. 16; Parent Ex. C at p. 16). It also noted that a collaborative team teaching (CTT) class was not restrictive enough to meet the student's needs (id.).

The May 30, 2007 IEP reflected that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher (Dist. Ex. 2 at p. 4; Parent Ex. C at p. 4). It also made reference to the student having celiac disease, for which she required a gluten free diet and vitamins (Dist. Ex. 2 at pp. 1, 5; Parent Ex. C at pp. 1, 5).

The district provided the parents with a Final Notice of Recommendation (FNR) dated June 13, 2007 that summarized the recommendations of the CSE and provided the parents with a specific class site for the student (Dist. Ex. 5; Parent Ex. E). The student's mother returned the FNR to the district along with a letter dated June 20, 2007 (id.; Dist. Ex. 6). On the FNR, the student's mother wrote "I defer my decision about placing my child in this program – please see attached" (Dist. Ex. 5; Parent Ex. E at p. 1). The accompanying letter from the mother stated that she had attempted to visit the offered class site but "was informed by school staff that although the program [would] be at the school in September, there was currently no program for [her] to look at" (Dist. Ex. 6; Parent Ex. E at p. 2). The student's mother further stated that in order to make a decision about an appropriate placement for her daughter, she wanted to see a similar program in another school and to "get an idea as to the make up of the proposed class" (id.). The student's mother requested a copy of the class profile and the name of another school where she could visit

a similar program (id.). The hearing record indicates that the district did not respond to these requests (Dist. Ex. 1; Parent Ex. A).⁹

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 her 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.).

The parents filed a due process complaint notice with the district on October 19, 2007 alleging that the district failed to offer the student a FAPE for the 2007-08 school year (Dist. Ex. 1; Parent Ex. A). The parents alleged the development of the student's IEP was procedurally flawed, and that the offered placement was substantively inappropriate (id.). Specifically, the parents stated that no individualized attention was given to the student's specific needs (id.). They argued that the CSE "mixed up" the student with her twin sister throughout the process by interchanging the girls' names and educational profiles (id.). The parents stated that the CSE did not develop or review any goals for the student, but rather used goals from a previous IEP and failed to review those goals for appropriateness (id.).

The parents further alleged that the annual goals and short-term objectives were generic, vague and insufficient (Dist. Ex. 1; Parent Ex. A). As an example, the parents stated that the annual goal that the student "will continue to improve cognitive skills," without stating the level of difficulty, was too broad to provide meaningful guidance to the individual responsible for implementing the goal (id.). They also stated that "[w]hile the short-term objectives may provide the necessary specificity, the absence of a particular level of performance renders the short-term objectives inappropriate" (id.). The parents noted that the first page of annual goals and short-term objectives were further insufficient because they failed to "establish a method for assessing the

⁹ An undated class profile of the district's offered 12:1+1 class site, which was offered into evidence at the impartial hearing, indicated that the proposed class consisted of six students that ranged between four and five years in age (Dist. Ex. 4 at p. 3). Half of the students demonstrated average intellectual ability and half of them demonstrated below average intellectual ability (id.). All six students on the profile were noted to be at the "P.P." (presumed to mean "pre-primer) level of instruction for reading and math (id. at p. 1). Three students demonstrated below average oral-expressive language skills and three students demonstrated age appropriate oral-expressive language skills (id.). Four of the students demonstrated below average oral-receptive language skills and two students demonstrated age appropriate oral-receptive language skills (id.). All six students demonstrated below average ability specific to written skills (id.). Six students received OT services; four students received physical therapy (PT) services, and one student had a 1:1 paraprofessional to assist in that student's physical management needs (id. at p. 4). Socially, all six students functioned at the prekindergarten level and one of those students had a 1:1 paraprofessional to assist with social management needs (id.). Three students received speech-language services and three students received counseling services (id. at pp. 2-3).

student's progress," and they noted that the columns for the "coding system" used by the district to indicate the method of measurement of the annuals goals were left blank for every goal (id.).

The parents also alleged that, despite indicating on the IEP that a modified promotional criteria was necessary for the student, the CSE failed to indicate what promotional standards the student needed to meet in English language arts (ELA) and math (Dist. Ex. 1; Parent Ex. A).

The parents stated in the due process complaint notice that they attempted to visit the proposed program at the offered school site on June 13, 2007, but were told that there was no program to view at that time (Dist. Ex. 1; Parent Ex. A). The parents stated that they wrote to the district on June 20, 2007 and requested to see a similar program at another school, as well as requested a class profile for the proposed program (id.). They stated that the district did not respond to either request (id.). The parents stated that they again requested information on the proposed placement on August 17, 2007, but did not receive a response to that request either (id.). The parents alleged that they went to the offered school site on September 21, 2007 to view the program (id.). The parents raised the following issues: (1) the distance of travel to and from the offered school site was "problematic;" (2) the classroom "contained four children, all of whom were boys;" (3) the teacher was only working with one student and the other students were "wandering around" the classroom; (4) the students were "not on the same functional and social level" as their daughter; (5) the "vice principal in charge of special education was unable to provide the parent with any details regarding the specific needs of the children and/or the children that would be added to the class throughout the school year;" and (6) that the school site "encompass[ed] a very large amount of students which would be overwhelming for [the student as she] require[d] a small, calm, structured setting given her complex needs" (id.).

An impartial hearing convened on April 7, 2008 and concluded on June 16, 2008 after three days of testimony (Tr. pp. 1, 12, 66). The district called two witnesses and submitted fourteen documents into evidence (Tr. pp. 18, 126; Dist. Exs. 1-14). The parents called two witnesses, one being the student's mother, and submitted twenty one documents into evidence (Tr. pp. 68, 180; Parent Exs. A-U).

In a decision dated July 30, 2008, the impartial hearing officer found that the district failed to offer the student a FAPE, that the parents' unilateral placement of the student at the Aaron School was appropriate, and that the equities favored an award of tuition reimbursement to the parents (IHO Decision at pp. 17, 21). The impartial hearing officer ordered the district to reimburse the parents for the student's tuition at the Aaron School for the 2007-08 school year (id. at p. 21).

With respect to the determination that the district failed to offer the student a FAPE, the impartial hearing officer found that the district reduced the student's related services without conducting appropriate evaluations and, more particularly, that the CSE did not rely on necessary evaluations to properly determine the student's current skill levels (IHO Decision at p. 14). The impartial hearing officer further explained that "the evidence established that the only assessment technique noted on [the student's May 30, 2007] IEP was teacher estimates to assess her levels, which is not one of the acceptable methods of evaluations for determining current levels" (id.). He stated that the only reference to testing on the IEP was a "notation regarding DAYC which does not reference any actual cognitive scores" (id.).

The impartial hearing officer stated that the May 30, 2007 IEP developed for the student was "merely a 'clone'" of the student's previous IEP and contained several goals that the student had already attained at the time of the CSE meeting, rendering at least some of the goals inappropriate (IHO Decision at p. 17). He again noted that the CSE failed to conduct formal evaluations and that the "turning five summary" lacked formal data regarding the student's reading or math levels (id.). He concluded that the "turning five summary" supported the parents' position that the student "had already attained many of the goals in the May 30, 2007 IEP... particularly in the social emotional area" (id. at pp. 17-19).

The impartial hearing officer found that the evidence established that the student was "a very social child who thrive[d] in social settings," and that the "testimony of the classroom teacher regarding the functional levels of the children and the class profile support[ed] the parent's position that the proposed placement was not appropriate" (IHO Decision at p. 18).¹⁰ The impartial hearing officer noted that he found the parents' assertion that the student's education profile was confused with that of her twin sister "convincing," stating that the IEPs were developed at the same time (id.).

The impartial hearing officer stated that he agreed with the parents' position that the goals were not reviewed for appropriateness during the CSE meeting, noting that the CSE did not have new speech goals or include a speech therapist as a member of the CSE (IHO Decision at p. 19). He determined that the goals and objectives were insufficient, and that while the short-term objectives may have provided the necessary specificity, the absence of a particular level of performance rendered them inappropriate (id.). With respect to the measurability of the goals, the impartial hearing officer found that the district's failure to fill in the grid it had established to indicate the method of measurement for each of the goals invalidated the IEP (id.).

The impartial hearing officer agreed with the testimony of the student's special education teacher at the Aaron School that the 12:1+1 program offered by the district was not appropriate because the class size was too large (IHO Decision at p. 20). He stated that the student, who was described as a "highly social child with conversational skills and a desire to participate in social situations," would not have been appropriately placed at the offered placement (id. at pp. 20-21).

Regarding the parents' unilateral placement of the student, the impartial hearing officer determined that the student was appropriately placed at the Aaron School (IHO Decision at p. 20). He found that the testimony and evidence supported a finding that the student had derived meaningful educational benefit from being placed at the Aaron School, and that a speech program (speech being the student's area of "greatest deficit") was effectively provided at the Aaron School (id.).

¹⁰ Although not specified by the impartial hearing officer, the "classroom teacher" is assumed to refer to the special education teacher at the recommended district placement.

Upon finding that the parents had cooperated with the CSE and participated in each and every step of the IEP process, and that the tuition at the Aaron School was reasonable, the impartial hearing officer awarded tuition reimbursement to the parents (IHO Decision at p. 21).

The district appeals the decision of the impartial hearing officer, requesting that the impartial hearing officer's decision be vacated in its entirety. The district alleges that, contrary to the impartial hearing officer's findings, the district offered the student a FAPE, the parents' unilateral placement of the student at the Aaron School was not appropriate, and the equities in this matter do not favor an award of tuition reimbursement to the parents.

As an initial matter, the district asserts that the parents failed to exhaust their administrative remedies because they did not (1) inform the CSE team that they believed the team lacked proper evaluations, or (2) avail themselves of the procedure to obtain an independent educational evaluation. The district also asserts that the parents' allegation that the CSE lacked proper evaluations was not properly before the impartial hearing officer and that the impartial hearing officer should not have decided that issue because it was not raised in the parents' due process complaint notice or during their opening statement at the impartial hearing, but was instead first raised in the parents' written closing statement after testimony had concluded.

The district also asserts that the evidence supports the district's contention that the IEP was procedurally valid and the CSE had sufficient information upon which to create a valid IEP. Further, the district asserts that the May 30, 2007 IEP contained appropriate measureable goals, the CSE's recommendations were substantively appropriate, the offered placement in a 12:1+1 setting was appropriate, and the student would have been suitably grouped at the offered class site.

The district contends that the parents' unilateral placement of the student at the Aaron School was inappropriate because it was too restrictive, the class size was smaller than what was recommended by the CSE, it did not afford the student the opportunity to access appropriately developing peers whose behavior she could model, and the student received no OT as was recommended on her IEP.

The district also contends that the equities in this matter do not favor reimbursement because the parents signed a contract with the Aaron School and paid a portion of the tuition, including a non-refundable deposit, prior to the CSE meeting, but did not inform the CSE of this fact at the CSE meeting.¹¹ The district concludes that this evidence demonstrates the parents did not "seriously intend" to enroll their daughter in public school.

In their answer, the parents deny many of the allegations in the petition. Particularly, the parents deny the district's allegations that it offered the student a FAPE, that the IEP was procedurally or substantively valid, that their unilateral placement of the student at the Aaron School was not appropriate, and that the equities do not favor an award of tuition reimbursement. The parents request that the decision of the impartial hearing officer be upheld in its entirety.

¹¹ The hearing record contains the parents' application for the student's admission to the Aaron School, their contract with the Aaron School, and the Aaron School tuition payment schedule (Dist. Exs. 12-14).

At the outset, I must address the district's assertion that the parents' allegation of a lack of proper evaluations upon which to create a valid IEP for the student was not properly before the impartial hearing officer. The district alleges that the parents first raised this issue in their written closing statement submitted to the impartial hearing officer after testimony had concluded and, accordingly, the impartial hearing officer should not have rendered a decision on the issue. A thorough review of the hearing record reveals that during the impartial hearing the parents cross examined one of the district's witnesses on what evaluative information was reviewed during the CSE meeting, the discussion during the CSE meeting as to the student's present performance, why the DAYC was administered, whether the CSE conducted any additional testing, whether testing was discussed with the parent during the CSE meeting, why a "Woodcock Johnson" or a "WISC" was not used, and why a "Wechsler Preschool Edition" or a "WIIPSI" was not used (Tr. pp. 141, 152-54, 178-80).

I find that the impartial hearing officer had enough information before him to make a determination as to whether the May 30, 2007 CSE had proper evaluations upon which to base the student's IEP. Moreover, I note that the hearing record does not reflect that the district objected to any of the aforementioned testimony being offered during the impartial hearing.

Moving on to the merits in this matter, I find for the reasons discussed below that the impartial hearing officer erred in finding 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. 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 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).

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).

In 2007, the New York State Legislature amended the 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 has 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 statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

Returning to the instant case, I find that the parents' assertion that the CSE confused the student with her twin sister throughout the process of developing the student's IEP not to be supported by an overall reading of the hearing record. The district's special education teacher who participated in the May 30, 2007 CSE testified that the annual reviews for the student and her sister were conducted "one after the next," that each IEP was developed separately, and that the team did not confuse the twins during the review (Tr. pp. 137, 149-50). She further testified that each meeting was kept separate and that the CSE had separate folders for the twins and held separate telephone conferences with the twins' teachers (Tr. p. 137). Although the impartial hearing officer found the student's mother's testimony convincing that the programs for the two children were confused in the IEP formulation process, the parents do not point to errors in the student's May 2007 IEP that would have resulted from such a confusion. Moreover, there is nothing in the hearing record showing that the CSE focused on incorrect data or that the IEP that was developed contained data that was based upon information relating to another student. A reading of the entire record and documentary non-testimonial evidence in the hearing record does not support the impartial hearing officer's determination on this issue (see Application of the Bd. of Educ., Appeal No. 08-074 [giving deference to the findings of witness credibility of an impartial hearing officer, unless non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion]; see also Carlisle Area School v. Scott P., 62 F. 3d 520, 524 [3d Cir.1995]; Application of the Dep't of Educ., Appeal No. 08-037; Application of the Bd. of Educ., Appeal No. 04-091; Application of the Bd. of Educ., Appeal No. 03-062; Application of the Bd. of Educ., Appeal No. 03-038; Application of a Child with a Disability, Appeal No. 03-025; Application of a Child with a Disability, Appeal No. 01-019). Furthermore, there is insufficient factual basis in the record supporting a conclusion that any alleged confusion about the sisters resulted in any procedural or substantive harm rising to the level that denied a FAPE.

The hearing record also does not support the impartial hearing officer's finding that the district did not have or rely on necessary evaluations to determine the student's current skill levels (IHO Decision at p. 14). Testimony by the district's special education teacher indicated that the CSE had available to it reports from the student's preschool, including the student's speech-language progress report written by the student's speech-language therapist, the OT progress report, the educational progress report, and the Turning Five Summary Report (Tr. pp. 129-30, 141, 175). The CSE also reviewed the preschool IEP developed two months earlier on March 19, 2007 and a psychoeducational evaluation conducted in 2006 (Tr. pp. 152, 154; Parent Exs. D; N). According to the district's special education teacher, the May 30, 2007 IEP reflected descriptions of the student's present levels of performance based on the preschool IEP and teacher reports (Tr. p. 152; Dist Ex. 2; Parent Exs. C at p. 3; D).

A review of the hearing record reflects that, consistent with the information provided in various reports (Dist. Exs. 7-11; Parent Exs. F-L; N-P), the May 30, 2007 IEP indicated that the student presented with a moderate speech-language disorder (Dist. Ex. 2 at p. 3; Parent Ex. C at p. 3). At times, the student had difficulty with transitioning to therapy and between therapy materials, and she required cues and coaxing in order to participate in novel activities (id.). The IEP indicated

that the student required moderate cues to follow one and two-step directives, and noted that as the complexity of directions increased, she experienced more difficulty (*id.*). The student was described as benefitting from phonemic cues, repetition, redirection, and a latency time to follow directions and answer simple "wh" questions, although it was also noted that the student's ability to answer "what" questions had significantly improved (*id.*). The student required minimal cues to sustain appropriate eye gaze (*id.*). Regarding expressive language, although the student easily "pick[ed] up" new strategies and novel utterances during pretend play and turn taking activities, she required moderate cues to expand length of utterance and to decrease her overall rate of speech (*id.*). The student's articulation was described as unintelligible at times, with an explanation provided that she was able to "achieve individual words and phonemes with good accuracy," but overall intelligibility decreased in connected speech (*id.*). The student had difficulty using her "language and excellent vocabulary" when tasks became more abstract (*id.*). She also presented with word finding difficulties and executive functioning difficulties (*id.*). Based on the DAYC and teacher reports, the IEP reflected that the student's functioning levels for reading, writing and math were "below grade level" (*id.*).

Also consistent with reports available to the CSE at the May 30, 2007 meeting, the IEP indicated that the student presented with mild delays specific to her social/emotional present levels of performance (Dist. Ex. 2 at p. 4; Parent Ex. C at p. 4). The student's language delays interfered with her communication during play at times and, although she used language as her primary source of communication, the student learned to communicate by gesturing, pointing and verbal language (*id.*). The student was noted to play cooperatively with peers during "center time" and on the playground in games involving chasing and dancing (*id.*). The student was described as friendly and empathetic toward peers and familiar adults (*id.*). She was beginning to understand how to problem-solve with others and express her feelings in appropriate ways (*id.*). The IEP noted that the student's behavior did not seriously interfere with the instructional process and could be addressed by the special education teacher (*id.*).

The IEP also indicated that the student presented with age appropriate gross motor skills and was working on throwing and kicking a ball to a designated target area (Dist. Ex. 2 at p. 5; Parent Ex. C at p. 5). It also indicated her diagnosis of celiac disease, for which she ate a gluten free diet and took vitamins (*id.*).

Based on the aforementioned information available to the May 30, 2007 CSE, the resultant IEP appropriately indicated that the student's needs included a 12:1+1 class, speech-language therapy, OT, and a gluten free diet and vitamins (Dist. Ex. 2 at pp. 3, 5; Parent Ex. C at pp. 3, 5). In addition, the academic present performance and learning characteristic narrative indicated the student's need for cues, phonemic cues, coaxing, repetition, redirection, and latency of response time when following directions and answering simple "wh" questions (Dist. Ex. 2 at p. 3; Parent Ex. C at p. 3).

Turning next to a review of the annual goals and objectives, the IEP included goals that addressed the student's needs in order to expand her social/emotional skills; increase her cognitive development and continue to improve cognitive skills; expand her fine motor skills; increase socialization and play skills; write her name; improve and increase pre-academic and readiness skills; continue to improve gross motor skills; increase and improve receptive language skills through comprehension and demonstration; improve and increase expressive language skills;

comprehend and interpret meaning from books and other texts; actively participate in conversation; improve overall speech intelligibility; improve her ability to recall events, stories and information; improve fine motor skills for greater academic success in the classroom; and improve self-help skills for greater success at home and in the classroom (Dist. Ex. 2 at pp. 6-14; Parent Ex. C at pp. 6-14). Although the goals may be vague when isolated out of context and viewed alone, the 67 short-term objectives included within the IEP comprehensively addressed the student's needs, and the majority of the short-term objectives were both detailed and measureable (*id.*). For example, an annual goal that the student would increase receptive language skills through comprehension and demonstration, contained corresponding short-term objectives that the student would follow two to three step commands/directives with minimal cues three out of five times; comprehend the usage of negatives (not) within directives/commands three out of five times; demonstrate a comprehension of possessive pronouns (his/hers) three out of five times, and increase the ability to sequence three to four events utilizing visual stimuli (Dist. Ex. 2 at p. 10; Parent Ex. C at p. 10). Another annual goal stated that the student would comprehend and interpret meaning from books and other texts, while the corresponding short-term objectives indicated that the student would relate a story to her own experience with verbal prompts eight out of ten attempts; predict what comes next in a story with verbal prompts eight out of ten attempts, and predict what comes next in a story with independently eight out of ten times (*id.*). Furthermore, goals and objectives included in the May 2007 IEP reflected the student's present levels of performance and need areas per CPSE and CSE progress reports available to the May 2007 CSE (Dist. Exs. 7-11; Parent Exs. G-K). I also note that between five to twelve months subsequent to the May 2007 CSE meeting, reports written by the Aaron School between October 2007 and May 2008 reflect that at various times during the 2007-08 school year the student continued to work on areas that were addressed by the May 2007 IEP including following various directives, responding to a variety of wh-question forms, conversational skills, play skills, and handwriting (Parent Exs. Q-U). Based on the foregoing, I find that the short-term objectives contained in the May 2007 IEP were adequate and cured any deficiencies in the annual goals (see M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *11 [S.D.N.Y. Sept. 29, 2008]).

Regarding the impartial hearing officer's finding that the May 30, 2007 IEP was a "clone" of the student's March 2007 preschool IEP, I agree that the hearing record reflects that the May 30, 2007 CSE team relied on the March 2007 preschool IEP to develop the student's IEP for the 2007-08 school year (Tr. p. 152). However, the May 2007 IEP was developed only two months after the preschool IEP was developed by the CPSE, and testimony by the district's special education teacher indicated that the goals on the preschool IEP were written by the CPSE with the intent of being applied for an entire year (Tr. p. 132). The district's special education teacher testified that, accordingly, the May 30, 2007 CSE team considered the goals on the March 30, 2007 IEP to be up-to-date and carried them over to the May 30, 2007 IEP (*id.*). Although the hearing record contains conflicting testimony regarding whether the specific goals were discussed at the May 2007 CSE meeting, as noted previously, the student's mother attended the March 2007 CPSE meeting and there is no indication in the hearing record that the student's mother objected to the goals developed by the March 2007 CPSE meeting at the time they were formulated. The hearing record further evidences that the student's mother participated in the May 2007 CSE meeting and that the goals, as formulated on that IEP, were appropriate to confer an educational benefit upon the student. The hearing record does not show that the student's mother objected to the continuation of the March 2007 CPSE IEP goals on the May 2007 IEP at the time of the May 2007 CSE meeting. The evidence in the hearing record shows that that the parents were significantly

involved in the discussions at the May 2007 CSE meeting (see Cerra, 427 F.3d at 193). In addition, the district's special education teacher indicated that if the parents had commented on the appropriateness of the goals at the time of the CSE meeting, the CSE would have made adjustments and changed the goals (Tr. p. 146). Moreover, I note that a review of 2008 progress notes from the Aaron School written after the May 30, 2007 CSE meeting reflected the student's needs and speech-language and OT objectives that were similar to the those included on the May 30, 2007 IEP (compare Parent Exs. Q; R; S; T; U, with Dist. Ex. 2 at pp. 6-14; Parent Ex. C at pp. 6-14).

Additionally, the District Court for the Southern District of New York recently held that similarity of an IEP to that of a previous IEP for a student, where the student was shown to make progress under the previous IEP, did not substantively invalidate the IEP at issue (M.C., 2008 WL 4449338, at *14; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir. 2008]; Application of the Bd. of Educ., Appeal No. 08-070; Application of a Child with a Disability, Appeal No. 05-126). The hearing record amply supports a conclusion that the student in this matter had made progress, that the May 30, 2007 IEP was based upon a successful program, and that the IEP was reasonably calculated to confer educational benefits (Dist. Exs. 8; 9; 10; 11; Parent Exs. G; H; I; J).

The May 30, 2007 IEP indicated that progress reports would be written three times per year, and noted method of measurement options (Dist. Ex. 2 at pp. 6-14; Parent Ex. C at pp. 6-14). Regarding the parents' assertion that the IEP was flawed because the columns for the "coding system" to indicate the method of measurement of the annual goals were left blank for every goal (Dist. Ex. 1; Parent Ex. A), I find convincing the testimony of the district's special education teacher that the specific measurement option used to assess and measure the student's progress would be determined by the teacher implementing each particular goal (Tr. pp. 134, 150). There is no evidence in the hearing record that the fact that the coding system was left blank would have deprived the student a FAPE.

Turning to the fact that the May 2007 CSE did not recommend that the student receive OT services, as noted above, the hearing record contains an OT progress report to the CPSE dated January 11, 2007 that stated that the student made good progress, but had not yet mastered all of her goals and continued to be missing some age appropriate skills (Parent Ex. I at p. 2). This report "strongly recommended" that the student continue to receive OT services in order to master these missing skills so that she could function more efficiently and independently in her environment (id.). Yet the hearing record also contains an OT progress report to the CSE, prepared by the same individual on the same date, which is identical in content except that it states that the student made good progress in therapy toward achieving age appropriate functioning and that OT services were not recommended when the student transitioned from the CPSE to the CSE (Dist. Ex. 9 at p. 2). This inconsistency is not addressed or explained in the hearing record. Furthermore, the student's mother testified that that the student was discharged from OT by her preschool occupational therapist at the end of the 2006-07 school year (Tr. pp. 188, 218). The hearing record shows that the student's mother did not believe that the student ever needed OT services, nor did the student's mother request OT services at the May 2007 CSE meeting, in the due process complaint notice, at the impartial hearing or on appeal (Tr. pp. 188-189, 211, 218). Lastly, the hearing record does not show that the lack of OT services on the student's IEP resulted in a denial of a FAPE.

Turning to the appropriateness of the 12:1+1 class that was offered by the district to the student for the 2007-08 school year, the special education teacher for the district's offered 12:1+1 classroom testified that in September 2007 the student would have been able to receive speech-language therapy and OT services as mandated on her May 30, 2007 IEP (Tr. p. 32).

Testimony by the district's special education teacher indicated that the CSE modified the student's speech-language services to two individual 30-minute sessions per week and one 30-minute small group (3:1) session per week because the student would have had the opportunity in the proposed 12:1+1 class to use her speech-language abilities as she socialized and interacted with her peers in the class (Tr. pp. 173-74).

Testimony by the special education teacher in the offered 12:1+1 classroom indicated that the class was a self-contained kindergarten class (Tr. p. 23). Her testimony reflected that there were three paraprofessionals in the classroom, with one being assigned to the class as a whole and two being assigned to other individual students in the class (Tr. pp. 29, 39). One of the paraprofessionals assigned to an individual student helped that student, who had multiple disabilities, with difficulties in his body control (Tr. pp. 39-41). The offered class contained six students at the beginning of the 2007-08 school year and seven students at the time of the impartial hearing (Tr. pp. 23-24).¹² Two of the students in the class were eligible for special education services as students with a learning disability, two students were eligible for special education services as students with an other health impairment, one student was eligible for special education services as a student with multiple disabilities, and two students were eligible for special education services as students with a speech or language impairment (Tr. pp. 24, 38). The students ranged in age from five to six years old (Tr. p. 24).

Regarding reading instructional levels, four students were at a pre-primer level and three students were between instructional levels 0.5 and 1.5 at the beginning of the school year (Tr. p. 25). At the time of the impartial hearing, all of the students had gained enough skills to reach a kindergarten reading level (id.). For math instructional levels, four students were below kindergarten level and three were at kindergarten level at the beginning of the school year (id.). At the time of the impartial hearing, all students were performing at the kindergarten level (id.).

The district's teacher testified that she functionally grouped her students for instruction in order to address their academic levels (Tr. pp. 25-26). At the time of the impartial hearing, there were three writing groups: two groups with two students each and one group with three students (Tr. p. 62). She stated that she rotated working with the groups throughout the week (id.). The paraprofessional also worked with the groups, and some students were able to work independently (Tr. p. 63). Five of the students received speech-language therapy, six received OT, five received counseling, and four received physical therapy (PT) (Tr. p. 28). The teacher indicated that she communicated with the related service providers on an as needed basis, bi-monthly, and at IEP meetings (id.). Based on the above, I find that the student would have been functionally grouped in the recommended 12:1+1 class and would have received her related services at the recommended district school.

¹² I note that at the start of the 2007-08 school year, the district's offered class site contained less students than were in the class at the Aaron School that the student was unilaterally placed in by her parents (Tr. p. 74).

The district's teacher further testified that the daily schedule consisted of a circle to say good morning; an OT based program called "Brain Gym" to improve the students' focus, attention to task, and self management; a sensory activity usually involving letters; a shared reading where the class read a familiar book or poem; a morning meeting to look at the calendar, weather and days of the week; working at a table on letters and writing stories; recess and lunch; an additional Brain Gym activity; math; a story related to numbers; writing and drawing; a favorite story; "specials" (music, art, computers, or library); and outside play (Tr. pp. 26-27). The teacher stated that she followed a standard kindergarten curriculum and adapted it for her students (Tr. p. 27). In addition to the Brain Gym and standard kindergarten curricula, the teacher indicated that she used "Foundations," a program for students with reading difficulties (id.). She also noted that she performed assessments of her students through observations and "teacher-made" assessments (id.). She used a classroom behavior plan where students earned rewards for good behavior (Tr. p. 40). One of the students in the class had an individual behavior plan to assist him in keeping his body under control (id.).¹³

The district's teacher opined that the student in the instant case would have fit into the offered 12:1+1 classroom in September 2007 because her IEP was consistent with the IEPs of the other students in the class (Tr. p. 29). The teacher also indicated that she had experience working with students with speech-language impairments and that she had students in the class whose IEPs had similar goals to those of the student, which goals she implemented for the other students (Tr. pp. 29-30, 34). The teacher measured progress of IEP goals through checklists, observations and assessments (Tr. p. 30). She reported that, in September 2007, she had three students in her class with higher functioning goals on their IEPs than the student in this case because those three students already knew numbers, letters and sounds (Tr. pp. 36-37).

Socialization and initiating peer interactions was described by the teacher as a "problem" at the beginning of the school year but, at the time of the impartial hearing, the teacher indicated that most of the students in the class were able to "initiate conversation and play, initiate exchanges in play, and . . . engage in play with one another, instead of just having parallel play" (Tr. p. 43).

Regarding the student's need for a gluten free diet, the teacher stated that she would have to make some changes at snack time (Tr. p. 46). She also noted that she had another student in her class that required a gluten free diet (Tr. p. 47).

When asked how she would address the student's auditory processing difficulties, the teacher stated that she would use visual prompts in her classroom (Tr. p. 53). Regarding environmental modifications, the teacher again referred to visual prompts and indicated that she used visual prompts during shared reading, through the use of math manipulatives, and "a lot of showing and re-teaching" (Tr. p. 54). Regarding transitions from one activity to the next, the teacher testified to various techniques she used in the class to assist the students in dealing with transitioning to the next activity (Tr. pp. 55-56). She indicated that many students in her class required cues and coaxing to transition and participate in novel activities (Tr. p. 56).

¹³ The district's teacher noted that the student with the individual behavior plan did not have acting out behaviors (Tr. p. 40).

The teacher stated that if the student needed higher functioning peer models, the class would have provided that for her because, at the beginning of the school year, two other students were functioning at a higher level than the student both academically and socially (Tr. p. 54).

In consideration of the foregoing, I find that the impartial hearing officer erred in his determination that the district did not offer the student a FAPE for the 2007-08 school year. Consistent with LRE considerations, I find that the offered 12:1+1 program with the related service of speech-language therapy was appropriate for the student and was reasonably calculated to enable the student to receive educational benefits. Having determined that the district 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 considered the parties' remaining contentions and find them to be unnecessary to address in light of my conclusions herein.

THE APPEAL IS SUSTAINED.

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

Dated: **Albany, New York**
 October 16, 2008

PAUL F. KELLY
STATE REVIEW OFFICER