



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-119

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

#### **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

#### **DECISION**

Petitioner (the parent) appeals from the decision of an impartial hearing officer which determined that the district offered the student a free appropriate public education (FAPE) and declined to award the parent tuition reimbursement for her son's tuition costs at the Aaron School for the 2007-08 school year. The appeal must be sustained in part.

At the time of the impartial hearing in April and June 2008, the student was five years old and attending the Aaron School where the parent had unilaterally enrolled him at the beginning of the 2007-08 school year (Tr. pp. 60, 122). The Aaron School is not approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services and classification as a student with autism are not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student is described in the hearing record as "happy" and "affectionate," displaying deficits in attention, language, muscle tone, motor planning, self-regulation and peer socialization (Parent Ex. I at p. 1). The student's cognitive abilities are in the low average range and he is reported to have gluten and dairy sensitivities (id. at pp. 1, 3).

In May 2004, when the student was 17 months old, he began receiving speech-language services (Parent Ex. I at p. 1). From September 2005 to June 2006 and during summer 2006, the student attended two placements with "typically developing children" (id. at p. 2).<sup>1</sup> The student

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<sup>1</sup> I note that the hearing record does not provide a description of either of these placements.

received the support of a special education itinerant teacher (SEIT) at the summer placement (id.).<sup>2</sup> Beginning in September 2006, the student attended a therapeutic nursery school to address "delays in social/emotional development, attentional weaknesses, sensory/motor development, and speech-language delays" (id.; Parent Ex. J at p. 1).<sup>3</sup> The student reportedly adjusted well to the classroom environment, but needed constant one-to-one support to remain attentive and responsive to classroom routines and expectations (Parent Ex. I at p. 2).

In December 2006, the student's related service providers prepared reports of the student's progress and made recommendations for the upcoming school year (Parent Exs. K; L; M; N). A psychological update reflected that although the student had made gains in play and interactive skills, he continued to present with difficulties regulating his body, using his relatively strong verbal abilities and maintaining appropriate social and physical boundaries (Parent Ex. M). The evaluator recommended that the student continue to receive weekly individual and dyadic counseling sessions in a 12-month program to address his underdeveloped social skills (id.). A speech-language report indicated that speech-language therapy addressed the student's needs in receptive and expressive language (Parent Ex. N at p. 1). Although the student had made steady gains and did best when visual prompts and structure were provided, his performance varied depending upon his levels of attention, distraction or impulsivity (id.). The student was reported to benefit when given choices or initial sound cues and extra time to respond (id. at p. 2). The speech-language pathologist reported that the student made "noteworthy progress" in developing his awareness of events, relating a sequence of events and expanding his play skills to include more creative and symbolic play schemas, but continued to need to develop his pragmatic skills (id. at p. 3). Although the student was responsive to redirection, he became disorganized or over stimulated when presented with new or too many items (id. at p. 4). The speech-language pathologist recommended that the student be enrolled in a small, structured school program with bright, non-aggressive peers and continue to receive in-school speech-language therapy two times per week for 30-minute sessions as well as therapy after school (id.).

A physical therapy (PT) update/clinical summary maintained that the student achieved five out of six objectives addressing his ability to use controlled movements and posture and made progress on two out of four objectives addressing his overall muscle strength and control (Parent Ex. K at p. 1). The physical therapist recommended that the student continue PT in order to work toward full achievement of the student's 2006-07 individualized education program (IEP) goals (id. at p. 2). An occupational therapy (OT) progress report indicated that in addition to OT services at the therapeutic nursery school, the student received four additional hours of OT outside of school (Parent Ex. L at p. 1). The student exhibited difficulty regulating his body, attending to a task, following one or two step directions and required frequent cues to make eye contact (id. at p. 2). He responded to deep breathing, deep (touch) pressure input, use of verbal cues, such as "wait", and slowing down during gross motor play assisted him in "reaching a calm state and improve[ed] his attention span" (id.). The occupational therapist opined that although the student had made progress, he continued to present with at least a one year delay in fine motor and visual perceptual

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<sup>2</sup> The Education Law defines special education itinerant services (commonly referred to as "SEIT") as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§4410(8)(a)]" (Educ. Law § 4410[1][k]).

<sup>3</sup> The therapeutic nursery school was a district funded division of a large social service agency, which provides services to children (Tr. p. 136).

skills and required therapy to address sensory processing weaknesses and bilateral coordination difficulties, which significantly affected his ability to participate in daily activities (id. at p. 3). She recommended that the student continue to receive OT services in "the current mandate" and that he attend a 12-month program with a class of bright, non-aggressive peers with a high teacher to student ratio (id.).

On December 15, 2006, the student's special education teacher at the therapeutic nursery school prepared an educational progress report (Parent Ex. J). The report indicated that the student had "mastered" many pre-math skills, including recognition of numbers from one to ten, comparisons of big/little and more/less and recognition of many shapes (id. at p. 2). Although the student was responsive to adult prompts for redirection and had made progress sustaining his attention independently, he was described as easily distracted during group activities and needing assistance to sustain attention, as he might fall out of his chair, begin touching a peer or get up and walk around the group area making unrelated statements (id.). The student's play skills were also affected by his difficulty sustaining attention, and he required intensive adult support to develop ideas for coherent play sequences; however, the student was only variably responsive to adult support and redirection in this area (id. at p. 3). The student also required support to complete tasks, specifically in organizing materials and developing a plan to address tasks presented (id.). The student responded to his name, one and two step directions and questions, and at times, perseverated on a sentence or topic (id.). Although the student was interested in his peers, his difficulties using pragmatic language interfered with successful peer interaction and he often resorted to physical contact to initiate interaction (id. at p. 4). The student's teacher described his receptive language skills as strong, although she opined that his difficulty sustaining attention interfered with his ability to understand and respond to the language of others (id. at p. 5). The teacher reported that the student interacted well with adults and was highly interested in his peers; however, the peers were "not always receptive" to the student's frequent, unexpected hugs (id. at pp. 5-6). The teacher maintained that the student needed adult prompting to use words to interact with peers and to generate ideas for things he could do with his peers, and that he required intensive support to maintain attention in a joint activity with a peer (id. at p. 6). The report also indicated that the student participated in gross motor activities when there was a "strong motivation" to do so, his movements seemed "awkward" and he had difficulty creating and carrying out a motor plan for complex activities (id. at p. 7). The student's fine motor development reflected difficulties with bilateral coordination and crossing midline and he required therapeutic interventions to address his sensory needs (id.). According to the report, the student's attentional weaknesses and impulsivity affected his play skills, ability to learn during group lessons and social interactions (id. at p. 8). Delays in the student's pragmatic language skills and in his social development prevented collaborative learning in small groups without adult support (id.). The report maintained that the student required an environment that provided regular opportunities for one-to-one adult interaction to assist in concentrating, facilitation of social interaction, expansion of play skills and development of motor skills in order to continue academic progress in the classroom (id.).

In late November and December 2006, a private psychologist conducted a psychological evaluation of the student to assess his level of cognitive and social-emotional functioning and to determine the types of supports and classroom setting he needed to foster his development (Parent

Ex I at p. 1).<sup>4, 5</sup> Administration of the Stanford Binet Intelligence Scales-Fifth Edition (SB5) yielded full scale, verbal and nonverbal IQ scores that indicated the student's intellectual functioning was in the low average range (id. at p. 3). The psychologist opined that the student's scores were "hampered" considerably as a result of his difficulty understanding unfamiliar language used in instructions and difficulty inhibiting his impulsive responses (id. at pp. 3-4). Selected subtests of the Developmental Neuropsychological Assessment Test (NEPSY) were administered to further assess the student's development (id. at pp. 4-6, 9). The student achieved subtest scores that revealed relative strengths in body part naming, comprehension of instructions, and narrative memory and weaknesses in phonological processing, verbal fluency, visuomotor precision, design copying, and block construction (id. at p. 9). The attention/executive functions subtest could not be completed because the student refused the tasks (id. at p. 9). The private psychologist reported that she was unable to assess the student's pre-academic skills through administration of the Pediatric Examination of Educational Readiness (PEER) because of his difficulties processing task demands and organizing responses (id. at p. 6). She indicated that her informal observation of the student suggested that he had developed some skills, including counting and identifying letters and numbers (id.). The private psychologist further reported that in the social/emotional domain, the student exhibited variable functioning (id. at p. 7). Although he was "warm and related" and was capable of engaging in pretend play and reciprocal interactions with adults, his ability to use language and play to express his feelings and intentions was inflexible, and his ability to independently organize appropriate social responses was limited (id.). The psychologist opined that the student would benefit from a structured school environment, which provided for ongoing, one-to-one teacher support with non-aggressive peers of average cognitive ability in a classroom where language was modeled and supported throughout the day (id. at p. 8). She recommended that the student continue to receive counseling, speech-language therapy, OT and PT (id.). She also suggested that a medical consultation should be considered in light of the student's attentional deficits and that the parent continue to receive parent guidance from providers to understand the student's difficulties (id.).

On February 8, 2007, the Committee on Preschool Special Education (CPSE) convened to modify the student's 2006-07 preschool IEP (Parent Ex. C).<sup>6</sup> Participants included the student's parent, a district representative, and the student's special education teacher and a social worker, both from the therapeutic nursery school (id. at p. 2). The February 2007 IEP reflected that the student was classified as a preschool student with a disability and recommended a 12-month school year program of an 8:1+2 special class in the therapeutic nursery school with related services of two 30-minute individual OT sessions per week, two 60-minute individual OT sessions per week, one 30-minute individual and one 30-minute group counseling sessions per week, two 30-minute individual PT sessions per week and two 60-minute individual speech-language therapy sessions per week, and special education transportation (id. at pp. 1, 23)<sup>7</sup>. The student's February 2007 IEP

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<sup>4</sup> Numerous sessions were held with the student during the psychological evaluation because the student displayed difficulties attending to task demands for long periods, despite ongoing support (Parent Ex. I at p. 2).

<sup>5</sup> The student was referred for the psychological evaluation by his parent (Parent Ex. I at p. 1) and, although it is not clear from the hearing record, it appears that the evaluation was performed by a private psychologist.

<sup>6</sup> The student's 2006-07 IEP was not made part of the hearing record.

<sup>7</sup> Although not explained in the hearing record, the February 2007 IEP contains a handwritten notation of "outside" for the related service recommendations of two 60-minute individual OT sessions per week and two 60-minute individual speech-language therapy sessions per week (Parent Ex. C at p. 23).

also reflected the termination of two 30-minute individual speech-language services sessions per week (id. at pp. 2, 23).

The student's academic performance and learning characteristics described in the February 2007 IEP reflected that although the student was "a bright and creative child," his ability to fully participate in classroom activities was "significantly" impacted by attentional difficulties, speech-language delays and atypical social behavior (Parent Ex. C at p. 3). The February 2007 IEP also reflected that the student required intensive support to stay focused on self-chosen and teacher directed tasks, problem solving, participation in "circle time" and working cooperatively with peers (id.). The February 2007 IEP indicated that the student's ideas were often off topic and "unrelated to the task at hand" (id.). No data regarding the student's reading, writing or math test/evaluation scores or instructional levels was included (id.). The student's academic management needs included a high ratio of teachers to students to provide support in maintaining attention, information presented "dynamically" in multiple modalities and incorporation of music and visuals (id.).

As to the student's speech-language performance reflected in the February 2007 IEP, he was described as exhibiting communication impairment characterized by deficits in receptive language/auditory processing and expressive language, specifically in form and content (Parent Ex. C at p. 4). He responded to simple one, two and some three step directions, but displayed difficulty processing more complex language (id.). Expressively, the student had become "increasingly talkative" and produced lengthier utterances; however, he continued to exhibit delays in semantics/syntax/morphology (id.). His "overall" intelligibility of speech was described as "fairly good" (id.). The student's pragmatic/social communication skills were determined to be weak with difficulty sustaining a conversation, maintaining a topic, and maintaining eye contact (id.). His play skills were also delayed as he presented with difficulties sustaining a multi-step organized play sequence accompanied by a narrative (id.). Lastly, the student was easily distractible and exhibited "variable attending behaviors" (id.).

In the area of social/emotional performance, the February 2007 IEP indicated that the student exhibited difficulty developing and attending to play themes as well as inconsistency in his ability to narrate play sequences, but that he occasionally played with a single toy for more than five minutes (Parent Ex. C at p. 5). The student was developing his social skills, interactive play skills, and awareness of boundaries (id.). The February 2007 IEP reflected that the student's social/emotional management needs could be addressed by counseling (id.).<sup>8</sup>

The health and physical development portion of the February 2007 IEP described the student as "energetic and playful," but that he presented with sensory processing deficits in regulatory behavior, motor planning, visual motor and attention skills (Parent Ex. C at p. 6). The student's low muscle tone interfered with his gross and fine motor development by at least one year (id.). Although the student's strength and endurance had improved, he was not at age level with his peers (id.). The student's strengths included his abilities in "low center of gravity" activities (i.e., rolling, transitions to sitting, sitting balance and equilibrium responses) and his ability to transition to standing and in jumping; while his weaknesses included a loss of balance

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<sup>8</sup> I note that the February 2007 IEP reflected that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher and that a behavior intervention plan (BIP) was not developed (Parent Ex. C at p. 5).

when running, an inability to hop, low muscle tone, bumping into obstacles and his limited interest in interactive play (id. at p. 8). The February 2007 IEP indicated that the student's health/physical management needs included sensory interactive/modulation techniques, child directed therapeutic kinetic activities and individual OT services in a sensory gym with suspended equipment to address vestibular and proprioceptive sensory processing deficits (id. at p. 6). The February 2007 IEP also indicated that the student was on a gluten free, casein free diet due to food sensitivities (id. at p. 8).

The February 2007 IEP included goals with corresponding short-term objectives to address the student's deficits in his social/emotional skills; gross and fine motor skills; self-help skills; attending skills; play skills; receptive, expressive, and pragmatic language skills; and his sensory processing and self-regulation skills (Parent Ex. C at pp. 9-16, 18-20). The February 2007 CPSE considered and rejected a general education program and SEIT services, as the student had "made progress," but continued to present sensory integration deficits and "significant" delays in language, communication and social/emotional development (id. at p. 22). His needs could "most appropriately be addressed in a small, highly structured setting" (id.). The hearing record does not reflect that the parent, the social worker or the special education teacher from the therapeutic nursery school, expressed concerns with the IEP at the February 2007 CPSE meeting.

On or about February 8, 2007, the parent was sent a "Final Notice of Recommendation (FNR)/Modification of IEP" by the district (Parent Ex. G). The notice reflected the recommendations made by the February 2007 CPSE (id. at p. 1). The parent signed the notice indicating that she consented to the 12-month (July/August) program (id. at p. 2).

On or about February 8, 2007, the parent was also sent a form entitled "Authorization of the IEP - Change" by the district (Parent Ex. H). The form noted that the February 2007 CPSE terminated the student's two 30-minute individual speech-language provided by the therapeutic nursery school with an effective date of February 8, 2007 (id. at p. 1). Additionally, the form noted that there would be no change in the student's transportation and transportation would be provided for the 10-month program as well as during July and August (id.).

On March 22, 2007, the parent signed a contract with the Aaron School for the student's enrollment for the 2007-08 school year and paid a registration fee to the Aaron School on March 23, 2007 (Tr. pp. 235, 237-42; Parent Ex. Z).

On April 30, 2007, the Committee on Special Education (CSE) convened to transition the student from the CPSE to the CSE and to develop his kindergarten program for the 2007-08 school year (Parent Ex. B at p. 1). Participants included the parent, a district representative who was also the school psychologist, a general education teacher, an additional parent member and the student's special education teacher and a social worker, both from the therapeutic nursery school (Tr. p. 128; Parent Ex. B at p. 2). The April 2007 CSE changed the student's classification to autism and recommended a 12-month school year in a 6:1+1 special class in a specialized school with related services of counseling, speech-language therapy, OT, PT and special education transportation (Parent Ex. B. at p. 1).

The academic performance and learning characteristics portion of the April 2007 IEP reflected results of a March 27, 2007 administration of the Developmental Assessment of Young Children (DAYC), for which the student's mother served as the respondent (Parent Ex. B at p. 3). Resultant scores indicated that the student's social/emotional functioning was in the average range,

however his physical development, cognitive skills, communication skills, and adaptive behavior skills were all in the below average range (id.). The April 2007 IEP also reflected the results of a May 2004 administration of the Bayley Scales of Infant Development-Second Edition (Bayley-II) when the student was 17 months old (id.). The student's academic management needs included a small class setting in a specialized class, small student-to-teacher ratio (6:1+1) and continuation of related services of counseling, speech-language therapy, OT and PT (id.).

The hearing record reveals that the description of the student's present levels of performance in the areas of academics, speech-language, social/emotional, as well as the academic management needs on the April 2007 IEP were identical to those that were contained in the student's February 2007 IEP (compare Parent Ex. B at pp. 4-5, 8, with Parent Ex. C at pp. 3-4, 8). However, the hearing record shows that the student's present health status and physical development as described in his February 2007 IEP and April 2007 IEP differed in that the student's sensory needs that were listed in the February 2007 IEP were removed from the April 2007 IEP (compare Parent Ex. B at p. 8, with Parent Ex. C at pp. 6-8).

All of the student's goals and short-term objectives on the April 2007 IEP were identical to those on the February 2007 IEP, with the exception of two goals and corresponding short-term objectives related to the student's balance and coordination needs, which were similar, but not duplicative (compare Parent Ex. B at pp. 9-15, 17-18, with Parent Ex. C at pp. 9-16, 18-20). The April 2007 IEP reflected that the CSE considered but rejected a general education program, special education teacher support services (SETSS), collaborative team teaching (CTT) and full-time special education class in a district school (12:1 or 12:1+1) (id. at pp. 20-21).

By FNR dated June 15, 2007, the district offered a special class at one of the district's community schools with related services of individual and group counseling, individual OT, individual PT and individual and group speech-language therapy (Parent Ex. F). The hearing record further reveals that the district sent a second FNR to the parent dated July 5, 2007 offering another district school because there was not a seat available at the first recommended district school (Dist. Ex. 1; see Tr. p. 131).

After receiving the FNR dated July 5, 2007, the parent and the social worker from the student's therapeutic nursery school visited the recommended placement for approximately one half hour (Tr. pp 132, 152-55, 226-28).

By letter dated August 16, 2007, the parent, through her attorney, requested an impartial hearing alleging that the district failed to offer the student a FAPE in the least restrictive environment (LRE) on procedural and substantive grounds for the 2007-08 school year (Parent Ex. A at p. 1).<sup>9</sup> The parent alleged that the unilateral placement program and interventions secured for the student were appropriate and reimbursable, that the parent acted reasonably and that equitable considerations did not precluded or diminish a reimbursement award for the parent (id. at pp. 1-2). The parent maintained that district bore the burden in establishing whether or not it provided the student with a FAPE (id. at p. 2). The parent specifically argued, among other things, that the district convened the April 2007 IEP meeting without properly and timely evaluating and assessing the student's present levels of performance; that the goals and short-term objectives

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<sup>9</sup> The hearing record reveals that the parent was represented by an attorney at the impartial hearing; however, she has filed this appeal pro se.

recommended on the April 2007 IEP were not developed individually with the "meaningful participation and involvement" of the parent and were "directly copied" from the student's February 2007 IEP; and that the recommended placement did not have the necessary equipment for the student's OT needs (i.e. suspension equipment) (*id.* at p. 3). The parent sought reimbursement for the student's tuition at the Aaron School for the 2007-08 school year, transportation for the student to and from the Aaron School and related services of OT, PT, speech-language therapy and parent training and counseling (*id.* at p. 4). The parent also sought reimbursement for "expenses [the parent] incur[red] while providing [the student] with an appropriate educational program during the 2007-2008 school year" (*id.* at p. 1).

The impartial hearing convened on April 18, 2008 and concluded on June 25, 2008, after two days of testimony (Tr. pp. 1, 117).<sup>10</sup> On April 29, 2008, the impartial hearing officer issued a decision on the student's pendency placement which ordered that the district to continue to fund or, in the alternative, reimburse the parent for the student's related services of OT, PT, speech-language therapy and counseling (IHO Order on Pendency at p. 2).

By decision dated September 11, 2008, the impartial hearing officer determined that the district did offer the student a FAPE and, therefore, dismissed the parent's claim for tuition reimbursement for the Aaron School (IHO Decision at pp. 6-7). The impartial hearing officer offered no analysis or explanation for his conclusion that the district offered the student a FAPE.<sup>11</sup>

The parent appeals, contending that the April 2007 IEP drafted by the district was inappropriate to meet the student's educational needs; that the program and placement recommended by the district were inappropriate; that the student's placement at the Aaron School was appropriate; that the student's placement at the Aaron School was reasonable and warranted as the district failed to offer the student a FAPE and that the unilateral placement of the student at the Aaron School and claim for tuition reimbursement were supported by equitable considerations. The parent further asserts that the impartial hearing officer "mistakenly" determined that the

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<sup>10</sup> The hearing record does not contain an explanation of why testimony in the impartial hearing did not begin for almost eight months after the filing of the August 16, 2007 due process complaint notice. Federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30 day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Compliance with the federal and State 45-day requirement is mandatory (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]). Impartial hearing officers must also comply with State regulations requiring the careful granting and written documentation of any extensions of time and the reasons why extensions were granted, as well as the inclusion of such written documentation as part of the hearing record on appeal (*see* 8 NYCRR 200.5[j][5][i]-[iv]). In the present case, there is no written documentation in the hearing record or the impartial hearing officer's decision about extensions that may have been granted and the reasons why they were granted. The timing of the due process complaint notice, the date of the impartial hearing and the date of the decision suggests that multiple extensions were granted. I encourage the impartial hearing officer to ensure that the impartial hearings, over which he presides, comply with federal and State regulations.

<sup>11</sup> State regulations provide in relevant part, that "[t]he decision of the impartial hearing officer ... shall set forth the reasons and the factual basis for the determination." The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). The impartial hearing officer's decision is devoid of any specific cites to transcript pages, exhibit numbers, any statutory or regulatory law, and contains only one passing reference to case law to support his conclusions. In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity. The impartial hearing officer is reminded to comply with State regulations, cite to relevant facts in the hearing record with specificity and provide a reasoned analysis of those facts that reference applicable law in support of his conclusions.



district offered the student a FAPE and declined to award the parent tuition reimbursement for the Aaron School for the 2007-08 school year. The parent sets forth numerous arguments on appeal, including that the district convened the April 2007 IEP meeting without properly and timely evaluating and assessing the student's present levels of performance. The parent also argues that the impartial hearing officer did not provide any reasoning for his decision that the district offered the student a FAPE nor did the impartial hearing officer cite to any exhibits relating to the student in his decision. The parent maintains that the impartial hearing officer's decision is "not supported by the substantial weight of evidence in the record." As relief, the parent requests that the impartial hearing officer's decision be vacated.<sup>12</sup>

In its answer, the district admits and denies the parent's allegations. The district argues that even though the impartial hearing officer did not articulate any reasoning for his conclusion, a review of the hearing record "makes clear" that the impartial hearing officer correctly determined that the district offered a FAPE for the student for the 2007-08 school year. The district also maintains that although not discussed in the petition or addressed by the impartial hearing officer in his decision, the parent bears the burden of demonstrating that the district failed to offer the student a FAPE for the 2007-08 school year. The district further alleges that documentary and testimonial evidence "amply" supports the impartial hearing officer's determination that the district offered a FAPE to the student and that the recommended placement was appropriate. The district argues, among other things, that the parent failed to meet her burden in demonstrating that the student was not properly or timely evaluated with respect to the student's present levels of performance. The district further contends that the parent failed to demonstrate that the Aaron School was an appropriate program for the student for the 2007-08 school year. As relief, the district requests that the parent's appeal be dismissed with prejudice.

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

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<sup>12</sup> Although the parent does not specifically state in her petition that she is seeking tuition reimbursement on appeal, a liberal reading of the pleadings, as well as a reading of the hearing record as a whole, suggests that she is seeking tuition reimbursement. Therefore, I will consider the parent's request on appeal as one for tuition reimbursement and will analyze it under the appropriate legal framework.

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 LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at \*7 [2d Cir. Oct. 9, 2008]; Walczak, 142 F.3d at 132).

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

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).

At the outset, the district contends in its answer that the burden of persuasion to prove that the district did not offer a FAPE to the student rested with the parent. The impartial hearing officer in this case made no finding with respect to the burden of persuasion in his decision and the parent does not address this issue on appeal. On August 15, 2007, New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). This amended law took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016). Previously, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). Under the circumstances of this case, it is not necessary for me to address the district's argument because I find, for the reasons set forth below, that the hearing record supports a finding that the district did not offer a FAPE to the student for the 2007-08 school year.

Turning to the instant case, the parent argues that the April 2007 IEP did not offer a FAPE to the student because the district convened the April 2007 IEP meeting without properly and timely evaluating and assessing the student's present levels of performance. Upon a review of the hearing record, I find, as more fully explained below, that the student's sensory deficits are a fundamental need, that the CSE did not properly identify this need in the present levels of performance listed in the student's April 2007 IEP even though those needs had been identified in the February 2007 IEP, and that the hearing record does not show that the April 2007 CSE had proper evaluative data to suggest that the student no longer demonstrated needs in this area. Therefore, the April 2007 IEP was not reasonably calculated to confer educational benefit upon the student and a FAPE was not offered to the student for the 2007-08 school year.

The student's April 2007 IEP reflects that the student's ability to fully participate in his preschool placement was significantly affected by attentional difficulties, speech-language delays and atypical social behavior (Parent Ex. B at p. 4). The student was described as needing "intensive support" in both self-chosen and teacher directed activities in order to stay focused, problem solve, participate in "circle time" and maintain on-topic conversation (id.). The April 2007 IEP also indicated that the student exhibited variable attending behaviors and was highly distractible (id. at p. 5). The hearing record reflects that the student's sensory needs are consistently identified as having a significant affect on his ability to attend to activities, process instructions, regulate his body, and contain his impulsivity (Parent Exs. I at pp. 4, 5, 7; J at 2-6, 8; L at pp. 1, 2; M; N at pp. 1-3). However, the April 2007 IEP does not include specific information regarding the student's sensory deficits that had been previously described in the February 2007 IEP (compare Parent Ex. B at p. 8, with Parent Ex. C at p. 6).

A comprehensive private psychological evaluation of the student conducted in December 2006, maintained that the student's difficulties in the areas of attention, executive control processes, language and sensory processing interfered with his ability to learn, communicate and socialize (Parent Ex. I at p. 7). The evaluator reported that she was unable to complete her assessment of the student's pre-academic skills because of his difficulty processing task demands

and organizing responses and also opined that the student's social/emotional difficulties were secondary to his processing and attentional difficulties (*id.*). A psychological update from the student's therapeutic nursery school also completed in December 2006, reflected that the student's needs were consistent with needs identified by the private psychological evaluation, including the student's inability to contain his affectionate impulses and difficulty regulating his body (Parent Exs. I at pp. 4, 6, 7; M).

Similar findings were reflected in a December 2006 educational progress report completed by the student's teacher at the therapeutic nursery school (Parent Ex. J). The teacher opined that the student's difficulties prevented him from fully participating in classroom activities without appropriate support; that he required assistance to attend to individual and group activities; that attentional weaknesses and impulsivity impacted on his play skills and ability to learn during group lessons and social interactions; and that the student's delays in pragmatic language use and social development prevented learning in small groups without one-to-one adult support (*id.* at p. 8). She further opined that the student required therapeutic interventions to address his sensory needs (*id.* at p. 7).

A December 2006 progress report developed by the student's occupational therapist at the therapeutic nursery school reflected that the student's goals included improving his visual perception and visual motor integration for greater success in academics and written work and improving his ability to use sensory information to understand and interact with his environment (Parent Ex. L at p. 1). The occupational therapist reported that the student often had difficulty regulating his body and could require frequent cues to make eye contact, attend to a task, follow one to two step directions, or attempt a novel task (*id.* at p. 2). She indicated that the student responded to deep breathing, deep proprioceptive input, vestibular input and the use of verbal cues to help slow down his body and to increase his ability to be calm and his attention span (*id.*). The student's occupational therapist reported that although the student had made progress, he continued to present with delays and required therapy to address the sensory processing deficits and bilateral coordination difficulties that significantly impacted his ability to participate in daily activities (*id.* at p. 3).

The hearing record reveals that the OT progress report defined "sensory integration" as "the ability to take in sensory information from the environment and process it into well-integrated, functional sensory-motor responses" and states that "[i]f problems arise with sensory processing it frequently can be seen in difficulties, such as gross and fine motor weakness, poor motor planning, and diminished attention to tasks, impaired peer socialization and problems with behaviors" (Parent Ex. L at p. 1). As described above, there is ample evidence in the hearing record that the student exhibits deficits in sensory processing as well as gross and fine motor weakness, poor motor planning, and diminished attention to tasks, impaired peer socialization and problems with behaviors (Parent Exs. I at pp. 1, 4, 6, 7; J at pp. 3, 4, 7, 8; K at pp. 1, 2; L at pp. 2, 3; M; N at p. 3). Although the April 2007 IEP includes information from the December 2006 educational progress report, it is not clear from the hearing record whether the December 2006 private psychological evaluation report or the psychological update and OT progress report from the student's then current providers were considered by the April 2007 CSE (*see* Parent Ex. B at p. 6). However, the hearing record suggests that these documents were considered by the CPSE in developing the student's February 2007 IEP, which stated that the student "present[ed] with sensory processing difficulties involving deficits in regulation, behavior, motor planning, visual motor, and attention" and determined the student's health/physical management needs to include

sensory interactive/modulation techniques, child directed therapeutic kinetic activities and individual OT services in a sensory gym with suspended equipment to address vestibular and proprioceptive sensory processing deficits (*id.*). The hearing record contains no new evaluative data to suggest that the student no longer exhibits needs in this area.

Based on the above, I find that the April 2007 IEP did not appropriately identify the student's sensory needs, which the hearing record shows significantly affect the student's learning, communication, and socialization; that the CSE lacked appropriate evaluative data to remove this need from the IEP; and that in the absence of this information, the April 2007 IEP was substantively and procedurally flawed such that it was not reasonably calculated to offer the student a FAPE for the 2007-08 school year. Having made this determination, I need not address the parent's other contentions.

I must now consider whether the parent met her burden of proving that the placement of the student at the Aaron School was appropriate. A private school placement must be "proper under the Act" (*Carter*, 510 U.S. at 12, 15; *Burlington*, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see *Gagliardo*, 489 F.3d at 112, 115; *Frank G.*, 459 F.3d at 363-64; *Walczak*, 142 F.3d at 129; *Matrejek* 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (*Carter*, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (*Carter*, 510 U.S. 7; *Application of the Bd. of Educ.*, Appeal No. 08-016; *Application of the Bd. of Educ.*, Appeal No. 07-097; *Application of a Child with a Disability*, Appeal No. 07-038; *Application of a Child with a Disability*, Appeal No. 02-014; *Application of a Child with a Disability*, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (*Gagliardo*, 489 F.3d at 112; see *M.S. v. Bd. of Educ.*, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (*Gagliardo*, 489 F.3d at 112; *Frank G. v. Bd. of Educ.*, 459 F. 3d 356, 364 [2d Cir. 2006] [quoting *Rowley*, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (*Frank G.*, 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (*Frank G.*, 459 F.3d at 364; see also *Gagliardo*, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (*Gagliardo*, 489 F.3d at 115 [citing *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (*Gagliardo*, 489 F.3d at 115 [citing *Frank G.*, 459 F.3d at 365 quoting *Rowley*, 458 U.S. at 188-89 [emphasis added]]).

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

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

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

The district contends that the parent failed to sustain her burden to show that the Aaron School was appropriate because: (1) the student was not receiving the necessary level of related services at the Aaron School and the parent relied on outside providers for the student's additional related services; (2) the student was not able to participate in the ordinary programs of his peers and the Aaron School had to bring in an outside, non-Aaron "SEIT paraprofessional" in order to meet the student's needs; and (3) the parent only presented general information regarding the program at the Aaron School at the impartial hearing.

According to the hearing record, the Aaron School is described as a special school tailored for students with language delays, learning disabilities and attention deficits (Tr. p. 71). The Aaron School's curriculum followed the New York State standards and the students were grouped according to age and functional level (Tr. pp. 60-61).

The parent's unilateral placement of the student at the Aaron School was inappropriate to meet the student's needs because the Aaron School did not provide the level of related services identified as appropriate to meet his needs (compare Tr. pp. 66-67, with Parent Ex. B at p. 22; see also Parent Ex. R at p. 5). While parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65), the school must offer appropriate individualized services to meet the student's unique, special education needs. Moreover, supplementation of the general education services at the Aaron School by the private services obtained elsewhere does not support a finding that the services at the Aaron School were appropriate to provide or meet the student's needs (see Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660 [S.D.N.Y. 2005]; Application of the Bd. of Educ., Appeal No. 07-097; Application of a the Dep't of Educ., Appeal No. 06-114; Application of a Child with a Disability, Appeal No. 06-094). Here, the April 2007 CSE recommended related services in a separate location of one individual and one group 30-minute counseling sessions per week, three individual 30-minute OT sessions per week, two individual 30-minute PT sessions per week and three individual and one group 30-minute speech-language therapy sessions per week (Parent Ex. B at p. 22). Although the Aaron school provided reduced frequencies of speech-language therapy and OT sessions, the Aaron School did not provide the student with counseling or PT services (compare Tr. pp. 66-67, with Parent Ex. B at p. 22). The parent testified that she procured related services

for the student from private providers outside of the Aaron School consisting of OT once per week, speech-language therapy twice per week for one hour, PT once per week for one hour and counseling twice per week for 45 minutes, and that she received parent training provided by a private behaviorist (Tr. pp. 123-26).<sup>13</sup> The student's occupational therapist at the Aaron School testified that she provided OT to the student three times per week for half an hour (Tr. pp. 76-77). The speech-language therapy plan from the Aaron school indicated that the student was also provided with two 30-minute speech-language therapy sessions with one peer from his class, as well as, one weekly 30-minute speech-language therapy directed social skills group within the classroom (Parent Ex. E). The student's teacher for the 2007-08 school year at the Aaron School testified that the student exhibited pragmatic language and self expression deficits and behavioral problems, which required the assistance of a paraprofessional (Tr. p. 70). The student's teacher further testified that student received two OT and speech-language sessions per week each for 30 minutes (Tr. p. 67). She opined that the student could benefit from additional OT and speech-language services beyond the two 30-minute sessions, which he received at the Aaron School (*id.*). She further testified that the student could not participate in the "one, two, three magic" behavior plan, which was in place in the classroom (Tr. p. 72; Parent Ex. R at p. 3). She stated that it was decided "amongst the team" that the student would benefit from outside one-to-one support (Tr. p. 72). The teacher asserted that "the things that [were] in place at [her] classroom were not appropriate for [the student]" (*id.*). In light of the foregoing, although the hearing record reflects that the student needed the related services which were delineated on the April 2007 IEP and in the evaluations of the student to address his multiple special education needs, the services provided by the Aaron School did not provide for the level of services necessary to adequately address the student's speech-language and OT needs and did not address the IEP recommendations for counseling or PT services at all. Moreover, the hearing record reflects that parent training and one-to-one support for the student were not provided by the Aaron School and that witnesses from the Aaron School testified that the student required outside services. Therefore, I find that the Aaron School program was not appropriate for the student.

In view of the foregoing, I find that the parent has not met her burden to show that the Aaron School addressed the student's special education needs and, consequently, the parent's request for the student's tuition costs at the Aaron School must be denied.

Having found that the parent failed to meet her burden to prove that the Aaron School was an appropriate placement for the student for the 2007-08 school year, I need not reach the issue of whether equitable considerations preclude the funding of tuition at the Aaron School (*see M.C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 66 [2d Cir. 2000]).

However, in light of the district's failure to offer the student a FAPE under the April 2007 IEP, I will order that the district perform a comprehensive evaluation of the student and reconvene the CSE to generate an appropriate IEP and offer an appropriate program for the remainder of the 2008-09 school year consistent with the requirements of the IDEA and Article 89 of the Education Law.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my decisions herein.

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<sup>13</sup> I note that the parent does not request reimbursement for the student's related services in her petition.

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

**IT IS ORDERED** that the impartial hearing officer's decision dated September 11, 2008 is hereby annulled; and

**IT IS FURTHER ORDERED** that, unless the parties otherwise agree, the district will perform a comprehensive evaluation of the student and will reconvene the CSE to create a new IEP in accordance with all relevant evaluative data within 45 days of this decision.

**Dated:** Albany, New York  
December 19, 2008

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