



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-014

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:

Law Offices of Neal H. Rosenberg, attorneys for petitioner, Nathaniel J. Kuzma, Esq., of counsel

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

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs at the Aaron School for a portion of the 2007-08 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determinations that the Aaron School was an appropriate placement for the student and that the equities favored the parent. The appeal must be dismissed. The cross-appeal does not need to be addressed.

At the time of the impartial hearing, the student was attending the Aaron School, a private school for children with special needs that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 173-74; IHO Decision at p.1; see 8 NYCRR 200.1[d], 200.7). The parent had unilaterally placed the student at the Aaron School for the 2007-08 school year (Parent Ex. C). The hearing record reveals that previously the student received Early Intervention (EI) services of speech-language therapy, physical therapy (PT) and occupational therapy (OT) from six months to three years of age (Dist. Ex. 11 at p. 1). A February 5, 2008 social history conducted by the district indicated that in addition to individual and small group speech-language therapy and OT sessions received at the Aaron School, the student privately received one individual speech-language therapy session and one individual OT session per week for 60 minutes each (id.). The hearing record indicates that at the time of the impartial hearing, the student demonstrated difficulties in the areas of speech-language, including pragmatic language, executive function skills, and OT (Tr.

pp. 32-33). Although the student was "never an aggressive student," when excited he tended to act impulsively, without recognizing how his actions (e.g. teasing a friend) might affect others (Tr. p. 224). New activities were difficult for the student as he worried about transitions and he would become physically disorganized (Tr. p. 225). The student's attention decreased and his anxiety and frustration increased in sensory stimulating environments in school that consisted of large groups of people (Tr. pp. 226-27). If the large group environment was "really loud," the student tended to either cover his ears, "stop in his tracks," or "tear up a little bit" (Tr. p. 227). In large group situations, the student required adult support to work through his feelings about sensory changes or transitions within the environment (*id.*). The student's eligibility for special education services as a student with an other health impairment (OHI) is not in dispute in this proceeding (Dist. Ex. 16 at p. 1; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

An October 2007 Aaron School OT plan indicated that the student received OT two times per week for 30-minute sessions, consisting of one time individually and one time with a peer (Parent Ex. E at p. 1). The student's goals and objectives addressed fine motor and graphomotor tasks, coordination and postural control to facilitate better hand use and safe mobility in all environments, his ability to use sensory information to effectively interact with people, and improve self-care skills (*id.* at pp. 1-2).

An October 2007 Aaron School speech-language therapy plan indicated that the student received speech-language therapy two times per week for 30-minute sessions, consisting of one time individually and one time with a peer, and that he attended a weekly 30-minute "speech therapy directed" social skills group within the classroom (Parent Ex. F at p. 1). The student's goals addressed phonemic awareness skills, initiation of conversation, play themes or games, expressive vocabulary and word finding skills, knowledge and use of various syntactic structures during structured activities, auditory comprehension of short stories, and his ability to maintain a topic of conversation with peers and adults (*id.*).

An October 31, 2007 craniofacial speech-language evaluation report indicated that the student was assessed over a period of several months to determine his current and future management needs specific to pragmatics, receptive and expressive language skills, and language-based learning and thinking skills (Dist. Ex. 3 at p. 1). At the time of the evaluation report, the student was already a student at the Aaron School where he received speech-language therapy and OT (*id.*). A variety of standardized tests were administered to the student (*id.* at pp. 10-14). In general, results of the evaluation revealed that although the student demonstrated significant progress in the foundations of language functioning, he needed to strengthen weaknesses in higher level language functioning and learn strategies to address those weaknesses (*id.* at p. 7). Continued language intervention was recommended on an individual basis at least three times per week with a focus on vocabulary retrieval; topic maintenance; provision of relevant information; improvement of grammatical skills; linguistic concepts; narrative and discourse storytelling; critical thinking skills involving problem solving, predicting, sequencing, and asking and answering why; and facilitating organizational skills (*id.* at p. 8).

A February 5, 2008 initial social history report conducted by the district with the parent acting as informant revealed that the student was referred to the CSE by the parent for evaluation due to concerns that the student displayed academic delays (Tr. pp. 146-48; Dist. Ex. 11 at pp. 1,

3).¹ The social history report indicated that the student had a history of physical and congenital problems including a diagnosis of DiGeorge syndrome, a chromosomal anomaly; as well as speech-language and fine motor difficulties, low muscle tone, and delayed developmental milestones (Dist. Ex. 11 at pp. 1-3, 4). The report noted that the student had received EI services, had attended a private nursery school between the ages of two and four, and had attended kindergarten at a local college early childhood center (*id.* at pp. 1, 2). At the time of the social history report, the student was attending first grade at the Aaron School (*id.*). The social history report indicated that the student was just beginning to learn to read (*id.* at pp. 2, 4). According to the report, he sometimes tried to avoid completing reading assignments, frequently inverted numbers and letters, and occasionally had problems understanding and processing information unless it was presented to him in small increments (*id.*). The student was noted to need "significant" support academically and socially due to "weak executive functioning skills" (*id.* at p. 1). Furthermore, the student was described as having difficulty prioritizing, organizing, and planning schoolwork, as well as staying on and following through with tasks (*id.* at pp. 1-2). When attempting to participate in class, the student experienced difficulty remembering specific details, retaining information for later retrieval, and following multi-step directions (*id.* at p. 2). He frequently responded to his teacher's questions by saying, "I don't know" or "I forgot" (*id.*). Although the student was reported to be making steady progress in math class, he had poor reasoning and problem solving skills, and difficulty with word problems (*id.*). Science was noted to be an area of interest and strength for the student (*id.*). He was described as appearing more confident during science instruction and tended to express himself more fully at that time (*id.*).

The social history report noted that in addition to one individual 30-minute session and one small group (2:1) 30-minute session for both speech-language therapy and OT received at the Aaron School, the student received one private individual speech-language and one individual OT session per week, each for 60 minutes (Dist. Ex. 11 at p. 2). The social history report described the student as a patient, warm, kind, inquisitive, and spontaneous youngster who had a good sense of humor and was "selectively affectionate" (*id.* at p. 4). The student was further described as having an excellent relationship with his parents and sibling (*id.*). He related well to others and had age-appropriate friends (*id.*). The report indicated that the student had a strong interest in maps, roads, sharks, and books, as well as building and playing with toy trains (*id.*). The social history report also indicated that the parent submitted a completed medical form reflecting a physical examination that occurred in August 2007 (*id.* at p. 3). The student had a history of chronic sinus infections and severe seasonal allergies that triggered asthma, but was otherwise described to be in general good health (*id.*).

On February 6, 2008, a district psychologist conducted a classroom observation of the student during morning meeting and science instruction in his first grade class at the Aaron School (Dist. Ex. 13 at p. 1). During the morning meeting, the teacher discussed the daily job that each student would have that day (*id.*). The student was observed to listen intently and follow directions meant only for him when the teacher described the job pictured on a chart next to the student's name (*id.*). During an activity that involved colors and numbers on a calendar, the student was observed to follow along and correctly answer when called upon (*id.*). The observation report

¹ The hearing record is unclear as to the exact date of the parent's initial referral to the CSE (see Dist. Exs. 7; 8; 9; Parent Exs. G; H).

noted that when the teacher explained that day's agenda period by period, the student sat and listened attentively, raised his hand appropriately, and did not call out (*id.*). He answered questions posed to him and initiated discussion when he had a question (*id.*). The student was noted to speak softly, to the point that the observer was unable to hear what he said (*id.*). When working on a number chart, the student wrote the number "29" when the teacher asked him to write the number "92" (*id.* at p. 2). When told to decorate his number and place it on the number chart, the student was observed to go to the cabinet, take out crayons, and proceed to color the number card at his desk (*id.*). The observation report indicated that the student's executions were "somewhat haphazard," as the student rushed through the project (*id.*). The observer noted that the student tended to walk with his head down and his shoulders somewhat raised (*id.*). The observation report stated: "He walked at a slow pace, like he was a much older man" (*id.*).

The latter part of the classroom observation involved a science lesson regarding voluntary and involuntary muscles (Dist. Ex. 13 at p. 2). The classroom teacher told students that there would be three steps to the activity: Read, Talk and Do (*id.*). The class was divided into two groups and each student was handed a worksheet and told to write his/her name at the top (*id.*). The observer indicated that the student held his pencil awkwardly and wrote his full name in capital letters (*id.*). Letter spacing was observed to be poor and the height of the letters was inconsistent (*id.*). Students were asked to try to keep their eyes open for as long as they could without blinking and they would be timed (*id.*). Despite the emotional difficulties experienced by a few classmates, the student maintained his focus on the teacher (*id.*). When it was his turn, he kept his eyes open for two seconds and was able to write his results in the spot allotted on the handout, and he returned his paper to the teacher (*id.*). The classroom observation report indicated that the student followed the directions and was attentive (*id.*).

According to the observation report, the teacher reported to the observer that she used the Wilson Reading Program with the student and that he was slowly progressing (Dist. Ex. 13 at p. 2). Reversal of letters and overall directionality difficulties were noted by the teacher (*id.*). The teacher reported that when blending letters, the student tended to blend them backwards, saying the final letters of the word first (*id.*). The classroom teacher estimated the student's grade level in reading to be at the beginning first grade level (1.3) (*id.* at pp. 2-3). She estimated his math skills to be at grade level, even though he consistently wrote certain numerals backwards (*id.* at p. 3). She described the student's handwriting as poor (*id.*). The classroom teacher also stated that the student was motivated, he followed directions and he worked hard in class (*id.*). She indicated that the student spoke very softly and processed information slowly (*id.*). His learning difficulties often inhibited his optimal functioning socially because other students might not have patience to "stick around" in their interactions with him (*id.*). The teacher noted the student's problems with pragmatics or being able to "pick up" on the social nuances of conversation (*id.*). Although the student had friends in the classroom, he rarely initiated conversations; instead, he tended to be quite shy and insecure in his dealings with peers (*id.*). The teacher explained to the observer that the student required support in social situations and that he attended a social skills group with his peers in which he worked on ways to initiate conversation and pragmatic language skills (*id.*).

On February 14, 2008, the same psychologist who observed the student at the Aaron School conducted a psychological evaluation to assess the student's intellectual and academic functioning (Dist. Ex. 14 at p. 1). The resultant psychological evaluation report indicated that the student separated easily from his mother and responded to the examiner in a friendly, cooperative manner

(id.). The student expressed some concern regarding how long the examination would take because he did not want to miss his school's afternoon activities (id.). He also demonstrated some perseverative thought in his expression of concern about an early-morning airplane trip the next day (id. at pp. 1-2, 5). The psychological evaluation report indicated that the student demonstrated speech misarticulations such as "aminals" for "animals," but that the maturity of his thoughts in his conversational language and overall vocabulary "far exceeded" his chronological age (id. at p. 2). The evaluator indicated that the student talked "non-stop during the evaluation," whether the talking was directed toward the examiner or if he was talking to himself as a "mediation strategy to help guide his executions" (id.). The student's posture was described as poor (id.). He appeared "fidgety" as he frequently moved and swiveled in his chair and was easily distracted by sights and sounds around him (id.). When voices from the next cubicle became too loud for the student, he covered his ears and remarked how loud it was, at which point the evaluator changed rooms to be able to have a quieter testing environment (id.). The evaluation report indicated that the student moved easily into the next room and was able to get to work, requiring only one break to use the bathroom (id.). Problems with attention and concentration were evidenced throughout the evaluation as the student often appeared overwhelmed when both verbal and nonverbal stimulus models and test items became too complex (id.). The student did not check his work for errors and often worked in a haphazard manner; at times the student tended to give up (id. at pp. 2-3).

Administration of the Wechsler Intelligence Scale for Children- Fourth Edition (WISC-IV) yielded a verbal comprehension index score (composite standard score (SS)/percentile rank) in the average range (SS 102/55th percentile); a perceptual reasoning index score in the extremely low range (SS 67/1st percentile); and a working memory index score (SS 86/18th percentile), a processing speed index score (SS 80/9th percentile), and a full scale IQ score (SS 81/10th percentile), all in the low average range (Dist. Ex. 14 at pp. 2-5, 7). The evaluation report noted considerable intra-test and inter-test variability (id. at p. 2). The evaluator indicated that the student's perceptual reasoning composite score was significantly below both his general level of functioning and his verbal comprehension composite score, which the evaluator determined was suggestive of the presence of a nonverbal learning disability (id. at pp. 2, 5). The student's distractibility coupled with perceptual motor integration problems further depressed his optimal functioning (id.). The evaluator indicated that although the student's overall score was a minimal estimate of his true intellectual potential, it was representative of his functioning at the time of the evaluation and of how his disabilities affected his learning (id.).

Administration of the Wechsler Individual Achievement Test- Second Edition (WIAT-II) reading subtests yielded a standard (and percentile) composite reading score of 83 (13) with standard (and percentile) scores of 88 (21) in word reading, 83 (13) in reading comprehension, and 86 (18) in pseudoword decoding (Dist. Ex. 14 at p. 4). Administration of the WIAT-II mathematics subtests yielded a standard (and percentile) composite score of 72 (3) in mathematics with standard (and percentile) scores of 77 (6) in numerical operations and 72 (3) in math reasoning (id.). The psychological evaluation report indicated that although the student demonstrated basic knowledge of letter and letter-sounds, he had difficulty blending sounds to make words, difficulty sequencing sounds and letters when reading and spelling words, and reversed and transposed letters and sounds in words when reading and writing (id. at pp. 4-5). Reversals were also evident in math (id.).

Administration of the Bender Visual- Motor Gestalt Test-Second Edition (Bender-Gestalt II) revealed that although the student's recall of designs was in the average range, his ability to

copy designs reflected performance in the very low range and significant problems regarding directionality confusion, rotations, reversals, lack of organization, and integration (Dist. Ex. 14 at p. 5).

The psychological evaluation report indicated that the student's school reported that the student demonstrated difficulties with socialization (Dist. Ex. 14 at p. 5). Specifically, he was noted to be unable to adopt another person's point of view; he had difficulty with pragmatically recognizing the social nuances of conversation and with sustaining conversation with peers (*id.*). In addition, poor posture and weak muscle tone were noted (*id.*).

Also on February 14, 2008, the district developed a student progress report as part of an evaluation process, with the student's first grade teacher from the Aaron School acting as informant (Dist. Ex. 15 at p. 1). The progress report indicated that on an average day the student's performance was rated as "excellent" for ability to cooperate in class (*id.*). The student's performance was rated "good" for class participation, ability to complete class work, ability to stay focused on a task, and complete homework (*id.*). The student's performance was rated "satisfactory" for ability to work independently, and "fair"/"poor" for organizational and study skills (*id.*). The student was described as an active participant when working with peers, but he tended not to be a leader and required teacher support to initiate and maintain social interactions with peers (*id.*). Pragmatic difficulties were noted in the student's ability in "reading his audience" and in reciprocal conversation and play (*id.*). Academically, the Aaron School teacher indicated that the student used the Wilson Reading Program, he was progressing in reading, and she estimated his reading skills to be within the first grade level (*id.* at p. 2). The student's speech-language difficulties in organization and sequencing presented a challenge to his reading comprehension (*id.*). His math skills were estimated to be slightly higher than reading, but also within a first grade level (*id.*). The student was in a small math group and benefited from individualized attention (*id.*). His writing skills were estimated to be at the first grade level and at the time of the report he was just beginning instruction in the writing process (*id.* at p. 3). Anecdotally, the teacher indicated in the progress note that the student was a motivated and diligent worker, he was better able to manage his belongings in school, and he displayed more independence and self-confidence socially and academically (*id.* at pp. 3-4). The Aaron School teacher reported that the student had academic and social models in school, and that he benefited from the language supports and the multisensory approach offered in the classroom (*id.* at p. 3).

A February 2008 mid-year progress note written by the student's Aaron School classroom teacher in collaboration with various therapists, the psychologist or social worker, and other teachers at the Aaron School provided information regarding the student's reading, math, and pragmatic communication skills that was consistent with the February 2008 social history, the classroom observation, and the progress reports, all conducted or initiated by the district (Dist. Exs. 11; 12 at pp. 1-3; 13; 15; Parent Ex. B at pp. 1-3). Executive function skills were described as a weakness for the student that exacerbated his struggles in his learning and development (Dist. Ex. 12 at p. 1; Parent Ex. B at p. 1). Strength was noted in science, whereby instruction incorporated use of graphic organizers, "Venn diagrams," and hands-on activities that involved predicting, observing, and experimenting to support the student's organization and understanding of new information (Dist. Ex. 12 at p. 3; Parent Ex. B at p. 3).

The CSE met for a "CSE Review" on March 4, 2008 (Dist. Exs. 16; 17). Meeting participants noted on the individualized education program (IEP) and the CSE review minutes (minutes) included a regular education teacher who also acted as the district representative, a special education teacher, a social worker, the student's teacher from the Aaron School who participated by telephone, the parent, and an additional parent member (Dist. Exs. 16 at p. 2; 17). The minutes indicated that the parent was concerned with the student's difficulties with directionality confusion that affected his handwriting, his ability to retell a story, and his difficulties in math and reading (Dist. Ex. 17). The minutes also reflected that the parent believed that the student's placement at the Aaron School provided the student with support that helped him to progress in school (*id.*). According to the minutes, the parent noted at the meeting the student's problems with socialization and pragmatic language and the student was described as interacting "better with adults than peers," although the parent was getting him play dates (*id.*). The minutes further indicated that the student's classroom teacher reported that the student was reading at an early first grade level and that he displayed confusion of sounds and directionality (*id.*). She noted that his executive function skills, especially involving sequencing and organization were "significantly depressed" (*id.*). In math, the student was performing at a mid-first grade level (*id.*). Language math problems were described as a struggle for him (*id.*). The minutes documented that the student needed greater language support and identified problems in pragmatic language, organization, sequencing, and recalling events (*id.*). Problems with spelling and writing were also noted, as the student displayed difficulties with perceptual-motor integration and visual-spatial organization (*id.*). The minutes reflected that that the student's Aaron School teacher described the student as "delightful," but that he needed "a lot of supports to continue to progress" (*id.*).

CSE recommendations included on the March 2008 IEP for the time period of April 16, 2008 through March 3, 2009 were for a 12:1 special class placement and related services of one 30-minute session per week of counseling in a group of 3:1, one 30 minute session per week of individual OT and one 30 minute session per week of OT in a group of 3:1, and one 30-minute session per week of individual speech-language therapy and one 30 minute session per week of speech-language therapy in a group of 3:1 (Dist. Exs. 16 at pp. 1-2, 14; 17). Recommended classroom accommodations and modifications included repeating and rephrasing directions or questions, response time allowed for the student to organize and gather his thoughts, preferential seating, opportunity for hands-on experience, and tasks broken down into smaller parts (Dist. Ex. 16 at pp. 3-4). Recommended testing accommodations were for an unspecified amount of extended time, questions and directions read and reread, and special location (*id.* at p. 14). In addition, for the rest of the 2007-08 school year, the CSE recommended a modified promotion criteria where the student would be expected to meet 80 percent of the English language arts (ELA) and math standards for first grade (*id.* at p. 15). For the part of the IEP that encompassed the 2008-09 school year, the CSE recommended that the student would be expected to meet 80 percent of the ELA and math standards for second grade (*id.*).

On or about March 6, 2008, the CSE chairperson sent a Final Notice of Recommendation (FNR) to the parent recommending a "special class" placement with related services at an identified district school (Dist. Ex. 18).

The parent responded to the CSE chairperson by letter on or about April 2, 2008 and acknowledged receipt of the FNR (Parent Ex. A). She also rejected the recommended public

school special education class placement (Tr. p. 151; Parent Ex. A).² The parent indicated that she had visited the proposed class and had been told that the students in that class were mainstreamed for academic subjects, and that they would be in a class of up to 22 students (Tr. pp. 150-51; Parent Ex. A). She stated her belief that the student would not be able to make appropriate progress in a class of that size, and he would not be able to function in large group situations of lunch and recess (Parent Ex. A). Furthermore, the parent stated that the student required small, structured groups throughout the day in order to stay focused and to make academic progress (*id.*). The parent indicated that the student would continue to attend the Aaron School for the remainder of the 2007-08 school year as it was appropriate for him (*id.*).

An impartial hearing was held for three days from October 6, 2008 to December 11, 2008 (Tr. pp. 1, 136, 193). At the impartial hearing, the district called two witnesses and entered 21 exhibits into the hearing record (Tr. pp. 13, 76; Dist. Exs. 1-21). The parent called three witnesses and entered eight exhibits into the hearing record (Tr. pp. 142, 172, 203; Parent Exs. A-H).

After the close of the impartial hearing, the impartial hearing officer issued a decision dated December 23, 2008 (IHO Decision at p. 12). In his decision, the impartial hearing officer described the background of the case and the positions of the parties and then summarized the relevant testimony and evidence presented by the parties (*id.* at pp. 2-9). The impartial hearing officer found that the district's recommended program and placement offered the student a free appropriate public education (FAPE) because the student's needs were similar to the needs of students in the recommended program, and the program provided models for the student to emulate and would potentially allow the student to progress (*id.* at pp. 9-11). Despite finding that the district had offered the student a FAPE, the impartial hearing officer went on to find that the parent's unilateral placement at the Aaron School was appropriate and that equitable considerations would not prevent the parent from obtaining tuition reimbursement (*id.* at pp. 11-12). The impartial hearing officer denied the parent's request for tuition reimbursement for the 2007-08 school year (*id.* at p. 12).

The parent appeals the decision of the impartial hearing officer, alleging that the impartial hearing officer erred in finding that the district offered the student a FAPE. The parent argues that the program set out in the March 2008 IEP was inappropriate because the recommended program and placement did not address the student's need for a small, structured environment in order to progress academically, primarily because the student would be overwhelmed when exposed to large numbers of other students in classes and at lunch and recess. The parent argues that it was arbitrary and capricious for the impartial hearing officer to hold otherwise because he acknowledged that the student needed small group support and attention, but he failed to consider how the district's program addressed those concerns. The parent also argues that the March 2008 IEP failed to identify specific goals to address the student's difficulties with attention, impulsivity, and transitions. Lastly, the parent contends that the impartial hearing officer properly found that the Aaron School offered the student an appropriate program and properly found that equitable considerations supported a tuition reimbursement award.

² In his decision, the impartial hearing officer referenced a letter that he received from the parent on May 28, 2008 wherein the parent requested a due process hearing (IHO Decision at p. 1). This letter was not entered into the hearing record (*id.* at p. 13).

In its answer, the district argues that the impartial hearing officer properly found that the district offered the student a FAPE for the 2007-08 school year because the IEP's goals and the recommended placement met the student's academic and behavioral needs and the parent failed to object to the goals at the IEP meeting. The district also argues in a cross-appeal that the impartial hearing officer erroneously found that the parent's unilateral placement of the student at the Aaron School was appropriate because it did not provide the student with sufficient mainstreaming opportunities and did not provide the student with counseling services. The district also cross-appeals the impartial hearing officer's finding that equitable considerations supported a tuition reimbursement award for the parent because the hearing record demonstrates that the parent never intended to remove the student from the Aaron School and place him in the district's recommended program.

The parent filed an answer to the district's cross-appeal, asserting that the impartial hearing officer did not err in finding that the parent's placement at the Aaron School was appropriate because the student would not have benefited from the mainstreaming opportunities that the district's recommended placement may have provided, because parental placements are not held to the same least restrictive environment (LRE) standards that districts are, and because the student's social skills needs were being met by social skills training that the Aaron School provided. The parent also contends that the impartial hearing officer did not err in finding that equitable considerations supported a tuition reimbursement award for the parent because, contrary to the district's claim, the parent fully cooperated with the CSE and acted in good faith throughout the creation of the IEP and the placement recommendation process.

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 (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; 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]; 8 NYCRR 200.5[j][4][ii]; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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; therefore, it applies to instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

Based on the hearing record and the particular facts before me, upon a complete and independent review of the hearing record, and for the reasons set forth in detail below, I am not persuaded that the impartial hearing officer erred in finding that the district met its burden of

persuasion to show that the student was offered a FAPE for the 2007-08 school year. I see no reason to disturb the findings of the impartial hearing officer.

Testimony by the district psychologist and the CSE review minutes reflect that in developing the student's IEP, the March 2008 CSE considered information offered by the parent and the student's Aaron School teacher who participated by telephone, and included information consistent with various reports from the district, the Aaron School, and the parent (Tr. pp. 28-29; Dist. Exs. 1; 2; 4; 11; 14-17; Parent Exs. E; F).

As described in the portion of this decision setting out the student's educational history, the March 2008 IEP reflected current evaluative data appropriately identifying the student's needs (Dist. Ex. 16 at pp. 3, 5-6).

The goals and short-term objectives included in the March 2008 IEP appropriately addressed the student's identified comprehension, expressive language, pragmatic communication and social skills, phonemic awareness, reading decoding, spelling, writing, math, coordination and postural control, use of sensory information, and self-care needs per evaluation, teacher reports, and the parent's aforementioned concerns (Dist. Ex. 16 at pp. 3-5, 7-18). Testimony by the district psychologist who conducted a psychological evaluation of the student on February 14, 2008 (see Dist. Ex. 14) indicated that neither the parent nor his teacher expressed any objection to the goals at the CSE meeting (Tr. pp. 37-40). The student's needs specific to his distractibility and impulsivity would have been addressed through the modifications and accommodations in the March 2008 IEP, that included preferential seating so he can maintain eye contact, repeating or rephrasing directions, and provision of a few moments for the student to gather his thoughts before he answers a question (Tr. pp. 64-66; Dist. Ex. 16 at pp. 3-5, 9). In addition, the student's difficulty with transitions was addressed through a specific goal and its corresponding short-term objective (Tr. p. 67; Dist. Ex. 16 at p. 9).

Regarding the proposed placement recommended by the district, testimony by the assistant principal of the proposed school indicated that the total population of the pre-K to grade five school was 550 students, and that 96 of them had IEPs (Tr. pp. 78-79). The assistant principal further testified that for the 2007-08 school year, the class that was recommended for the student was a K-1 class that was primarily made up of first grade students (Tr. p. 79). Three of the students were in kindergarten (Tr. p. 132). The class was considered part of the grade level of the majority of the students in the class (first grade), and the class was included in all activities in which the first grade takes part (Tr. pp. 79-80). The hearing record includes an undated class profile of the district's proposed class for the student (Dist. Ex. 20). According to the assistant principle at the recommended placement a class profile she created in February or March 2008 reflects that there were only eight students enrolled in the 12:1 class at that time (Tr. p. 131; Dist. Ex. 20 at p. 3). Seven of the students were six years of age and one student was seven years old (Tr. p. 132; Dist. Ex. 20 at p. 3). All of the students were described as "below average ability" in oral receptive and expressive language and writing skills, with age appropriate physical development (Dist. Ex. 20 at pp. 1-2). Two students demonstrated social behavior that was appropriate for their age, and six students needed reminders and redirection socially (id. at p. 2). Six students required no additional assistance beyond the class staffing ratio regarding their personal care, while two students required "guidance intervention" (id.). For reading, one student in the class was at a readiness instructional level and seven students were within the 0.5 to 1.5 instructional level range (id. at p. 1). For math,

one student was at a readiness skills level, two students were at a pre-kindergarten level, and five students were within the 0.5 to 1.5 instructional level range (*id.*).

The hearing record supports the impartial hearing officer's finding that the district's recommended program and placement offered the student a FAPE in part because the student's needs were similar to the needs of students in the recommended program (IHO Decision at pp. 9-11). For example, the assistant principal testified that the students in the proposed class were eligible for special education services as students classified with an OHI, a learning disability, or a speech or language impairment (Tr. p. 106). Grade level curricular activities addressed students' fine and gross motor and sensory needs (Tr. p. 81). The proposed class followed the general curriculum with modifications, primarily based on each student's IEP (Tr. pp. 81-82). The proposed school used the "Balanced Literacy Curriculum," which included reading and writing workshops, shared reading, word studies, guided reading, and independent reading (Tr. p. 81). Students with reading difficulties in the lower grades, such as in the proposed class, received specialized reading instruction through use of "Fundations," a phonics program that consistently breaks everything down into "bite-sized" pieces (Tr. pp. 82-84). Students in the upper grades received specialized instruction through use of the Wilson Reading Program to address phonological awareness (Tr. p. 82). The "Great Leaps" program was also used in the proposed class to address reading fluency (Tr. pp. 82, 84). The assistant principal testified that the teacher of the proposed class incorporated multisensory instruction in her classroom that included movement activities (Tr. pp. 84-86). In conjunction with the occupational therapist, she also used the "Handwriting Without Tears" program and yoga to address personal space and boundaries, deep stretching, and long movements (Tr. pp. 84-85). A special education reading specialist also worked individually with the students "who most needed it" in first grade during the 2007-08 school year (Tr. pp. 129-30).

According to the assistant principal's testimony and consistent with the aforementioned class profile, during the 2007-08 school year the proposed class was comprised of less than 12 students, which allowed for conversation with an assigned partner within lessons (Tr. pp. 86-87). The classroom teacher monitored each partnership and conversation (Tr. p. 87). She used role playing so that students could practice how to behave in difficult situations (*id.*). The assistant principal testified that the classroom teacher would "scaffold" socialization opportunities by creating low threatening/low anxiety activities such as an art project, which created opportunity for students per their IEPs, to practice their language skills with each other as the teacher monitored their interactions (Tr. pp. 87-88).

According to the testimony of the assistant principal, the proposed class included two or three students who presented with sensory difficulties similar to the student's (Tr. p. 89). The proposed classroom contained an area to "tune out" and calm down, and a computer equipped with headphones in a listening center for individuals that needed to "tune everything out" (*id.*). The assistant principal further testified that the classroom teacher was a good model for students regarding making their voices carry and in how to present themselves in a way that others would want to hear what they were saying (*id.*).

Although the assistant principal was not familiar with the student, upon reviewing his 2007-08 IEP she testified that "he would have been a good fit" for the proposed class because his academic, speech-language, and reading needs and goals were similar to the other students in the

class (Tr. p. 100). The hearing record shows that the student demonstrated no behavioral problems, and the assistant principal testified that the student would have fit in socially in the proposed class (Tr. p. 101). The assistant principal also testified that the students in the class, which she described as similar to the student, made progress during the 2007-08 school year (*id.*).

According to the assistant principal, the students in the proposed class attended music, art, physical education, library, science and "rooft," a period where students played on the school's rooftop playground (Tr. pp. 91-92, 114). Additional activities included a circus arts program and a theater arts program (Tr. pp. 113, 116). The assistant principal testified that all "specialty teachers" had their own classrooms and that the 12:1 class attended each special as a group (Tr. pp. 92, 107-09). The specialty teachers collaborated with the proposed classroom teacher frequently (Tr. p. 126). During the 2007-08 school year, students who had difficulty transitioning between activities received assistance in doing so from the classroom teacher and the assistant principal (Tr. p. 92). The proposed classroom teacher brought one student to the assistant principal's office for a few minutes to "settle in," following which the assistant principal escorted the student to the specific class and stayed with the student for five to ten minutes (Tr. p. 93). The assistant principal testified that after two to three weeks of escorting the student, the student "really settled in and was fine with his transition" (*id.*).

The district's proposed class had social studies with another first grade class approximately two to three times per week (Tr. p. 109). The group was comprised of eight to ten students from the 12:1 class (depending on the time of year and the enrollment in the class) and 20 general education students from the other first grade classroom, for a total of about 28 students (Tr. pp. 109-10). The special education classroom teacher from the 12:1 class was present, as were the first grade regular education teacher and a student teacher (Tr. p. 110). The assistant principal explained that a larger group for social studies accommodated for guest speakers and associated activities, and allowed for greater variety of small group interactions to practice social skills (Tr. pp. 127-29).

Recess and lunch lasted 25 minutes each, daily (Tr. pp. 111-12). Special education support was sometimes available and the guidance counselor would often be at recess (Tr. p. 111). The students from the proposed 12:1 class were combined for lunch with the kindergarten classes and for recess with first grade classes, with each activity comprised of 90-100 students (Tr. pp. 111-13). To address the needs of students with sensory difficulties during lunch and recess, the assistant principal testified that in addition to adults providing supervision, 10 to 12 fourth and fifth grade students acting as "monitors" assisted students in the lower grades (Tr. pp. 90, 118-20). The monitors opened milk containers and ketchup packets, talked to students, made sure everyone was eating during lunch, and played "calm games" or did storytelling with students during recess (Tr. pp. 90, 118-19). In addition, the art teacher and the technology teacher had different days during the week when students were able to go to their classrooms during recess and engage in calm, quiet projects (Tr. pp. 90-91). Furthermore, the assistant principal and a guidance counselor engaged students in either a book club, Scrabble, or other activities (Tr. p. 91). The hearing record does not support the parent's argument that the student would have been denied a FAPE if he was required to participate in lunch and recess at the district's proposed school.

Testimony by the assistant principal indicated that the teacher of the proposed class for 2007-08 was dually certified in early childhood education and special education (Tr. p. 93). The

teacher planned multiple lessons for her class to meet the appropriate skill level of specific children (Tr. p. 94). As an example, the assistant principal testified that one math activity would have three different groups based on the students' specific needs (*id.*). If the period was 45 minutes in duration, the teacher would try to spend 15 minutes in each group and would also provide each student with appropriate independent work for reinforcement (Tr. p. 121). Academically, each student worked on reading, writing, and math skills according to their own ability (Tr. p. 122).

The assistant principal further testified that the students in the proposed 2007-08 class made academic progress (Tr. p. 94). She explained that some students were mainstreamed for specific periods because their academics became so strong in specific areas that it was no longer appropriate for them to be in a 12:1 class for those subjects (Tr. p. 95). Behaviorally, some students with "intense behaviors" that initially resulted in suspension or their parents being called into school, stopped demonstrating disruptive behavior within a few months (*id.*). At the time of the impartial hearing, there were students in their third year at the proposed school that the assistant principal described as "model students" for their grade level (*id.*).

Testimony by the assistant principal indicated that the recommended school had two full-time "speech teachers," one full-time and one part-time occupational therapist, one part-time physical therapist, and one-half time guidance counselor (Tr. pp. 97-98). Related services were provided to students based on their IEP (Tr. p. 98). The classroom teacher collaborated with related service providers "almost daily" to discuss what was going on throughout the week and to make sure all programs were coordinated (Tr. pp. 98-99). The classroom teacher kept a log of what was going on in the classroom when a student was pulled out of the classroom for provision of a related service, so that she could later go over with that student what was missed (Tr. p. 99). The teacher also did not teach lessons that necessitated the students' presence over a period of days during the time when some students were out of the room for related services (*id.*). Instead, activities such as independent reading might be scheduled during that time (*id.*). In addition to any students' related services per their IEP, an occupational therapist provided a weekly push-in session of yoga to address personal space and boundaries, deep stretching, and long movements (Tr. pp. 85-86, 117).

The hearing record also supports the impartial hearing officer's finding that the district's recommended program and placement offered the student a FAPE in part because the program provided models for the student to emulate and would potentially allow the student to progress to a less restrictive environment (IHO Decision at pp. 9-11). For example, the assistant principal indicated that the recommended school viewed opportunities for exposure to more students within the student's grade level in different settings as appropriate and valuable, in order for a student to have strong models (Tr. pp. 96-97). An additional goal was for students in the 12:1 class to move toward a less restrictive environment (Tr. p. 97). Testimony by the district psychologist who participated in the March 2008 CSE meeting indicated that the CSE felt that the student would benefit from the small 12:1 class because a "CTT class"³ would have too many students in the classroom (Tr. p. 34). In addition, the psychologist noted that the CSE wanted the 12:1 class to be in a community school so that the student would have opportunity to relate to regular education students, yet still receive academic supports and related services during his school day (Tr. pp. 34,

³ Presumably, "CTT" refers to "collaborative team teaching" (see 8 NYCRR 200.6[g]).

43). Accordingly, I find that the hearing record reflects that the recommended district placement would have been the student's LRE and that the hearing record does not support the parent's argument that the student could not be educated with non-disabled peers.

Testimony by the school psychologist demonstrated that the program and services offered by the March 2008 CSE to address the student's academic and social needs for the 2007-08 school year was similar to the program the parent preferred at the Aaron School. Similarities included a 12:1 special education class, a multisensory approach, an environment and related services that addressed social skills training, and incorporation of goals received from the Aaron School speech-language pathologist and occupational therapist (Tr. pp. 33-37, 43). The hearing record reflects that both the district's recommended program and the Aaron School used the "Fundations" program (Tr. pp. 82-84, 215). Furthermore, the school psychologist noted that she addressed the parent's concerns regarding directionality confusion, handwriting skills, sequencing, math, reading, and socialization through the student's management needs and goals on the March 2008 IEP (Tr. p. 41). The school psychologist affirmed that the information included in the March 2008 CSE minutes was an all encompassing account of what transpired at the CSE meeting and that the parent offered no objection to the substance of the IEP during the meeting (Tr. pp. 40-41).

In light of all of the above, I find that the district comprehensively addressed the student's needs through its March 2008 IEP recommendation for a 12:1 class with related services and supports and accommodations in the classroom. Furthermore, the March 2008 IEP goals appropriately addressed the student's needs. Regarding the parent's concern that the student would have difficulty in large group lunch and recess, the hearing record reflects that structured opportunities existed for the student to engage in calm, small group activities as well as to have the support of adults and general education peers (Tr. pp. 90, 118-20). I find that the district offered the student a FAPE during the time at issue in this appeal and I also find that the recommended 12:1 class in a community school was the student's LRE.

I have reviewed the parties' remaining contentions, including the district's cross-appeal, and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 10, 2009

PAUL F. KELLY
STATE REVIEW OFFICER