



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-019

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

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Tracy Siligmuller, Esq., of counsel

Law Offices of Skyer, Castro, Cutler and Gersten, attorneys for respondents, Gregory Cangiano, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that it failed to offer an appropriate educational program to the student and ordered that the student remain in his preschool setting and continue to receive related services both at preschool and at home through the end of the 2008-09 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending the Williamsburg Infant & Early Childhood Developmental Center (Williamsburg) (Tr. pp. 30-31; Dist. Ex. 3 at p. 1, see Tr. pp. 4, 28). Williamsburg has been approved by the Commissioner of Education as a preschool program with which districts may contract to instruct preschool students with disabilities but has not been approved to instruct school aged students with disabilities (see 8 NYCRR 200.1[d], 200.1[nn], 200.7, 200.16[i]). The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

The hearing record reveals that, as an infant, the student developed encephalitis which subsequently resulted in cortical visual impairment, variable exotropia, motor delays and other impairments (Tr. p. 342; Parent Ex. B at p. 1; Dist. Exs. 4 at p. 1; 7 at p. 1). In January 2004, the student began receiving Early Intervention services (Tr. pp. 293-94; Parent Ex. B at p. 1).

On May 30, 2006, the student underwent a psychological evaluation (Dist. Ex. 4). The psychologist administered portions of the Mental Scale of the Bayley Scales of Infant Development II (BSID II) which yielded an age equivalent score below the 7-month level (<0.1 percentile) (id. at p. 2). The psychologist reported that the student was able to engage in simple gestural imitation by shaking a rattle and bells with hand-over-hand assistance (id.). The student was also reported to show emerging causal relation awareness and, with assistance, pressed the buttons of toys to produce vibrations or sounds (id.). The psychologist also reported that the student showed an understanding of object permanence when he was observed to change his body position to reach items (id.). The student produced vocalizations in response to his father and to express wants, which indicated some understanding of social reciprocity (id.). The psychologist reported further that the student had weaknesses in his oral-motor skills, and although he was able to eat mashed or pureed foods, and was able to use a straw, he was unable to chew and was fed mostly with liquids and supplements (id. at p. 3). The psychologist also reported that the student had no visual response during the evaluation (id.). He estimated the student's communication skills, self-care, daily living, socialization and motor skills to be below the skills of a 12-month old (id. at pp. 2-3). The psychologist recommended a full-time preschool program with the following related services: speech-language therapy, occupational therapy (OT), physical therapy (PT) and vision services (id. at p. 3).

In September 2006, the student began attending a full-day preschool program at Williamsburg with a 1:1 paraprofessional for safety, vision and mobility concerns (Dist. Exs. 8 at p. 1; 9 at p. 1; Parent Ex. B at p. 1). He received PT, OT, and speech-language therapy (Parent Ex. B at p. 1). The student also received PT, OT, speech-language therapy, vision therapy and special education itinerant teacher (SEIT) services¹ at home (Dist. Ex. 10 at p. 1; Parent Ex. B at p. 1).

On January 22, 2008, the student underwent a private psychological evaluation to assess his then current level of functioning (Parent Ex. B at p. 1).² The psychologist reported that the student had significant global developmental delays and exhibited considerable difficulty with oral communication, fine motor precision and gross motor skills (id. at pp. 1-2). An analysis of the results of the Pediatric Evaluation of Disability Inventory (PEDI), the Adaptive Behavior Assessment System-Second Edition (ABAS-II), the student's medical report and his therapy reports, suggested to the psychologist that the student's deficits were neurologically based (id. at p. 2). The psychologist reported that the student was able to walk holding only one hand (id. at p. 1). The psychologist reported further that the student was observed to demonstrate clear choices (yes/no) when presented with familiar questions, understood and responded to simple and familiar commands (i.e. stop), and pointed to body parts (id. at p. 2). The psychologist opined in the evaluation report that the student was not ready to transition to a kindergarten environment because the student was still working on his early developmental skills (id. at p. 3). The psychologist recommended that the student be enrolled in a classroom where the class size was small, the

¹ The Education Law defines special education itinerant services (commonly referred to as "SEIT services") 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]).

² In conjunction with this evaluation, an observation of the student was conducted on February 7, 2008 (Parent Ex. B at p. 1).

student-to-teacher ratio was low, where there was an opportunity for individual and small group instruction, and where there was access to assistive technology (id. at pp. 3-4). The psychologist also recommended that the student's at-school and home-based related services and his SEIT services be maintained at their current "intensity" (id.).

The district's speech-language pathologist observed the student in his program at Williamsburg on February 6, 2008 (Tr. p. 81; Dist. Ex. 5 at p. 1). The observation report indicated that the student willingly participated in activities and played appropriately with toys when he was provided with hand-over-hand guidance by his teachers, but that the student was non-verbal (id. at pp. 1-3). The student was reported to move around on the floor on his hands and knees, stand up with assistance, and toddle with his hands extended outward (id. at p. 2). The student was also noted to communicate a choice between a rattle and a drum by gesturing toward the rattle (id. at p. 3).

A March 4, 2008 report from the student's doctor revealed that the student had undergone surgery in 2007 (Dist. Ex. 6 at pp. 1-2; see Dist. Ex. 8 at p. 1). The report noted that although the student's cortical visual impairment had gradually improved, he had not achieved the skills typically acquired by preschool age students, and therefore educationally must be treated as blind (id.). The doctor reported that the student, at age four, had only recently taken his first walking steps (id. at p. 2). The doctor noted his concurrence with respondents' (the parents') conclusion that the student should remain for an extra year at the preschool level, indicating that such a course of action made sense and would give the student the best opportunity to acquire the basic skills already developed by other children his age (id.).

An OT progress report dated March 10, 2008 noted that the most significant progress made by the student in the prior year was that he was able to take steps by himself, however, the student had made little progress in his grasp/fine motor and self-care skills (Dist. Ex. 7 at p. 1). The therapist noted further that the student mouthed his hands "almost constantly" and bilateral elbow splints were used at his school in order to prevent skin breakdown (id.). The therapist reported that the student had low muscle tone in his trunk, weak upper extremities, and limited spinal extension (id. at pp. 2-3). He exhibited limited vocalization, did not assist in dressing or undressing, and inconsistently tracked bright lights from midline to side and vice versa (id. at p. 3). The student's occupational therapist recommended he continue receiving three individual 30-minute sessions of OT per week (id. at p. 2).

A speech-language progress report dated March 13, 2008 indicated that the student exhibited a response latency of several seconds across cognitive and motor domains (Dist. Ex. 8 at p. 1). The student ate mostly purees and had not adapted well to soft solids (id.). The progress report indicated that the student did not seem to enjoy eating and was not particularly motivated to feed himself and that despite being fed enhanced calorie foods, the student had not gained significant weight (id. at pp. 1-2). The progress report noted further that the student responded somewhat consistently to his name being called, recognized family members by name and voice, was able to follow simple commands and that he explored objects or toys mostly by banging on or with them (id.). According to the speech-language progress report, the student's receptive language skills and the student's sound production/articulation development fell within the greater than 50 percent delay range for his chronological age (id.). The student babbled strings of reduplicated and varied syllables using vocalic sounds and consonant-vowel and vowel-consonant combinations and utilized several word approximations (id.).

An education progress report dated March 17, 2008 indicated that the student was evaluated using the Hawaii Early Learning Profile (HELP), a developmental checklist for children from birth to age three (Dist. Ex. 9 at p. 1). The student was reported to exhibit greater than a 50 percent delay in both his cognitive and social/emotional skills (id.). The student's attending skills and ability to focus were inconsistent, and he exhibited difficulty in group settings (id. at p. 2). According to the progress report, the student used a "Tech Talk" device to assist him in making choices (id.).

A progress report from the student's SEIT, dated March 17, 2008, noted that the student presented with serious delays across all areas of development and was totally dependent on others for all his daily needs (Dist. Ex. 10 at pp. 1, 2). The SEIT progress report also noted that the student was not able to communicate by talking, but used crying and babbling to indicate his needs (id. at p. 1). The report noted further that the student's eyesight had improved significantly and that he was able to track objects with his eyes and reach out toward them (id.). The student had recently learned to walk independently across a room, was able to grasp and hold small objects, and was learning to respond to different commands (id.). The SEIT indicated in the report that the student was not ready to graduate from his present special education preschool (id. at p. 2). The SEIT opined that by remaining at the preschool for an additional year, the student would be able to maximize his potential to obtain educational skills required to catch up with other children and that uprooting the student from this preschool educational environment would result in a regression of the progress he had made (id.).

A PT progress report dated March 19, 2008 indicated that the student had a hemivertebra in his thoracic spine, tonal and sensory anomalies, movement and postural asymmetries, generalized weakness, and impaired balance (Dist. Ex. 11 at p. 1). The report noted further that the student appeared to have thoracic scoliosis, a thoracic kyphosis and a "forward head/neck" posture as well as limited spinal extension and rotation range, low tone, joint laxity throughout, and pronated ankles (id.). The student reportedly could walk unsupported for approximately 20 feet and go from a supine or prone position to floor-sitting independently, however, he required moderate assistance to transition from floor-sitting to standing (id.). The PT progress report indicated that based on "standardized assessment tools including the Peabody Developmental Motor Scales, Second [E]dition," the student was functioning at a 10-12 month level (id. at p. 2). The report recommended that the student continue receiving three individual 30-minute PT sessions per week to address his strength, balance, coordination, motor planning, endurance, mobility, safety issues, and to maintain the flexibility of his joints, particularly in his spine and ankles (id.).

An OT progress report dated May 22, 2008 from the student's home-based occupational therapist reflected that the student had been seen for the previous nine months with an emphasis placed on using his hands to perform functional tasks (Dist. Ex. 12 at p. 1). The progress report indicated that the student could use his hands to move objects from one place to another and could also use a modified spoon to transfer objects from one bowl to another (id.). The report noted further that the student was attempting to move up stairs (id.). The OT progress report provided several annual goals and corresponding short-term objectives designed to assist the student in performing functional tasks with his hands (id.). The occupational therapist recommended that the student continue to receive five individual 45-minute sessions of OT per week and indicated in the report that the student would benefit from a continued stay at his preschool program in order to successfully achieve his goals (id. at p. 2).

On May 28, 2008, the Committee on Special Education (CSE) convened for the student's "turning five" review (Dist. Ex. 1 at p. 1). Attendees included a district school psychologist, a district social worker, the student's preschool special education teacher, a district representative,³ both of the parents, an additional parent member, and the parents' advocate (Tr. pp. 90, 126; Dist. Ex. 1 at p. 2). The CSE recommended that the student receive a 12-month 12:1+4 special class program with the following related services: five individual 30-minute sessions of OT per week, five individual 30-minute sessions of speech-language therapy per week, five individual 30-minute sessions of PT per week, five individual 45-minute sessions of vision education services per week, and a 1:1 health paraprofessional (*id.* at pp. 1, 28). Prior to making these recommendations, the CSE considered and rejected a general education program with related services, a 12:1+1 special class in a community school, and a 6:1+1 class in a specialized school (Tr. pp. 108, 130; Dist. Ex. 1 at p. 27).⁴ The CSE developed annual goals and short-term objectives to develop the student's skills in the areas of: expressive and receptive language, mood and feeling awareness, object and function awareness, social awareness, attention and focusing, oral sensorimotor and sound production, eating and drinking, posture, transitioning and balance control, walking/creeping and use of stairs, grasp and manipulation, self-care and self-help, exploration and toy interaction, gross motor, and toileting (Dist. Ex. 1 at pp. 10-21, 23-25).

By Final Notice of Recommendation (FNR) dated June 19, 2008, the district's placement officer informed the student's mother of the CSE's recommended placement of the student in a 12:1:4 class with related services at one of the district's schools (Dist. Ex. 2). The FNR informed the student's mother that she could request another CSE meeting or an impartial hearing and provided contact information for district staff if she wished to discuss the recommendation (*id.*).

On June 24, 2008, the parents visited the proposed placement (Tr. pp. 70, 76-77).

On June 27, 2008, the Committee on Preschool Education (CPSE) convened for a review (Dist. Ex. 3 at p. 1). The CPSE recommended placement of the student at Williamsburg in a 9:1:2 class for five hours per day with a 1:1 paraprofessional from July 1, 2007 to September 1, 2008 (*id.* at p. 1, 2).⁵ The student would also receive the following related services: three individual 30-minute sessions of OT per week, three individual 30-minute sessions of speech-language therapy per week, and three individual 30-minute session of PT per week (*id.* at pp. 1, 33). The CPSE also recommended that the student receive home-based special education services with a SEIT and home-based related services including: three individual 60-minute sessions of speech-language therapy per week, five individual 45-minute sessions of OT per week, two individual 45-minute sessions of PT per week and four individual 60-minute sessions of vision education services per week (*id.* at p. 33). Prior to making these recommendations, the CPSE considered and rejected a program of related services only, a program of SEIT services only, a half-day center-

³ The district's representative was the speech pathologist who had conducted the student's February 6, 2008 class observation (Tr. p. 89; Dist. Ex. 5).

⁴ At the impartial hearing, the district's psychologist also testified that the CSE considered continuing the student in his current preschool program (Tr. pp. 141-42). The IEP fails to indicate that the preschool program was considered by the CSE (*id.*).

⁵ The hearing record reveals that the district did not continue the student's placement beyond September 2008 because Williamsburg did not have a kindergarten program to offer to the student (Tr. pp. 109-10, 130, 142-43).

based special class (or special class integrated setting) program, and a 10-month program (id. at p. 32).

By due process complaint notice dated July 9, 2008, the parents' attorney advised the CSE chairperson that the parents were requesting an impartial hearing (Parent Ex. A at p. 1). The due process complaint notice alleged that the CSE's program and placement recommendations were procedurally and substantively flawed because: the district failed to include a regular education teacher at the May 28, 2008 CSE meeting, the CSE failed to properly gauge or evaluate the student's skill level, the goals and objectives in the IEP were vague and generic, the IEP failed to identify how progress toward the goals would be measured, and the district's placement recommendation put the student in a class with other students who did not have similar academic, educational, social and physical needs (id. at pp. 2-4). The parents' attorney proposed that the district maintain and fund the student in his current preschool placement until such time as the parties could agree on an appropriate school placement (id. at p. 5).

By an FNR dated August 15, 2008, the district again informed the student's mother that the CSE had recommended placement of the student in a 12:1:4 class with related services (Dist. Ex. 13). The August 15, 2008 FNR recommended placement at the same district school previously recommended in the June 19, 2008 FNR (compare Dist. Ex. 13, with Dist. Ex. 2). The FNR informed the student's mother that she could request another CSE meeting or an impartial hearing and provided the same contact information that was provided in the prior June 19, 2008 FNR (id.).

The impartial hearing began on August 5, 2008 (Tr. p. 1). On this date, the parties addressed the student's pendency placement (Tr. pp. 4-5). The hearing was adjourned to September 9, 2008 (Tr. pp. 18-19). On September 8, 2008, the impartial hearing officer issued an interim order on pendency which found that the June 27, 2008 IEP was the parties last agreed upon IEP and therefore the CPSE's recommended placement at Williamsburg was the student's pendency placement (IHO Pendency Decision at pp. 3-4). The impartial hearing officer ordered this pendency placement to continue until the case was "decided on the merits" (id. at p. 3). Neither party appealed the interim decision on pendency.

The impartial hearing resumed on September 9, 2008 and concluded on December 16, 2008 (Tr. pp. 22, 155, 227, 338, 367).⁶ The impartial hearing officer rendered her decision on January 7, 2009 (IHO Decision at p. 14). In addressing a procedural issue first, the impartial hearing officer found that the student's special education teacher's limited telephone appearance at the CSE meeting did not impede the parents' opportunity to participate, did not impede the student's right to a free appropriate public education (FAPE), and did not cause a deprivation of educational benefits (id. at p. 11). However, the impartial hearing officer ultimately found that the May 28, 2008 IEP was inappropriate because it did not accurately reflect the results of the private psychologist's January 22, 2008 evaluation (IHO Decision at p. 11; Parent Ex. B). The impartial hearing officer determined that the CSE was at a disadvantage because this private psychologist's evaluation was not provided in advance of the CSE meeting (IHO Decision at p. 11).⁷ The

⁶ On October 26, 2008, prior to the completion of the hearing, the student turned five (Tr. p. 4).

⁷ The hearing record reveals that the parents provided an uncorrected copy of the private psychologist's report to the CSE but did not allow the CSE to keep the document on the day of the CSE meeting (Tr. pp. 146, 329). The student's mother testified that she faxed a final copy of the report to the CSE once it was finalized (Tr. p. 329).

impartial hearing officer concluded that a kindergarten program was inappropriate for the student and further that the student's current program, consisting of the Williamsburg preschool program with related services and the at-home program of related services and SEIT services, was appropriate (id. at p. 12). The impartial hearing officer ordered the student was to remain in his preschool setting at Williamsburg through the end of the 2008-09 school year (id.). The impartial hearing officer also ordered the following services to be provided to the student: three 30-minute sessions of in-school speech and language therapy per week, three 30-minute sessions of in-school OT per week, three 30-minute sessions of in-school PT per week, three 60-minute sessions of at-home speech and language therapy per week, five 45-minute sessions of at-home OT per week, two 45-minute sessions of at-home PT per week, four 60-minute sessions of at-home vision services per week, and four 75-minute sessions of at-home SEIT services per week (id. at p. 13).

The district appeals and asserts that the impartial hearing officer erred in determining that it had failed to offer a FAPE. The district asserts that the CSE properly considered the student's evaluations and educational information and that its proposed program and placements were appropriate. The district asserts further that the May 29, 2008 IEP contained measurable goals addressing each of the student's needs. The district also asserts that it was improper for the impartial hearing officer to allow the parents to raise the issue of the special education teacher's limited participation at the CSE meeting because the parents had failed to raise this issue in their due process complaint notice, failed to subsequently amend their due process complaint notice to include this claim, and failed to obtain the district's consent to raise this issue. The district asserts further that the parents have failed to prove that their proposed program involving the preschool program at Williamsburg, the home-based related services, and SEIT services were appropriate and necessary for the student. The district asserts that: there is no evidence of any coordination between the school program and the home-based program, the SEIT does not provide any services that the parents themselves could not provide, and the SEIT services are not appropriate for the student because he is school-aged and is therefore no longer eligible for SEIT services. The district asserts further that the equities do not support the parents' claim for "reimbursement" because the parents had already determined, prior to the May 28, 2008 CSE meeting, that the student should continue in his preschool and home-based programs. Finally, the district asserts that, if they are successful in this appeal, they are entitled to recoup the funds paid for the student's pendency placement.

In their answer, the parents assert that the impartial hearing officer correctly determined that the district failed to offer a FAPE. The parents contend that the private psychologist and one of the student's two SEITs opined that a kindergarten placement was not appropriate for the student and that he continued to require a preschool environment. The parents also assert that the district's proposed kindergarten placement was inadequate because the proposed classroom failed to provide the student with the one-to-one special education support recommended by the private psychologist. The parents assert further that the instruction in the proposed class is conducted primarily by paraprofessionals who are not licensed as special educators. The parents also assert that the district's proposed related services program failed to meet the student's needs, went against the recommendations of the student's current related service providers, and would be detrimental to the student's development. Moreover, the parents also contend that the district's recommended placement could not provide the student with the related services proposed on the May 28, 2008 IEP. The parents assert that the student's current preschool program, his SEIT services and the current level of related services are appropriate because this program meets the student's identified needs and has helped the student make significant developmental progress. The parents assert that

equitable considerations support their position because they fully cooperated with the CSE, made the student available for all evaluations, and meaningfully participated at the May 28, 2008 CSE meeting. Finally, the parents assert that the district is not entitled to recoup the funds expended for the student's pendency placement.

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]).⁸ 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.,

⁸ The term "free appropriate public education" means special education and related services that-

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see 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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; E.G. v. City Sch. Dist. of New Rochelle, 2009 WL 773960, at *4 [S.D.N.Y. Mar. 16, 2009]).

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).

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, 489 F.3d at 111; 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).

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 law took effect for impartial hearings commenced on or after October 14, 2007; therefore it applies to the instant case (see Application of the Bd. of Educ., 08-016).

Initially I will address the district's contention that the impartial hearing officer erred in allowing the parents to argue that the CSE was improperly constituted because the student's special education teacher did not participate for the entire CSE meeting.

The district asserts that it was improper for the impartial hearing officer to decide this issue because the parents failed to allege this issue in the due process complaint notice.⁹ Ultimately, the impartial hearing officer decided this issue in the district's favor.¹⁰ As such, the district has suffered no harm as a result of the impartial hearing officer's determination on this issue. Notably, "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination" (Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001]). A party aggrieved by an impartial hearing officer's decision may appeal to a State Review Officer (see 34 C.F.R. § 300.514[b][1]; see 8 NYCRR 200.5[k][1]; Mackey v. Bd. of Educ., 386 F. 3d 158, 160 [2d Cir. 2004]; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of the Bd. of Educ., Appeal No. 04-016; Application of a Child with a Disability, Appeal No. 02-007; Application of a Child with a Disability, Appeal No. 99-029). "Generally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]). The district is not aggrieved by the impartial hearing officer's determination and therefore the issue need not be address further.

I now turn to the issue of whether the CSE properly considered the private psychologist's January 22, 2008 evaluation.

In her decision, the impartial hearing officer found that the district failed to accurately reflect the results of the private psychologist's January 22, 2008 evaluation in the IEP, in particular those portions of the evaluation which identified the student's physical, visual and communication needs (IHO Decision at p. 11). She found that this purported defect rendered the IEP inappropriate (id.). The hearing record does not support this conclusion. Although the private psychologist's report may not have been specifically identified in the IEP, the hearing record reveals that the private psychologist's report was considered at the May 28, 2008 CSE meeting. The hearing record shows that the district agreed to delay the convening of the CSE meeting to accommodate the parents' desire to have the student evaluated by the private psychologist prior to the next CSE meeting (Tr. p. 88). The CSE meeting was convened subsequent to the January 22, 2008 private psychological evaluation (Dist. Ex. 1 at p. 1; Parent Ex. B at p. 1). Moreover, the district representative, the district psychologist and the student's mother all testified that the report was reviewed at the May 28, 2008 CSE meeting (Tr. pp. 88-89, 137, 317, 328-29, 331).

⁹ Although the parents raised the issue of an improperly constituted CSE in the due process complaint notice, the parents' allegation concerned the lack of a regular education teacher at the CSE meeting (Parents Ex. A at p. 2).

¹⁰ In finding for the district on this issue, the impartial hearing officer determined that the limited telephone appearance by the special education teacher did not impede the student's right to a FAPE, did not impede the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, and did not cause a deprivation of benefits to the student (IHO Decision at p. 11). The impartial hearing officer found further that the CSE considered and discussed the progress reports from the special education teacher (id.). The impartial hearing officer also found that the parents were represented by an advocate at the CSE meeting and had they wished, they could have requested that the CSE team reconvene on a date when the special education teacher could be present for the whole meeting (id.).

Additionally, I find that the IEP adequately identified the student's physical, visual and communication needs (see Dist. Ex. 1 at pp. 1, 3-10, 14-23, 25, 26, 28). Regarding the student's physical needs, the IEP reflected that the student had the following: significant mobility limitations, difficulty manipulating small objects, difficulty with feeding, movement and postural asymmetries, joint laxity, impaired balance, limited spinal extension and rotation range, and generalized weakness (id. at pp. 3-5, 8). The IEP also reflected that the student: failed to demonstrate appropriate protective extension reactions, needed assistance to move through the environment, had no awareness of his bodily needs, compulsively put his hands in his mouth, required assistance to transition from floor-sitting to standing, and required a helmet for safety (id. at pp. 3, 7, 9).¹¹ With respect to the student's visual needs, the IEP reflected that the student suffered from cortical visual impairment and strabismus, and had difficulty with focusing on both small and large objects (id. at pp. 3, 4, 7, 9). The physical effects of these visual needs are also reflected throughout the IEP (id. at pp. 3, 4, 7, 9, 16-20). Regarding his communication needs, the IEP reflected that the student possessed significant global delays in his language abilities, was inconsistent in responding to questions and requests, could engage in two-way communication but needed to be cued and focused, interacted with other children only with adult guidance, and utilized an alternative/augmentative communication device called a Tech Talk 8 (id. at pp. 1, 3, 5, 7).

In addition to the private psychologist's January 2008 evaluation report, the hearing record reflects that the CSE considered numerous reports at the May 28, 2008 meeting including reports from the student's preschool special education teacher, speech-language pathologist, occupational therapist, physical therapist, vision therapist, SEIT, and physician (Tr. pp. 81-82, 89, 91-93, 103, 106, 128-29, 132, 137, 143-45, 317; see also Dist. Exs. 5, 6, 8-12; Parent Ex. B). The hearing record also reveals that the CSE utilized the results of the administration of the Early Language Accomplishment Profile (Dist. Ex. 1 at p. 5). Moreover, during the meeting, the CSE considered the opinions of the district's speech-language pathologist and the student's preschool special education teacher (Tr. pp. 81-82; 96, 128; see Dist. Exs. 5; 9).¹² The CSE meeting also occurred with significant involvement from the parents (Tr. pp. 90, 110, 113, 126, 131). The hearing record also reveals that the CSE considered several potential educational settings for the student including keeping the student in his current preschool program (Tr. p. 141; Dist. Ex. 1 at p. 27). The hearing record demonstrates that the CSE adequately reviewed all of the records and opinions provided at the CSE meeting (including the private psychologist's report) and considered that information in evaluating not only the student's physical, visual and communication needs, but also his health and physical development, his social/emotional performance, his academic performance and learning characteristics, and his cognitive needs (Tr. pp. 94-105, 132-33, 136; Dist. Ex. 1 at pp. 3-9; see Dist. Exs. 5; 6; 8-12). Therefore, the hearing record does not support the impartial hearing officer's finding with respect to the private psychologist's report and does support the conclusion that the IEP was formulated in a manner that adequately complied with procedural requirements.

¹¹ The IEP also reflected that the five-year old student was able to crawl, able to stand up while using an object for support, and could walk independently with small steps (Dist. Ex. 1 at p. 3).

¹² The speech-language pathologist reported the results of her observation of the student, and the student's preschool special education teacher provided her impressions of the student and his classroom behavior (Tr. pp. 81-82; 128; see Dist. Exs. 5; 9).

Next, a substantive analysis of the district's recommended program and placement is necessary.

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]). The hearing record reveals that the CSE's recommended 12:1:4 program addressed the student's significant language and communication deficits by recommending five individual 30-minute sessions of speech therapy (Dist. Ex. 1 at pp. 26-28). It also contemplated the continued use of the Tech Talk 8 assistive communication device (Tr. p. 105; Dist. Ex. 1 at p. 7).¹³ To address the student's visual impairment, physical weakness and delayed fine/gross motor skills, the CSE recommended five individual 30-minute sessions of OT, five individual 30-minute sessions of PT, and five individual 45-minute sessions of vision services (Tr. p. 100-01; Dist. Ex. 1 at pp. 26-28).¹⁴ In order to address the student's significant feeding and toileting needs, the CSE recommended OT as well as a support by a 1:1 paraprofessional (Tr. pp. 94, 98, 136; Dist. Ex. 1 at pp. 1, 28).¹⁵ The IEP also provided extensive goals and short-term objectives provided to address the student's other identified needs (Dist. Ex. 1 at pp. 10-25).¹⁶

Although the student's mother testified that she could not remember the CSE team going over the student's goals and objectives, the impartial hearing record reveals that the district's speech-language pathologist testified specifically about several of the goals discussed at the CSE meeting (compare Tr. p. 318, with Tr. pp. 94-95, 97, 101-02, 104-07). Additionally, the hearing record also reveals that the CSE relied upon the reports of the student's teachers and related service providers to fashion goals for the student (Tr. pp. 94-95, 101-02, 104-07; Dist. Ex. 1 at pp. 10-21, 23-25). Moreover, the hearing record reflects that at the CSE meeting, the student's preschool special education teacher participated in the discussion of these goals (Tr. pp. 104-05).

¹³ The CSE also developed appropriate goals to address the student's communication needs (Dist. Ex. 1 at pp. 10, 14, 15). To specifically address the student's expressive language skills, the CSE provided three goals and eight corresponding short-term objectives (id.). To improve the student's receptive language skills, the CSE developed two goals and five corresponding short-term objectives (id. at pp. 10, 15). The CSE provided also one goal with three corresponding short-term objectives to improve the student's oral sensorimotor skills for sound production (id. at p. 14).

¹⁴ There were appropriate goals to address these visual, physical and motor needs (Dist. Ex. 1 at pp. 17-23). To address the student's postural control, balance and transferring, the CSE provided two goals with ten corresponding short-term objectives (id. at p. 17). The CSE developed one goal with five corresponding short-term objectives to address the student's walking and stair negotiation abilities (id. at p. 18). The CSE also developed five goals with eighteen corresponding short-term objectives to address fine motor (grasping and manipulation), gross motor, visual attention, tracking, and toy exploration and interaction skills (id. at pp. 19-23).

¹⁵ The CSE also developed two goals with nine corresponding short-term objectives designed to improve the student's eating, drinking, transitioning and navigating skills (Dist. Ex. 1 at pp. 18, 25). The CSE also developed one goal with three short-term objectives designed to improve the student's toileting skills (id. at p. 24).

¹⁶ The IEP contains 23 goals and 81 short-term objectives to address the student's needs and to measure the student's progress (Dist. Ex. 1 at pp. 10-25). Goals and short-term objectives were developed in the following areas: social awareness, expressing moods and feelings, awareness of objects and causality, attentional skills, oral sensorimotor skills for sound production, eating and drinking skills, gross and fine motor skills, self-care and toileting skills, and visual attending and tracking skills (id.).

Regarding the district's proposed placement, the assistant principal of the proposed placement testified that her school had 104 students, 56 of whom are in 12:1:4 classes (Tr. pp. 41-42). Two of those classes are kindergarten classes, one of which has twelve kindergarten students, and the other class has half kindergarten students and half first-grade students (Tr. p. 38). The students receive all of their related service at the school (Tr. pp. 65, 67-68).¹⁷ Additionally, all of the classrooms and related service treatment rooms are located on the same floor of the school (Tr. p. 42). The school uses the New York State curriculum (Tr. pp. 49-50). The assistant principal of the proposed placement testified that all the special education teachers are licensed and certified, and all of the paraprofessionals have a minimum of 18 college credits (Tr. p. 46).¹⁸ All special education teachers are supervised by a unit coordinator and by the assistant principal herself (Tr. p. 50). According to the assistant principal, the ultimate goal of the school is to get every child mainstreamed into general education classes (Tr. p. 43). To assist in that goal, the students are formally evaluated quarterly with the "Brigance" assessment instrument¹⁹ and their IEP goals and programs are adapted accordingly (Tr. pp. 43-44).²⁰

The assistant principal testified that as of the first day of the school year, the school had a seat available for the student in the 12:1:4 kindergarten class that was comprised exclusively of students eligible for special education services as students with multiple disabilities (Tr. pp. 45, 47). Although the intended class ratio is 12:1:4, at the time of the hearing, several of the students in the class had individual health paraprofessionals thereby raising the paraprofessional total in the class to seven paraprofessionals (Tr. pp. 52-53, 71). Within the class, the students are functionally grouped into three different groups for differentiated instruction (Tr. pp 48, 74-75). The assistant principal also testified that the classroom has different stations to address different tasks (Tr. p. 52). There are stations for daily living skills,²¹ stations for reading, and stations for math and science (Tr. p. 62). The classroom also utilizes the Picture Exchange Communication System (PECS) symbols and boards (*id.*). According to the assistant principal, the proposed class is designed to be visually provocative and intriguing to the students (Tr. p. 55).²²

The assistant principal also described a typical day in the proposed classroom (Tr. pp. 63-64). Initially, the students arrive by bus and are brought to the classroom where breakfast is waiting for them (Tr. p. 63). After breakfast, the students participate in a double period of English and language arts (Tr. p. 64). The students then attend gym (*id.*). Math instruction also occurs in the morning (*id.*). Throughout the morning, the students receive pull-out or push-in OT and PT services (*id.*). After lunch, the students participate in a period entitled "drop everything and read"

¹⁷ In the case of the student, he would also be able to receive his mandated vision education therapy at the school (Tr. p. 68).

¹⁸ The assistant principal also testified that all paraprofessionals undergo continual professional development both at the school and at outside workshops (Tr. p. 46).

¹⁹ The hearing transcript incorrectly referred to the Brigance assessment as "Brigands" (Tr. pp. 43-44).

²⁰ The progress of students is reflected in report cards which are issued three times per year (Tr. p. 44).

²¹ The assistant principal testified that the school is focused on developing students' daily living skills (Tr. p. 43).

²² In addressing the student's visual needs, the IEP recommended using brightly colored objects to focus the student's attention (Dist. Ex. 1 at p. 4).

(DEAR) (id.). This period consists of either reading out loud or guided reading, depending upon the student (id.).

The assistant principal also testified how the proposed class would be able to meet the student's individual needs (Tr. pp. 54, 56-58, 60, 61, 65, 66). She testified that the student would be academically grouped with other classmates in accordance with his estimated reading, writing and math levels as reflected in his IEP (Tr. pp. 65-66). In addressing the student's love of music, the assistant principal testified that the school's music teacher was particularly successful in using a piano to connect with students who appreciate music (Tr. p. 56).²³ In addressing the student's feeding concerns, the assistant principal testified further that the school would serve him pureed foods, and would utilize speech-language therapy sessions to work on the student's mouth muscles (Tr. p. 57). She testified that the school would also be able to accommodate the student's adaptive physical education requirements in a separate room used for OT and PT (Tr. p. 65). The assistant principal also testified that the school would encourage the use of the student's Tech Talk 8 communication device in order to assist the student with his communication needs (Tr. p. 58). The assistant principal also testified that the proposed class would be able to provide the student with the constant redirection and prompting recommended on his IEP (Tr. p. 54; see Dist. Ex 1 at pp. 3, 6). In addressing the student's social and emotional needs, the assistant principal testified that the classroom teacher and paraprofessionals would assist the student in interacting with his peers through cueing and focusing the student and also through the use of classroom activities and games (Tr. pp. 60-61).

Regarding home-based services, testimony by the home-based SEIT indicated that it was not until March 2008 that she was able to "start teaching [the student]" because "he was so severely handicapped that [she] could not even get to the point of what an actual SEIT does" (Tr. pp. 161-62). Up to that time the SEIT stated that most of the work that she did with the student was "under the direction of all the other therapists, the O.T., the P.T., the vision, the speech, the music all give the SEIT's what to do" (Tr. p. 177). Testimony by the student's parent reflected her opinion that without SEIT services the student would likely make some progress, but probably not make the progress that he did with SEIT services (Tr. p. 334). The parent also testified that the student's home-based services maximized the services the student received in school (Tr. p. 335).

In conclusion, based upon the evidence in the hearing record, I find that the CSE sufficiently addressed the student's identified needs by recommending a small, structured 12:1+4 academic setting with significant related services (Dist. Ex. 1 at pp. 1, 2, 26, 28). Moreover, the hearing record reflects that the CSE provided a placement that was in the LRE (Tr. pp. 143-45, 150; see Dist. Ex. 1 at p. 27). The CSE also developed significant goals and short-term objective to assist the student in overcoming his cognitive, language, motor, and socialization deficits (Dist. Ex. 1 at pp. 10-25) Furthermore, the hearing record establishes that the recommended 12:1+4 special class placement would have met the student's needs and at the time of the CSE's recommendation was reasonably calculated to confer educational benefits to the student. (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006] citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-112; Application of

²³ The IEP indicated that the student should use music throughout the day (Dist. Ex. 1 at p. 4).

a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). 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). Therefore, I find that the CSE offered the student a FAPE for the 2008-09 school year.

Having determined that the challenged IEP offered the student a FAPE for the 2008-09 school year, I need not reach the issue of whether the parents' request to keep the student at Williamsburg was appropriate, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I will now consider the district's assertion that the parent should be ordered to reimburse the district for payments made pursuant to pendency.

The IDEA and the New York State Education Law require that a student remain in his or her current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). In addition, during the pendency of administrative and judicial proceedings, a student remains at his current educational placement, "unless the State or local educational agency and the parents or guardian otherwise agree" (20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]).

The district requests that a State Review Officer "reconsider" the decisions in Application of a Child with a Disability, Appeal No. 05-091 and Application of a Child with a Disability, Appeal No. 08-061 both of which denied the district's claim to recoup pendency payments in light of a determination that the district offered a FAPE to the student (see also Application of the Dep't of Educ., Appeal No. 08-134). The District cites case law to support their argument that public policy and fairness considerations dictate a recoupment of these payments (see Doe v. Brookline Sch. Comm., 722 F.2d 910 [1st Cir. 1983]; see also Dale M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813 [7th Cir. 2001]). I find the district's arguments favoring the approaches taken by the courts in Brookline and Dale M. to be unpersuasive. I decline to order the parents to reimburse the district for costs incurred by the district in maintaining the student's pendency placement, an expense it was required to pay in order to comply with the pendency provisions of state and federal law (see Murphy v. Arlington Cent Sch. Dist., 297 F.3d 195 [2d Cir. 2002]; Bd. of Educ. v. Schutz, 290 F.3d 476 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; see also 20 U.S.C. § 1415[j]; 34 C.F.R. § 300.51[8]; Educ. Law § 4404[4]; 8 NYCRR 200.5[m]).

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision that the student remain in his preschool setting at Williamsburg, and receive preschool related services, home-based related services and SEIT services through the end of the 2008-09 school year, is hereby annulled.

AND IT IS FURTHER ORDERED that the impartial hearing officer's decision that the student's IEP be amended to mandate his current preschool program and current related services is hereby annulled.

Dated: **Albany, New York**
 April 13, 2009

PAUL F. KELLY
STATE REVIEW OFFICER