



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-096

**Application of a STUDENT WITH A DISABILITY, by her parents, 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:**

The Law Offices of Skyer, Castro, Cutler & Gersten, attorneys for petitioners, Jesse Cole Cutler, Esq., of counsel

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

### DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request for reimbursement for their daughter's tuition at the Aaron School for the 2008-09 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that it failed to offer an appropriate educational program to the student for that year. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing, the student was attending second grade at the Aaron School, which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. p. 135; Dist. Ex. 15 at p. 1; see 8 NYCRR 200.1[d], 200.7). According to the evidence contained in the hearing record, the student's performance on intelligence testing reflected high average cognitive functioning with relative weaknesses in complex language and attention, processing speed, planning, organization and fine motor skills (Parent Ex. G at pp. 6, 9). Academically, the student's performance on December 2008 testing placed her near or above grade level in most areas except math (id. at pp. 6, 9-10). The student also exhibited oculomotor dysfunction, for which she was treated by a behavioral optometrist (Dist. Ex. 15 at p. 5). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

When the student was approximately 2.5 years old, she was reportedly evaluated through the Early Intervention Program (EIP) but not found eligible for services (Tr. pp. 270-71). At approximately 3.5 years of age, while in nursery school, the student was evaluated through the Committee on Preschool Special Education (CPSE), which included speech-language, psychological, and educational evaluations (Tr. pp. 271-72). The CPSE evaluations reportedly revealed a 6-12 month language delay, with expressive and receptive language concerns as well as organizing and sequencing deficits (Tr. p. 272). A classroom observation of the student identified difficulties with transitions, following multi-step directions, and the student's tendencies toward rigidity and isolating herself in social situations (Tr. pp. 272-73). The CPSE recommended special education itinerant teacher (SEIT) services for ten hours per week and speech-language therapy twice per week, which the student received for just over one year prior to her transition into kindergarten (Tr. pp. 273-74).

For kindergarten, the Committee on Special Education (CSE) classified the student as having a speech or language impairment and recommended a collaborative team teaching (CTT) kindergarten program (Tr. pp. 276-79). The student's mother rejected the program and enrolled the student at the Aaron School for the 2006-07 school year (Tr. pp. 277-79). In February 2007, the Aaron School generated an educational mid-year report relative to the student's performance (Dist. Ex. 1). The student's teachers characterized her transition to the 2006-07 school year as "successful" and noted that the student's "ability to carry out program routines (arrival, clean-up, packing up, etc.) ha[d] greatly improved; however, she frequently require[d] teacher assistance to stay focused and complete the task at hand" (*id.* at p. 1). Her teachers observed that "[a]s the year progressed, [the student] demonstrated progress in her ability to make choices and problem-solve in the classroom" (*id.*). The report revealed that the student's reading group, which consisted of three other students, met daily for 45 minutes per session, and utilized the "Wilson Foundations" program (*id.* at p. 2). According to the report, the student's six member math group met daily for 30 minutes per session, and utilized the "Stern Structured Mathematics" program and the "Saxon Mathematics" curriculum (*id.* at p. 4). The report also outlined the student's performance in English language arts (ELA), handwriting, science, social studies, and "specialties" (library, music, physical education, computers, and art) (*id.* at pp. 3-10). The mid-year report noted that the student learned most effectively when she received direct teaching, teacher models, and opportunities for guided practice, and further noted that she benefited from the individual attention afforded by a small group learning environment (*id.* at p. 5).

In April 2007, the Aaron School generated an occupational therapy (OT) progress report (Dist. Ex. 2). The reporting occupational therapist acknowledged the student's history of sensory processing difficulties (particularly vestibular processing), and advised that at the time of the report, the student was receiving OT twice per week, once in a 1:1 setting and once in a group of two (*id.* at p. 1). The reporting occupational therapist opined that with regard to the student's sensory processing, she "ha[d] begun to efficiently integrate input from the vestibular sense" and that she "demonstrate[d] significant improvement in her graphomotor skills and overall fine motor coordination" (*id.* at pp. 1-2). In the area of gross motor functioning, the reporting occupational therapist observed that the student was working on development of age appropriate ball skills, and relative to self-care skills, she was able to "appropriately discriminate the right and left sides of her body to place her shoes on the correct feet" (*id.* at p. 2).

In May 2007, the Aaron School developed a speech-language progress report (Dist. Ex. 3). The reporting speech-language pathologist advised that at the time of the report, the student was receiving speech-language therapy twice per week for 30 minutes per session in a group of two (id. at p. 1; see Tr. pp. 194-95, 214). The report documented "consistent progress since the start of the school year" in the student's receptive and expressive language, and characterized pragmatic language and play skills with adults as two of the student's strengths (Dist. Ex. 3 at pp. 1, 3). However, the reporting speech-language pathologist also indicated that "[a]lthough [the student] ha[d] made steady gains since the initiation of therapy this year, when compared with peers of the same chronological age, she continue[d] to demonstrate auditory processing deficits and expressive and pragmatic language deficits" (id. at p. 4).

At the conclusion of the 2006-07 school year, the Aaron School generated the student's spring 2007 kindergarten report card (Dist. Ex. 4). The report card reflected the student's progress with respect to academics and social development, noting that she primarily received ratings of "independently mastered" or "in progress" in the majority of categories assessed, including social development (response to school, classroom behavior, and interpersonal relationships), language in the classroom, calendar, fine motor skills, handwriting development, reading readiness (auditory and visual perception), decoding, spelling, oral reading, listening comprehension, math (concepts, patterns, counting, graphing, time, and money), social studies, and science (id. at pp. 2-6, 8, 10-14). With regard to written expression, the report characterized the student's skills as "emerging" (id. at p. 4). Teacher comments contained in the spring 2007 report card confirmed the student's overall progress, noting her increased abilities to incorporate another student's play scheme into her own, to express her needs and desires, to problem solve during conflicts (with teacher assistance), and to follow classroom routines with greater independence (id. at p. 15). The report card also revealed that the student continued to require teacher support when she was distracted, visual prompts and modeling during group discussion, and instruction and teacher assistance to "interpret and manage" at times when she became emotionally sensitive to changes in routine or when she became frustrated by having to wait her turn to speak (id.). The student also required prompting to stay on topic during conversation, to be more aware when her friends were speaking, and to raise her hand and use a quiet voice when she desired to contribute to classroom discussion (id.).

For the student's first grade year (2007-08), the CSE reportedly convened and developed an individualized education program (IEP) for the student in May 2007 that recommended a 12:1+1 special class, but according to the student's mother, the district did not provide a timely Final Notice of Recommendation (FNR) (Tr. pp. 281-82; see Parent Ex. F). The parents ultimately rejected the district's recommended placement and the student remained enrolled in the Aaron School for the 2007-08 school year (Tr. pp. 281-82).

In fall 2007, the Aaron School issued a report card documenting the student's progress in first grade relative to academics and social development (Dist. Ex. 5). The report card evidenced that the student primarily received ratings of "independently mastered" or "in progress" in the majority of the categories assessed; including social development (response to school, classroom behaviors, and interpersonal relationships), language in the classroom, calendar, reading readiness (auditory and visual perception), fine motor skills, handwriting skills, decoding, reading comprehension, spelling, listening comprehension, math (concepts, counting, and graphing), social studies, and science (id. at pp. 3-10, 12-15). The student's skills in oral reading, written

expression, and math (including problem solving and place value) were described as "emerging" (id. at pp. 6-7, 9-10).

Teacher comments established that the student successfully transitioned to the 2007-08 school year, adapted to the routines of her new classroom, and was an enthusiastic academic and social participant (Dist. Ex. 5 at p. 18). The fall 2007 report card noted that the student required assistance interpreting social interactions with peers, maintaining cooperative play for extended time periods, and participating in activities in which she shared ideas with peers and was required to respect the opinions and contributions of others (id.). The Aaron School teachers also observed that the student experienced difficulties beginning tasks on her own and requesting assistance when tasks became overwhelming (id.).

On January 15, 2008, a district school psychologist conducted a classroom observation of the student at the Aaron School (Dist. Ex. 11). According to the resultant observation report, the student responded appropriately to teacher questions, raised her hand to be called on, and followed directions to transition to the next activity (id. at p. 1). In February 2008, the Aaron School generated a mid-year report relative to the student's 2007-08 school year (Dist. Ex. 14). The report commented that the student's "struggles" in school could be attributed to her anxiety and language processing weaknesses and as a result, the student required the "structured, supportive therapeutic environment the Aaron School provide[d]" (id. at pp. 1-2). Aaron School staff observed that the student had shown improvement in independently managing stressful moments, but acknowledged that the student's "worried and anxious behaviors" affected her academic development, and that her weakness in language processing hindered her ability to grasp academic concepts (id. at p. 2). Socially, the February 2008 mid-year report indicated that the student's difficulty comprehending language quickly and efficiently and her difficulty reading her peer's nonverbal cues affected her ability to successfully engage in play or conversation with her peers (id.). According to the mid-year report, when the classroom environment was too noisy or moving at a faster rate than the student could process, her anxious feelings increased and her ability to control her emotions was impaired (id.). The mid-year report revealed that the student was receiving private counseling services outside of school to improve her coping skills and manage her anxiety (id. at p. 3). According to the February 2008 mid-year report, the Aaron School's social worker indirectly monitored the student's emotional development by visiting the student in her classroom to "gain a sense of how she is fairing day to day" (id.).

Academically, according to the February 2008 mid-year report, the student had acquired many new skills in reading and utilized them in small group reading sessions, as well as during her independent reading, although listening and reading comprehension activities were determined to be more challenging for the student due to her language processing deficits (Dist. Ex. 14 at p. 3). In math, the student reportedly made "steady progress," although her ability to reason, follow through on tasks, problem solve, and complete word problems were affected by both her anxious feelings and her language processing deficits (id.). In ELA and writing activities, the student's teachers at the Aaron School noted her enthusiasm for books and listening to storytelling (id. at p. 4). The February 2008 mid-year report cited the student's general progress in social studies, science, music, computers, art, library, and physical education, and concluded by characterizing the student's spring semester at the Aaron School as "successful" (id. at pp. 4-7).

On February 12, 2008, the CSE convened to develop an IEP for the student's second grade year (2008-09) (Dist. Ex. 15; see Tr. p. 285).<sup>1</sup> In attendance were the special education teacher who also functioned as the district representative, the school psychologist, and the parents; a special education teacher from the Aaron School participated telephonically (Dist. Ex. 15 at p. 2).<sup>2</sup> The CSE recommended a 12:1+1 special class in a community school, related services consisting of OT once per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a group not exceeding two, speech-language therapy twice per week for 30 minutes per session in a group not exceeding three, and counseling once per week for 30 minutes per session in a 1:1 setting (id. at pp. 13, 15; see Dist. Exs. 16; 17; 18). The IEP also included program modifications consisting of visual cues and verbal prompts, and redirection (Dist. Ex. 15 at p. 3). The February 2008 IEP included annual goals and corresponding short-term objectives to address the student's needs in reading; math; receptive, expressive, and pragmatic language; fine and graphomotor skills; and her social/emotional development (id. at pp. 6-12). The hearing record evidences that the CSE identified as the primary parental concern that "[the student] should be in a setting [in which] she can get individual attention" (Dist. Ex. 16).

Additionally on February 12, 2008, the student's father consented to a deferral of the recommended placement until September 1, 2008, on the ground that "the IEP developed during [the February 12, 2008 CSE] meeting was for the school year 2008-09" (Dist. Ex. 17). In the "Notice of Recommended Deferred Placement," the district explained to the parents that "[a]t this time we are not able to offer you a specific projected site as classes may undergo reorganization prior to that date [September 1, 2008] and the existing functional groupings are subject to change" (id.). The notice contained the name and telephone number of a district contact person, with the instruction that if the parents wished to visit a "sample" of the type of program recommended for the student, they could call the contact person (id.). The notice also advised the parents that they would be receiving an FNR notifying them of a specific site on or before August 15, 2008 (id.). A handwritten note on the notice by the student's father indicated that he consented to the deferment of the recommended program, but asked that the district "send this to [the parents] in a timely manner so [the parents] can visit any proposed program while school is in session" (id.). On February 13, 2008, the parents signed an enrollment contract with the Aaron School, reserving a seat for the student for the 2008-09 school year (Parent Ex. L at p. 1; see Tr. pp. 288-89).

By FNR dated June 19, 2008, the district recommended a 12:1+1 special class and related services at a specific district school consistent with the recommendations set forth in the February 2008 IEP (compare Dist. Ex. 15 at pp. 1, 3-4, 13, 15, with Dist. Ex. 18). The FNR listed the name and telephone number of a district contact person and advised the parents that if the CSE did not

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<sup>1</sup> The hearing record contains multiple duplicative exhibits. For the purposes of this decision, only District exhibits were cited in instances where both a District and a Parent exhibit or an IHO exhibit were identical. It is the responsibility of the impartial hearing officer to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal No. 09-038; Application of a Child with a Disability, Appeal No. 07-119; Application of the Bd. of Educ., Appeal No. 06-074).

<sup>2</sup> The hearing record indicates that the parents waived their right to have an additional parent member present at the February 12, 2008 CSE meeting (see Dist. Ex. 16).

hear from them by July 7, 2008, the district would effectuate the recommended program (Dist. Ex. 18).

On July 3, 2008, the student's father forwarded correspondence to the district responding to the June 19, 2008 FNR (Parent Ex. E). Initially, the student's father asserted that although the FNR was dated June 19, 2008, it was not postmarked until July 1, 2008, almost two weeks later (id. at p. 1; see Parent Ex. D at p. 2). He then advised that the parents were not able to agree or disagree with the district's recommendation until they had an opportunity to visit the recommended school (Parent Ex. E at p. 1). He further advised that since the parents did not receive the FNR until "one business day before [their] response [was] due," they would not be able to visit the recommended program (id.). Consequently, he advised that he would attempt to schedule a meeting and tour of the recommended placement at his earliest opportunity (id.). He concluded his letter by requesting that the district "please send [the parents] whatever information concerning the recommend[ed placement] exists, including a class profile," so that they could determine whether the recommendation was appropriate (id.).

On August 18, 2008, the parents, through counsel, forwarded to the district notice that they were unilaterally placing the student at the Aaron School advising the district of: (1) their rejection of the February 2008 IEP, based upon the district's alleged denial of a free appropriate public education (FAPE)<sup>3</sup> for the student "on both procedural and substantive grounds" including, but not limited to, the CSE's alleged failure to create a valid IEP for the student; its alleged denial of the parents' right to meaningful participation in formulation of the February 2008 IEP; and its alleged failure to recommend "an appropriate placement for the [student] that would provide suitable and functional grouping;" (2) their intention to enroll their daughter in the Aaron School for the 2008-09 school year; and (3) their intention to seek funding from the district for their daughter's 2008-09 school year their (Parent Ex. C at p. 1).

On September 26, 2008, the parents, through counsel, filed a due process complaint notice and requested an impartial hearing (Parent Ex. A). The parents alleged that: (1) the February 2008 CSE was not properly composed, as it lacked a regular education teacher and an additional parent member, whose appearance the parents did not waive in writing; (2) by the time they received the district's June 19, 2008 FNR, the recommended placement had closed for the summer, thereby preventing the parents from visiting it; (3) the district failed to respond to their July 3, 2008 written request for information relative to the recommended placement in advance of a visit; (4) when the parents visited the recommended placement on September 16, 2008, they learned that the class roster had already been filled to the maximum of 12 students, that the recommended class was

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<sup>3</sup> 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 school, 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]; see 34 C.F.R. § 300.17).

working and functioning at a much lower level than the student was, and that the recommended class would not provide the student with a suitable and functional peer group for instructional and social/emotional purposes; and (5) the annual goals and short-term objectives contained in the February 2008 IEP were "inadequate," "generic," "vague," and failed to provide a baseline from which to gauge the student's progress (id.). In their due process complaint notice, the parents advised the district that they would seek full tuition reimbursement at the Aaron School for the 2008-09 school year (id. at pp. 1, 4).

On October 13, 2008,<sup>4</sup> the speech-language pathologist retained by the Aaron School to conduct a speech and language evaluation of the student concluded her evaluation (Parent Ex. H).<sup>5</sup> The evaluator characterized the student as an "affectionate, talkative child with varied language skills," who usually grasped main ideas and concepts with the aid of visual cues and who possessed knowledge of morphological and structural rules (id. at p. 7). However, the evaluator opined that the student exhibited significant difficulty with both expressive and receptive language when visual cues were not provided, had deficits in working memory and executive functions, and exhibited weaknesses in higher order thinking skills and pragmatics (id.). According to the evaluator, the student's expressive language deficit manifested itself in her "significant word retrieval disorder, limited vocabulary, and deficits in the organization of language, including the sequencing of ideas and creating syntactically correct sentences" (id.). The evaluator noted that the student's observed "inability to process and retain information and details, especially when they are not within her life experience, when picture cues are not provided, and when higher order thinking skills of prediction, understanding causality and inferencing are required to comprehend and integrate information," demonstrated her receptive language weakness (id.). The evaluator noted that test results revealed the student's vulnerabilities in the areas of attention and working memory, which were evidenced by her difficulty retaining information and her distractibility throughout the testing situation (id. at pp. 2-7). The evaluator opined that the student's sensory needs, "seen in her need to fidget and mov[e] around," intensified her distractibility, and could be expected to be exacerbated in a classroom or group situation (id.).

The evaluator recommended additional speech-language therapy sessions, twice per week for 60 minutes per session, supplementing the two 30-minute sessions the student received weekly at the Aaron School (Parent Ex. H at p. 7). She also recommended that the student continue in "an academic, language based, small classroom, with the possibility of moving to a small classroom setting for middle school," and consideration of the "Fast ForWord Language Program" (id.).<sup>6</sup> In the classroom, the evaluator recommended that the student's teachers use visual aids, verbal mediation strategies, break down abstract language and concepts, and review vocabulary with the

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<sup>4</sup> The list of exhibits contained in the impartial hearing officer's decision incorrectly ascribes a date of "January 13, 2008" to this report (IHO Decision at p. 22).

<sup>5</sup> The speech and language evaluation report contained in the hearing record indicates that the evaluation took place on September 18 and 25, 2008, and concluded on October 13, 2008 (Parent Ex. H at p. 1).

<sup>6</sup> The "Fast ForWord Language Program" is described in the hearing record as an intensive 6-8 week computerized learning program designed for students with expressive language and auditory processing deficits that also strengthens working memory and attention (Parent Ex. H at pp. 7-8).

student (*id.* at p. 8). She also surmised that as the student's workload increased, the student would likely experience further difficulties in planning and organizing her work (*id.*).

On October 22, 2008, the district responded to the parents' due process complaint notice (Parent Ex. B). The district countered that the CSE relied upon a classroom observation, related services progress reports/evaluations, teacher progress reports, and medical reports in developing the February 2008 IEP, and that the placement offered to the student in the June 19, 2008 FNR was reasonably calculated to enable the student to obtain educational benefits (*id.* at pp. 2-3).

In November 2008, the Aaron School generated its fall report, setting academic and social goals for the student for the 2008-09 school year (Parent Ex. I). The student's teachers opined that that the student "adjusted well to the 2008-09 school year," noting that she had several friends in the classroom and was continuing to build relationships with her peers (*id.* at p. 1). The report described the student as struggling at times with language processing and emotional regulation, as demonstrated by "a few incidents where [the student] was highly sensitive about a misunderstanding or a conflict with a peer," but noted that the student was compliant, flexible, and receptive to teacher support during such occurrences (*id.*). According to the student's "team," the student remained focused and completed work with teacher intervention and redirection (*id.*). In math, the fall report described the student as "motivated to learn new strategies while still improving existing abilities" and noted that the student demonstrated "good" number sense from 1 to 100 and was able to add multiple digit numbers by their place value (*id.* at p. 2).<sup>7</sup>

On December 1, 2008, the parents' private pediatric psychologist completed a psychoeducational update relative to the student "in order to assist in ongoing treatment and educational planning" (Parent Ex. G at p. 1).<sup>8</sup> The evaluating pediatric psychologist referred to his prior evaluation of the student conducted in December 2005, during which he concluded that the student's results on the Wechsler Primary and Preschool Scale of Intelligence – Third Edition (WPPSI-III) revealed that she possessed superior nonverbal reasoning and abilities, with a performance IQ score of 125 (95th percentile), as opposed to weaker verbal skills, with a verbal IQ score of 101 (53rd percentile) (*id.*). On the December 1, 2008 administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), the student achieved a full scale IQ score of 114 (82nd percentile), in the high average range of intellectual functioning; however, the evaluating pediatric psychologist noted that this score was actually comprised of four notably disparate index scores, including a composite verbal comprehension score of 114 (82nd percentile, high average range), a perceptual reasoning score of 121 (92nd percentile, superior range), a composite working memory score of 99 (47th percentile, average range), and a composite processing speed score of 103 (58th percentile, average range) (*id.* at pp. 2, 9). The evaluating pediatric psychologist hypothesized that the seven point disparity between the student's verbal

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<sup>7</sup> The balance of the November 2008 Aaron School fall report discussed the class curricula and listed the subject goals set for the student in science, social studies, writing, language arts, writing, art, music, physical education, library, and computers; however, it did not comment on the student's performance in each subject (*see* Parent Ex. I at pp. 2-6).

<sup>8</sup> According to the hearing record, the pediatric psychologist's evaluation began on September 27, 2008, and concluded on December 1, 2008 (Parent Ex. G at p. 1).



comprehension and perceptual reasoning composite scores "demonstrate[d] ongoing strengths in nonverbal reasoning, but also significant progress with verbal skill development" (id. at p. 2).

With regard to the student's verbal functioning, the evaluating pediatric psychologist observed that while many of the student's language scores fell within the average range, she experienced difficulties "when greater language processing or expression was required," including "continued difficulty with complex listening skills which impact[ed] upon her ability to take in important orally presented information at times" (Parent Ex. G at pp. 2-3; see id. at pp. 10-11). According to the evaluating pediatric psychologist, in the areas of visual-motor and visual-perceptual skills, the student "demonstrated superior visual-spatial reasoning potential and problem solving skills with some fluctuations in performance," which manifested themselves in a tendency of the student "to become overwhelmed by competing and more complex stimuli," while "she demonstrated relatively slower speed of processing and developing visual-motor relative difficulties" (id. at pp. 3-4; see id. at pp. 10-11). The evaluating pediatric psychologist discussed the student's executive functions by noting that her "planning and organizational skills [were] variable depending on the structure and familiarity of the task," and observed that the student "demonstrate[d] continued variable distractibility, but appear[ed] to have the capacity for adequate attention," discerning that she had more difficulties when the auditory processing or organizational demands became greater and that these difficulties negatively affected her ability to consolidate, retain, and retrieve information consistently and efficiently (id. at pp. 4-5; see id. at pp. 10-11).

Academically, the evaluating pediatric psychologist determined that results of administration of the Wechsler Individual Achievement Test – Second Edition (WIAT–II) revealed that the student's basic ability to write letters and spell words was at a 2.5 grade level, and that her math calculation skills were at a 1.0 grade level, and opined that the student "performed near or above an expected level on many academic tasks, and ha[d] made significant gains in decoding" (Parent Ex. G at p. 5; see id. at pp. 9-10). He added that it was important to note, however, that the student's "scores were achieved in a highly structured 1:1 setting, and that her difficulties would likely be more pronounced in a large classroom setting or when working independently without supports" (id. at p. 5). Socially/emotionally, the evaluating pediatric psychologist identified the student's proclivity to "wander off task when she feels overwhelmed or overly challenged and frustrated," and opined that the student was "at risk as she feels increasingly overwhelmed and challenged by academic demands of school," which he indicated "speaks to her continued need in her current supportive school setting" (id. at pp. 5-6; see id. at pp. 11-12).

In summary, the evaluating pediatric psychologist characterized the student as "a bright and engaging seven year old girl" whose "intellectual potential falls at least in the high average/superior range" (Parent Ex. G at p. 6). He identified "difficulties in complex language and attention, processing speed, planning, organization, and fine motor skills," surmised that the student's "math and writing skills are not developing at an appropriate pace," and cautioned that she "is at risk for increased academic and socio-emotional difficulties if she does not continue with intense specialized support and remediation" (id.).

An impartial hearing convened on January 15, 2009 and concluded on May 18, 2009, after three days of testimony. In a decision dated July 20, 2009, the impartial hearing officer determined that with respect to the parents' allegation that the February 2008 was improperly composed: (1) the district was not obligated under 8 NYCRR 200.3(a)(1)(ii) to have a regular education teacher

present at the CSE meeting because the student was not participating in general education at the time of the February 2008 CSE meeting; (2) the hearing record indicated that the parents did in fact waive their right to the participation of an additional parent member in writing (see Dist. Ex. 16) under 8 NYCRR 200.3(a)(1)(viii); and (3) there was no evidence in the hearing record demonstrating that the absences of a regular education teacher and an additional parent member from the CSE meeting "seriously infringed the parents['] opportunity to participate in the IEP formulation process" or caused a deprivation of educational benefits (IHO Decision at pp. 16-18).

The impartial hearing officer also found that the parents' allegation that the February 2008 IEP's annual goals and short-term objectives were "vague and generic" was not persuasive, opining that the annual goals and short-term objectives were appropriate insofar as they corresponded to the student's needs (IHO Decision at p. 18). While acknowledging that the February 2008 IEP lacked measurable short-term objectives and a description of how the student's progress toward her annual goals would be measured, the impartial hearing officer concluded that these inadequacies did not rise to the level of denying the student a FAPE (*id.*).<sup>9</sup>

Next, the impartial hearing officer addressed the parents' assertion that the district's recommended 12:1+1 placement was not the student's least restrictive environment (LRE) (IHO Decision at p. 18). She reasoned that because the student would not have been exposed to typically developing peers at the Aaron School and she would have been in the district's recommended placement during lunch and recess, the Aaron School placement was more restrictive than the district's recommended placement (*id.*).

The impartial hearing officer then examined the appropriateness of the district's recommended placement,<sup>10</sup> concluding that evidence contained in the hearing record indicated that the student would not be grouped together with students with similar academic needs in reading and writing, as well as social development needs, and that under State regulation (8 NYCRR 200.6[a][3]), the district deprived the student of a FAPE for the 2008-09 school year (IHO Decision at pp. 18-19).

Turning her attention to the appropriateness of the parents' placement at the Aaron School, the impartial hearing officer determined that: (1) although evidence contained in the hearing record established that the Aaron School provided the student with a small class size, school staff gave no indication that the student received counseling services from a certified provider; and (2) there was insufficient evidence contained in the hearing record to demonstrate how the Aaron School's program addressed the student's specific special education needs, particularly with respect to her counseling needs (*id.* at pp. 19-21). The impartial hearing officer further determined that although the student received outside counseling, such outside services did not render the Aaron School an appropriate placement for the student (*id.* at p. 20). She also found that there was insufficient

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<sup>9</sup> The parties do not appeal this aspect of the impartial hearing officer's decision.

<sup>10</sup> The impartial hearing officer credited the student's mother's testimony that she did not receive the June 19, 2008 FNR until July 2008, and that this delay prevented the parents from visiting the recommended placement prior to the start of the 2008-09 school year (IHO Decision at pp. 18-19). She also credited the district's witnesses' testimony that at the start of the 2008-09 school year, there was a seat available for the student in the recommended class, and that even if all 12 seats were filled prior to the student's enrollment, the district could have secured a variance, thereby providing the student with a seat in the recommended class (*id.* at p. 19).

evidence in the hearing record to show that the student was grouped appropriately for social development at the Aaron School (*id.*). In light of the foregoing, the impartial hearing officer concluded that the parents failed to meet their burden of proving the appropriateness of the Aaron School placement, and consequently denied their request for reimbursement for the 2008-09 school year (*id.* at p. 21). Finally, while acknowledging that she was not required to address equitable considerations in light of her previous determinations, the impartial hearing officer commented that "I do not credit the [student's mother's] testimony that she would have considered a public school placement because I credit that she did not want her daughter to consider herself different" (*id.*).

The parents appeal, requesting that the impartial hearing officer's July 20, 2009 decision be annulled insofar as it determined that the parents failed to satisfy their burden of proving the appropriateness of the Aaron School placement and that equitable considerations did not favor an award of tuition reimbursement, and denied their reimbursement request for the 2008-09 school year. They proffer three principal arguments: (1) that contrary to the impartial hearing officer's findings, the hearing record demonstrates that the Aaron School offered the student a program that met her special education needs socially, emotionally, academically, and in the LRE; (2) that contrary to the impartial hearing officer's determination, the evidence contained in the hearing record demonstrates that the parents' claim for reimbursement is supported by equitable considerations in that the evidence establishes that the parents would have enrolled the student in public school had an appropriate placement been offered by the district, and because it was the district's failures to timely respond to the parents' request for information and to timely forward the June 19, 2008 FNR that deprived them of an opportunity to visit the recommended placement prior to the start of the 2008-09 school year; and (3) that the impartial hearing officer failed to comply with 8 NYCRR 200.5(j)(5)(v) insofar as she failed to inform the parties of their right to obtain a review of her decision by a State Review Officer.

The district submitted an answer and cross-appeal, seeking the annulment of that portion of the impartial hearing officer's decision which determined that the district failed to offer the student a FAPE for the 2008-09 school year. First, the district counters that the impartial hearing officer correctly determined that the Aaron School was not an appropriate placement for the student because: (1) the parents failed to demonstrate that the student was functionally grouped at the Aaron School; (2) the Aaron School failed to provide the student with sufficient related services, particularly in the areas of counseling and speech-language therapy; and (3) the Aaron School was overly restrictive because it did not provide the student with any mainstreaming opportunities, and because it was not the LRE for the student.

Second, the district argues that the impartial hearing officer correctly determined that a consideration of the equities favors the district, because: (1) the impartial hearing officer correctly discredited the student's mother's testimony that she would have considered a public school placement for the student; (2) the parents re-enrolled the student in the Aaron School only one day after the February 12, 2008 CSE meeting, and seven months before they visited the recommended district placement; (3) by the time they visited the recommended placement in September 2008, the parents had already paid the Aaron School non-refundable tuition; (4) the student's mother conceded during her testimony that when she and her husband visited the recommended placement in September 2008, they were not considering it for the 2008-09 school year because the student had already begun classes at the Aaron School; and (5) the parents failed to provide the district

with sufficient notice of their intention to re-enroll the student at the Aaron School for the 2008-09 school year pursuant to 20 U.S.C. § 1412(a)(10)(C)(iii) because their August 18, 2008 notification letter was untimely and failed to provide the district with an adequate explanation of their concerns relative to the recommended placement; and (6) the parents' argument that the district's recommended placement was "never available" to them because they did not have an opportunity to visit the placement prior to the start of the 2008-09 school year is disingenuous and without legal basis because a parent is not legally entitled to visit a recommended placement. Third, the district maintains that the impartial hearing officer's failure to advise the parties of their right to appeal at the conclusion of her decision did not prejudice the parents, as evidenced by their timely filing of the instant appeal.

The district cross-appeals, asserting that the impartial hearing officer's determination that the district's recommended program for the 2008-09 school year was inappropriate was erroneous. The district contends that there is no evidence in the hearing record indicating that there were autistic students in the recommended placement. The district also asserts that even if some of the other students in the recommended class were autistic, there is no legal basis supporting the impartial hearing officer's determination that the recommended placement was de facto inappropriate on that basis. The district further contends that the parents' argument that the recommended placement was filled to capacity at the start of the 2008-09 school year is contradicted by the testimony contained in the hearing record. The district argues that the parents' allegation that the lack of a regular education teacher at the February 2008 CSE meeting deprived the student of a FAPE is without merit, contending that a regular education teacher was not required to attend because the CSE was not considering a general education program for the student. Furthermore, the district notes that parents did not voice any disagreement with any aspect of the CSE composition or the IEP during the CSE meeting. The district also contends that the parents failed to raise their argument that the CSE was inadequately composed due to the lack of an additional parent member during the impartial hearing, and that they affirmatively waived their right to the participation of an additional parent member prior to the CSE meeting. Finally, the district maintains that the parents' claim for tuition reimbursement should be dismissed because the Aaron School is a for-profit business. By way of its cross-appeal, the district seeks to overturn that portion of the impartial hearing officer's decision which determined that the district failed to offer the student a FAPE for the 2008-09 school year.

The parents submitted an answer to the district's cross-appeal, contending that their claim that the February 2008 CSE was not properly composed because it lacked an additional parent member was included in their due process complaint notice and was not abandoned at the impartial hearing. The parents also allege that they did in fact provide requisite notice of their intention to unilaterally place the student at the Aaron School, allegedly furnishing written notice on February 12, 2008 and July 3, 2008, prior to their August 18, 2008 10-day notice letter. The parents further contend that they were unable to ascertain the appropriateness of the recommended placement because: (1) the district allegedly did not offer the recommended placement until July 3, 2008, which deprived them of the opportunity to visit the recommended placement prior to the start of the 2008-09 school year; and (2) the district allegedly failed to respond to their request for a class profile and other information relative to the recommended placement. The parents maintain that relative to the grouping issue, the hearing record confirms that four students in the recommended placement demonstrated behaviors on the autism spectrum, that none of the other students in the recommended placement were performing at the student's grade level in math, and that only one

other student was performing at the student's grade level in reading; therefore, rendering the grouping at the recommended placement inappropriate for the student. The parents also allege that the special education related services offered by the district were inadequate to meet the student's special education needs and that the district was obligated to have a regular education teacher participate in the February 2008 CSE meeting because the IEP recommended placement in a community school with mainstream integration of the student throughout the school day. Lastly, while acknowledging that the Aaron School is a for-profit institution, the parents maintain that the school's for-profit status does not bar reimbursement on that basis.

At the outset, I will address two procedural issues arising on appeal. First, the parents are correct in their contention that the impartial hearing officer failed to include a statement in her decision "advising the parents and the board of education of the right of any party involved in the hearing to obtain a review of such a decision by the State Review Officer" (8 NYCRR 200.5[j][5][v]; see 8 NYCRR 200.5[k]). However, notwithstanding this omission, the parents initiated a timely appeal of the impartial hearing officer's decision. Because the impartial hearing officer's omission did not result in actual harm to the parents, I will not overturn her decision on that ground (see Application of a Child with a Disability, Appeal No. 01-002). Nevertheless, I remind the impartial hearing officer to comply with State regulations and include this statement in future decisions.

Second, in its cross-appeal, the district contends that: (1) a regular education teacher was not required to attend the CSE meeting because the CSE was not considering a general education program for the student; (2) the parents did not voice any disagreement with any aspect of the CSE composition or the IEP during the February 2008 CSE meeting; and (3) the parents failed to raise their arguments that the CSE was inadequately composed due to the lack of an additional parent member during the impartial hearing and that they affirmatively waived their right to the participation of an additional parent member prior to the CSE meeting. However, in her July 20, 2009 decision, the impartial hearing officer determined each of these issues in the district's favor (see IHO Decision at pp. 16-18), and the parents did not appeal these determinations.<sup>11</sup> As such, the district has suffered no harm as a result of the impartial hearing officer's determinations on these issues. 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]; 8 NYCRR 200.5[k][1]; Mackey v. Bd. of Educ., 386 F. 3d 158, 160 [2d Cir. 2004]; Application of the Dep't of Educ., Appeal No. 09-019; 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;

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<sup>11</sup> Because the parents did not appeal these aspects of the impartial hearing officer's July 20, 2009 decision, they are final and binding upon the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5]; see Application of a Student with a Disability, Appeal No. 09-079; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-013; Application of a Student with a Disability, Appeal No. 08-073; Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

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 determinations and therefore these issues need not be addressed further.

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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; 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 Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at \*6 [S.D.N.Y. Oct. 13, 2009]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; 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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), 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). An IEP must be reviewed periodically, but not less than annually, to determine whether the annual goals are being achieved and to make appropriate revisions (20 U.S.C. §§ 1414[d][4][A]; 34 C.F.R. § 300.324[b][1]; 8 NYCRR 200.4[f]). An eligible student's IEP must be in place at the beginning of each school year (20 U.S.C. § 1414[d][2][A]; 34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; see Cerra, 427 F.3d at 194).

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., Appeal No. 08-016).

Turning to the merits of the case, I will address the district's cross-appeal first. In its cross-appeal, the district contends that the parents' argument that the recommended placement was filled to capacity at the start of the 2008-09 school year is contradicted by the testimony contained in the hearing record. The impartial hearing officer stated in her decision that, in part, "based on the possibility of a variance" she found that the district failed to establish that a FAPE was offered during the 2008-09 school year (IHO Decision at p. 19). However, elsewhere in the decision, when considering the parents' argument that the recommended class was filled to capacity at the beginning of the 2008-09 school year, the impartial hearing officer explained that she "credit[ed] the testimony of the [district's] [b]orough [e]nrollment [a]dministrator that he could have obtained a variance so that the class size would have been 13:1:1," and that she further credited the testimony of the proposed classroom teacher that "at the start of the school year there were 10 students and 2 or 3 additional students on the roster" (id.; see Tr. pp. 21-23, 42-45). The classroom teacher testified that "we had ten bodies in our classroom" (Tr. p. 80) and "[o]n the first day of school, we were not full...I believe we had ten children on our roster" (Tr. p. 78). The classroom teacher

added that additional students were listed on the classroom roster but that "we knew" (Tr. p. 81) they were not coming back "because we had evidence they had moved on to other settings" (*id.*) and she was "confident they were not going to be returning as a student in my classroom" (Tr. pp. 80-81). Based upon the foregoing, I conclude that the evidence contained in the hearing record supports the district's assertion that it could have offered a seat to the student in the recommended class at the start the 2008-09 school year. I note also that the parents rejected the offered classroom placement prior to the start of the school year and advised the district by letter dated August 18, 2008 that the student would be enrolled elsewhere. Once the parents advised the district of their declination of the district's offer of placement, under these circumstances, the district was under no obligation to keep a seat in the classroom available for the student. Furthermore, the borough enrollment administrator testified that if a variance was needed, it would have taken less than one week to obtain it (Tr. p. 45). The hearing record does not demonstrate that the potential necessity of obtaining a variance in classroom size, if the parents had changed their minds between August 18, 2009 and the beginning of the school year and decided to enroll the student in the public placement, which they did not, deprived the student of a FAPE for the 2008-09 school year.

Next, the impartial hearing officer concluded that the student would not have been suitably grouped in the recommended placement with other students having similar academic (reading and writing) and social development needs, and that the district deprived the student of a FAPE for the 2008-09 school year (IHO Decision at pp. 18-19). State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][i], 200.6[a][3], [h][3]; see Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102).<sup>12</sup>

State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a] – [d]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at \*6 [S.D.N.Y. Oct. 13, 2009]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). The similarity of abilities and needs may be demonstrated through the use of a proposed class profile or by the testimony of a witness who is familiar with the children in the proposed class (see Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years

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<sup>12</sup> See Walczak, 142 F.3d at 133 (approving IEP that placed student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed).



shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, the regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Connor, 2009 WL 3335760, at \*6; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

A careful review of the hearing record demonstrates that the student in this case would have been grouped appropriately within the district's recommended placement for both academic instruction and social/emotional purposes. Testimony elicited from both the district representative and the student's mother, each of whom participated in the February 2008 CSE meeting, reflects that the parents provided the CSE with the student's up to date progress reports from the Aaron School for consideration in developing the student's 2008-09 IEP (Tr. pp. 131-32, 285-86). The hearing record also establishes that the student's special education teacher from the Aaron School participated telephonically in the February 2008 CSE meeting and that she discussed the student's then current functioning levels with the other CSE members during the meeting (Tr. pp. 143-44, 325-28; Dist. Exs. 15 at pp. 1-5; 16). The hearing record also reveals that the February 2008 CSE considered and based its recommendations on a classroom observation of the student conducted by the district on January 15, 2008, the Aaron School progress reports, and the Aaron School teacher's and parents' input at the CSE meeting (Tr. pp. 157-58; Dist. Exs. 11; 15 at p. 3; 16; Parent Ex. B at pp. 2-3). Consequently, I find that the student's functional levels were accurately reflected in the February 2008 IEP.

Teacher estimates of the student's then current levels of academic performance contained in the February 2008 IEP reflected that the student was performing at a 1.1 instructional level in reading comprehension and writing skills, at a 1.6 instructional level in decoding skills, and that in math, she was performing at a 1.2 instructional level in problem solving skills and at a 1.5 instructional level in computation skills (Dist. Ex. 15 at p. 3). According to the October 10, 2008 profile of the recommended class contained in the hearing record; in reading, four of the twelve students in the recommended class were functioning at the .5 to 1.5 instructional level and one student was functioning at the 1.6 to 2.5 instructional level, and in math, two of the twelve students were functioning at the .5 to 1.5 instructional level (see Dist. Ex. 19 at p. 1; see also Tr. pp. 83-87). Based upon the student's academic levels of performance and that of other students in the recommended class as identified in the hearing record, I conclude that the student would have been suitably grouped for instructional purposes in both reading and math.

Additionally, the teacher of the recommended class testified during the impartial hearing that her class included students who were "competing on grade level," were "demonstrating age appropriate math skills," and "who were reading on grade level" (Tr. p. 84). She added that the class contained "at least one child who [was] ready to be mainstreamed in the area of literacy" who attended a second grade general education class and participated in its literacy block, and that she also worked with a student who was "mainstreaming socially" by attending "cluster activities" and "science and an extra art period with the general ed[ucation] second grade classroom" (Tr. pp. 70, 84). She explained that "[t]he needs that were outlined in [the student's] IEP are very similar to a lot of the needs that are written on the IEPs of my current students, so I do think that ... [the student] would have fit in very well" in the recommended class (Tr. p. 69).

With respect to the student's social/emotional needs, the hearing record reflects that the student exhibited similarities to the students in the recommended class with regard to her social/emotional and behavioral functioning. The teacher of the recommended class testified that approximately four of the students in the class "presented with behaviors on the autism spectrum," including "sensory processing issues, occasional behavior issues ... [and] accepting limits," but she characterized them as "high functioning" (Tr. pp. 63, 92). Additionally, she explained that "several" students in the recommended class were classified as students having speech or language impairments, "a few" were classified as students having an other health impairment, and one "may have" been classified as a student having an emotional disturbance (Tr. p. 90). The student's mother testified to her daughter's history of sensory concerns, including problems with motion and loud noises, and that she had difficulty processing large quantities of sensory information presented all at once (Tr. p. 271). These needs were confirmed by the Aaron School documents reviewed by the February 2008 CSE (Dist. Exs. 2; 7), as well as by the February 2008 mid-year report from the Aaron School, which also noted that the student "becomes easily distressed if the students around her are not working at the same pace" that she is and that "[s]he will often cry, request help, or respond to peers using negative remarks or shouting" (Dist. Ex. 14 at p. 2). The report indicated that the student's "anxious feelings/behaviors and language processing deficits" affected her ability to negotiate the social context of the classroom and that the "sensory environment often created when young children engage socially" exacerbated the student's anxious feelings and lead to the crying or shouting behaviors (*id.*). Although the hearing record does not reveal if the February 2008 mid-year report was available to the CSE at the time of its meeting, as indicated above, the hearing record demonstrates that the student's Aaron School teacher participated in the CSE meeting and reviewed the student's progress and then current functioning (Tr. pp. 157-58, 313-15). The student's February 2008 IEP also noted that the student had difficulties with pragmatic language that affected her social interactions with others (Dist. Ex. 15 at p. 4).

The impartial hearing officer also commented that she "credit[ed] the parent's description of the autistic children she observed in the proposed class" and she did not find the grouping of "the autistic students" with this student to be appropriate (IHO Decision at p. 19; *see* Tr. pp. 254-55, 268-69, 298-306). However, the hearing record does not establish that the students in the district's recommended 12:1+1 special class were classified as students with autism, but rather that approximately four students in the class presented with "behaviors" on the autism spectrum, including sensory processing and occasional behavior problems, similar to the student and that notwithstanding these behaviors, they, like the student, were high functioning (*see* Tr. pp. 63, 92). Placement of a student in a special class should be based upon the individual needs of the student and not based upon classification (8 NYCRR 200.6[h][2]; *see* 8 NYCRR 200.1[ww][3][i][a] – [d]).

Based upon the foregoing, I do not find that the evidence contained in the hearing record supports the impartial hearing officer's conclusion that for instructional and social/emotional purposes, the student would not have been suitably grouped in the recommended district class with students with similar academic and social development needs (*see Connor*, 2009 WL 3335760, at \*6-\*7). I will now consider whether the district's recommended special education program and related services contained in the February 2008 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefits in the LRE.

The hearing record indicates that the descriptions of the student's functional levels and needs set forth in the February 2008 IEP resulted from a synthesis of information drawn from a classroom observation of the student, the Aaron School progress reports, and the participation of the student's special education teacher at the Aaron School, and the parents (Tr. pp. 58, 131-32, 157, 285-86, 326-28; Parent Ex. B at pp. 2-3). To address the student's needs, the district recommended a 12:1+1 special class in a community school, related services consisting of OT once per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a group not exceeding two, speech-language therapy twice per week for 30 minutes per session in a group not exceeding three, and counseling once per week for 30 minutes per session in a 1:1 setting, and program modifications consisting of visual cues and verbal prompts, and redirection (Dist. Ex. 15 at pp. 1, 3-4, 13, 15; see Dist. Exs. 16; 17; 18). The CSE meeting minutes reflected that the parents were concerned that the student receive individual attention (Dist. Ex. 16), and their concern was reflected in the February 2008 IEP, which noted that the "[s]tudent requires a small and structured instructional setting to address her language deficits, attentional difficulties and social/emotional needs" (Dist. Ex. 15 at p. 13; see id. at p. 14 [CSE rejected a special class in a 12:1 community school because the CSE opined that "the student needs an additional adult support in the classroom to address her language processing and attentional deficits]).

The hearing record reflects that the February 2008 CSE based its recommendation of a 12:1+1 program partly on the student's previous progress achieved in a similar sized classroom at the Aaron School, as informed by the student's mother during the CSE meeting (Tr. p. 287). The student's mother testified that the parents advised the CSE that the student was "doing really well at the Aaron School," and the district representative responded that "it sound[ed] like that size class works for her, so she should probably be in a 12 to 1 to 1 class"(id.). The hearing record reflects that the parents did not object to the recommendations in the IEP at the CSE meeting. During the impartial hearing, the teacher of the recommended class asserted that she had read the student's February 2008 IEP in order "to see the student's current level of functioning, the issues that are challenging for that student, and what kinds of supports are needed to address those challenges" (Tr. p. 60). She further opined that the recommended class matched the student's needs as reflected on the IEP in terms of class size (12:1+1), age level (seven and eight year olds), and functional level (Tr. pp. 62-63; see Tr. p. 90). She confirmed that the recommended school had "all related services available on site," and noted that similar to the student, other students in the recommended class also received OT, speech-language therapy, and counseling services (Tr. pp. 63, 65; see Dist. Ex. 19 at p. 2). She also opined that after reviewing the February 2008 IEP, the district's recommended placement could have addressed the student's special education needs (Tr. p. 60).

In addressing the student's academic needs, the teacher of the recommended class advised that she developed her own curriculum, using the district's general education curriculum as a platform and adapting it to correspond with the different levels of functioning exhibited by the students in her class (Tr. p. 63). She explained that in addressing the students' different functioning levels, she frequently utilized small group work, individualization, and differentiation (Tr. pp. 63-64). She revealed that she supplemented the district's Balanced Literacy and Everyday Math curricula with her own additional materials, such as "Brain Gym," and created her own social studies and science curricula tailored to the interests and abilities of each of the individual students in the recommended class (Tr. pp. 64, 93-95). She tracked the students' progress through periodic

formal and informal assessments, including portfolio assessments in which she collected samples of student work over time and analyzed them for signs of progress (Tr. pp. 64-65).

To address the student's social/emotional needs, the teacher of the recommended class testified that the recommended school employed a "counselor that works with children who need more emotional and social development kinds of work," and stated that the recommended school would have provided the student with the one 30-minute individual session per week of counseling services recommended in the February 2008 IEP (Tr. p. 63; see Dist. Exs. 15 at pp. 4, 13-14; 16; 17; 18).

The teacher of the recommended class also described a typical day, which usually began with independent reading as part of the Balanced Literacy curriculum, and then led to a shared reading session in which the class read a selected piece together and analyzed it, focusing on phonetics, grammar, or punctuation (Tr. pp. 64-65). Next, she typically broke the class up into four small groups, according to student reading levels, for guided reading, during which she concentrated on developing specific skills targeted for each group (Tr. pp. 66, 99). She clarified that while she worked with one group, the rest of the class participated in literacy centers with the assistance of the paraprofessional, and there was then a class wide writer's workshop wherein the students worked at their own level, followed by an individualized "word study" program that included each student's own spelling list and goals (Tr. pp. 66, 100). The students then participated in "choice time," defined by the teacher as a "behavioral support that I have in my classroom for making good choices," followed by lunch and recess (Tr. p. 66).

According to the teacher of the recommended class, after recess the class engaged in a read aloud in which the students read a book together, then transitioned to a 50-minute math period that included two different group lessons, multiple small group activities tailored to address the various functional levels of the students, and math centers, featuring more "exploratory activities" that were facilitated by the paraprofessional (Tr. pp. 66-67). She characterized the math groups as "very fluid from day to day" based on the students' varying mastery of skills (Tr. p. 101). She reported that the afternoons consisted of a "cluster," focusing on social studies, science, art, gym or music, followed by a snack, an additional block of choice time, and dismissal (Tr. p. 67).

The teacher of the recommended class asserted that her "goal for teaching is to ... figure out what each child needs and do whatever [she] can to make sure that learning happens at their pace ... that they're comfortable in school, that school is an enjoyable experience," and added that "with such a small number of children, I'm able to really individualize everything" (Tr. pp. 67-68). She also confirmed that she made herself available to the students during lunch periods, and offered a 37-minute "intervention" in the mornings before the start of the school day for students in need of additional help (Tr. p. 68).

It is also noteworthy that the hearing record demonstrates that several recommendations and concerns identified by the student's pediatric psychologist in his December 1, 2008 psychoeducational update, which was created after, and therefore not reviewed at the February 2008 CSE meeting, were consistent with the district's recommended program (see Parent Ex. G). The pediatric psychologist recommended "continued remediation to remediate her math, higher level reading comprehension and writing skills" (id. at p. 6). In the February 2008 IEP, the CSE addressed the student's needs for remediation in reading comprehension, adducing one annual goal

and four short-term objectives; and in math, setting forth three annual goals and nine short-term objectives (Dist. Ex. 15 at pp. 10-12).

The December 1, 2008 psychoeducational update noted the student's need for assistance with inferencing (Parent Ex. G at p. 7). The February 2008 IEP addressed her need through a short-term objective focusing on increasing the student's ability to answer "why" and "how" questions (Dist. Ex. 15 at p. 10). Additionally, the February 2008 IEP addressed the student's writing deficits with regard to graphomotor skills (letter formation, sizing and placement) by setting one annual goal and two short-term objectives that were also noted in the pediatric psychologist's psychoeducational update (compare Dist. Ex. 15 at p. 8, with Parent Ex. G at p. 7).

The pediatric psychologist identified the student's need to "be appropriately pushed and challenged" and, "with appropriate supports, [to] be pushed to do more and helped to develop stronger and more adaptive coping skills" (Parent Ex. G at pp. 6-7). The February 2008 CSE recommended that the student receive individual counseling services once per week, and developed one annual goal and five short-term objectives specifically focused on increasing the student's independent coping skills (Dist. Ex. 15 at pp. 4, 9, 13, 15; see Dist. Exs. 16; 17; 18). The recommended 12:1+1 program also afforded the student exposure to typically developing peers through lunch, recess, and participation in general school activities, thereby accessing additional challenges for the student (Tr. p. 69; Dist. Ex. 15 at p. 15; see Parent Ex. G at p. 6).

The pediatric psychologist also suggested "specific classroom accommodations to improve her ability to learn in the classroom," including seating her away from auditory and visual stimuli in order to minimize distraction, encouraging her participation in class discussions and group activities, and providing her with "any curriculum modification and aids ... that help her organize herself and work up to her potential," opining that she "would benefit from an understanding and supportive environment in which adults around her provide structure and assistance when needed" (Parent Ex. G at p. 7). The February 2008 CSE also addressed these needs; incorporating the visual cues, verbal prompts, and redirection suggested by the pediatric psychologist into the IEP in order to assist the student with "planning/programming and executive skills" (compare Dist. Ex. 15 at p. 3, with Parent Ex. G at p. 7).

A student's recommended program must 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 Newington, 546 F.3d at 114; Gagliardo, 489 F.3d at 108; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that environment education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent

appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

In the case at bar, the hearing record evidences that the district's recommended program would have provided the student a special education program and related services in the LRE. The student would have been afforded opportunities to interact with typically developing peers during lunch, recess, and in general school activities (Tr. p. 69; Dist. Ex. 15 at p. 15).

In summary, I do not concur with the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2008-09 school year because the evidence contained in the hearing record demonstrates that the special education program and services recommended by the district for the 2008-09 school year would have conferred educational benefits on the student. As discussed above, the hearing record reflects that the CSE considered the evaluations and reports provided from the Aaron School, the information from the student's then current teacher at the Aaron School, the parents, and the January 15, 2008 classroom observation and developed a 12:1+1 special class program with related services that would have provided her with the structured instructional setting necessary to address the student's language deficits, attentional difficulties, and social/emotional needs (see Dist. Ex. 15 at pp. 1, 3, 13, 15; see also Tr. p. 69; Parent Ex. B at pp. 2-3).

Consequently, a careful review of the evidence contained in the hearing record supports a conclusion that the district's recommended special education program and related services in the February 2008 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefits in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y.] citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386 at 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F3d at 1120; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-045; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021).

Having determined that the district offered the student a FAPE in the LRE for the 2008-09 school year, I need not reach the issue of whether the Aaron School was appropriate for the 2008-09 school year, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with

a Disability, Appeal No. 08-157; Application of the Dep't of Educ., Appeal No. 08-045; Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS HEREBY ORDERED** that the portion of the impartial hearing officer's decision dated July 20, 2009 which determined that the district did not offer the student a FAPE for the 2008-09 school year is hereby annulled.

**Dated: Albany, New York  
November 30, 2009**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**