



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-108

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, Karyn R. Thompson, Esq., of counsel

Susan Luger Assocs., Inc., Special Education Advocates, attorneys for respondents, Lawrence D. Weinberg, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Rebecca School for the 2008-09 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending the Rebecca School for the 2008-09 school year, having been unilaterally placed there by his parents (Tr. pp. 181-82, 319). The student has been found eligible to receive special education programs and services as a student with autism (Parent Ex. C). According to the student's physician, the student had been offered diagnoses of autism and an attention deficit hyperactivity disorder (ADHD) (Dist. Ex. 11 at p. 1). In June 2007, the student reportedly had also been offered a diagnosis of a pervasive developmental disorder – not otherwise specified (PDD-NOS) (*id.*). The student demonstrates delays in his attention and in his receptive, expressive and pragmatic language skills, as well as in his oral motor and fine and gross motor skills (Tr. pp. 147-48; Dist. Ex. 3). Additionally, the student exhibits difficulties with sensory integration, including delays in auditory, tactile, and proprioceptive processing (*id.*). The Rebecca School is a private school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]; *see* Tr. pp. 58-60).

On December 12, 2007, a staff member from the student's preschool completed an unsigned educational update of the student (Dist. Ex. 9). The report reflected that the student had been attending the preschool since July 2, 2007 (id. at p. 1). The report further reflected that the student demonstrated delays in speech-language, fine motor skills, self-help skills, and sensory processing skills (id.). The report indicated that the student was able to recognize colors, shapes, and numbers (id.). The report also indicated that the student was able to greet people and speak in a one word sentence when requested and that the student was able to make eye contact (id.). Regarding "[a]reas of improvement," the report further revealed that the student did not "hit his head against the wall" (id.). The report indicated that the student was able to hold a crayon but did not present with a tripod grasp throughout activities (id. at p. 2). The report also indicated that the student was able to draw some shapes, letters, and numbers (id.). The report further indicated that the student was able to wash and dry his hands independently, place his belongings in the closet, use a fork and spoon, and drink through a straw and out of a water bottle (id.). The report reflected that the student's current goals included improvement in his vocabulary, following commands, naming objects, social conversation, sharing toys, working independently, writing numbers and letters, and in his understanding prepositions (id. at pp. 1-2).

On January 10, 2008, the student's physician completed a physical examination form regarding the student (Dist. Ex. 11). The physician reported that the student had been offered diagnoses of autism and an ADHD (id. at p. 1). The physician further reported that the student had exhibited a "speech delay" from the time he was two years old (id.). The physician indicated that the student demonstrated difficulty with maintaining attention and displaying stable eye contact, in addition to exhibiting echolalia (id.). The physician also reported that in June 2007, the student had been offered a diagnosis of a PDD-NOS (id. at p. 1). The physician recommended regular physical education and speech-language therapy and occupational therapy (OT) on an as needed basis (id. at p. 2).

On February 12, 2008, a district social worker completed a "Social Update" of the student that included a parent interview (Dist. Ex. 4). The social worker reported that the parents indicated that their son had made "some progress" in the "entire domain where he has been demonstrating delays" and would benefit from the continuation of "all services" (id. at p. 1). The social worker further reported that the parents believed that the student had "benefited a great deal" from special education services and that they were satisfied with the services their son was receiving (id.). The social worker indicated that the parents would like their son to receive the special education services that could best address his needs (id.). The social worker also indicated that the student displayed difficulties interacting and taking turns; however, with prompts the student shared and played with children his age (id. at p. 2). The student reportedly was in good health (id.). According to the social update, the social worker and the parents reviewed the parents' "due process rights" (id.).

On February 13, 2008, a district school psychologist conducted an interview of the student's preschool teacher and a classroom observation as part of a psychoeducational reevaluation of the student (Dist. Ex. 10). The school psychologist indicated in the resultant report that the preschool teacher reported that the student had made progress in the areas of working with peers, self-help skills, and fine motor skills, and that he displayed less tantrum behavior (id. at p. 1). The school psychologist also indicated that the preschool teacher reported that "positive changes" regarding the student included that he sat straight and engaged in tasks (id.). The school psychologist further indicated that the preschool teacher reported that "negative changes" regarding the student included that from "time to time [the student would] return to scratch himself,

bang on wall" (id. at p. 2). The school psychologist further reported that the student demonstrated enthusiasm and "like[d] [a] sense of independence" (id.). The school psychologist indicated that the preschool teacher reported that the student needed a "small group 12:1:1" with a behavioral management paraprofessional and related services of speech-language therapy and OT (id.). The school psychologist indicated that the preschool teacher reported that the student "need[ed] help" with reading readiness skills (id. at p. 3). The school psychologist also indicated that according to the preschool teacher, the student demonstrated age appropriate daily living skills, gross motor skills, and social/emotional skills with adults; and below average language/communication skills and fine motor skills (id.). The school psychologist indicated that the preschool teacher reported that the student "pushe[d]" and "turn[ed] on himself" (id.). The school psychologist further reported that according to the preschool teacher, the student exhibited "fair" attention and concentration skills (id. at p. 4). The school psychologist noted that according to the preschool teacher, the student sometimes displayed adequate attention and at other times he would not be able to maintain his attention, especially if there was noise (id.). The preschool teacher interview report indicated that the student attempted to engage socially with his peers, but did not know how (id.). The report also indicated that the student pushed other students in an attempt to initiate social contact (id.). The preschool teacher interview report noted that both the student's social skills and the amount of his food intake relative to the student being "underweight" were areas of concern (id.).

The school psychologist further reported on the "Observation Checklist" also dated February 13, 2008 that during the classroom observation period, the student easily engaged with other students including displaying cooperative play, taking turns, and sharing (Dist. Ex. 10 at p. 6). The school psychologist indicated that the student was easily distracted by both visual and auditory stimuli and needed visual cues (id.). The school psychologist also indicated that the student responded to questions and asked simple questions and that the student had the ability to work independently if interested in the task (id. at pp. 6-7). The school psychologist further reported that the student's transitional skills were rigid and that he "like[d] consistency" (id. at p. 7). The school psychologist opined that "today [wa]s an 'on' day – can become withdrawn and say 'no' and refuse..." (id.). The school psychologist completed an additional checklist regarding the student on which she indicated that the student demonstrated "[f]irmly established" skills in dressing, feeding, speech intelligibility, use of scissors and identification of colors, shapes, similarities and differences (id. at p. 8). Additionally, she also reported that the student exhibited "firmly established" skills in use of objects, repeating back four-word sentences, repeating back three numerals, and in his ability to maintain his attention for at least five minutes (id.). The school psychologist also indicated that the student demonstrated "[e]merging" skills in toilet training, cooperative play with peers, sharing teacher attention with peers and adults, learning and following a routine, coping skills regarding unexpected changes in routine, expression of needs, his pincer grasp, drawing a straight line, and copying of simple design (id.). Furthermore, according to the school psychologist the student exhibited "[e]merging" skills in recognizing his name and letters, identification of directions and position, counting objects to 20, recognizing numerals one to ten, 1:1 correspondence, sequencing of three events, and visually tracking from left to right (id.). The school psychologist reported that the student had "[n]ot exhibited" skills in knowing his birthday and telephone number, identification of quantities, and telling a story with details and a sequence of events that made sense (id.).

The district school psychologist reported that during her February 13, 2008 observation of the student in his preschool 12:1+1 special class there were nine children and three adults in the classroom (Dist. Ex. 5 at p. 1). According to the observation report, the student sat in a chair while

the teacher assistant read from a book along with another student (id.). The student appeared to enjoy the story and as directed, returned the book when the story was finished and selected another book (id.). According to the observation report, the student's 1:1 behavioral management paraprofessional then looked through a book with the student and he appeared to enjoy the interaction (id.). The observation report also reflected that the student hit another student when the students were asked to clean up (id.). According to the observation report, they then sat on the rug for "circle" time (id.). The observation report reflected that the teacher reviewed the numbers and the calendar as the students applauded one another for jumping in the circle and responding to the teacher (id.). The student participated in the activity and appeared "enthusiastic and happy" (id.). According to the observation report, the student along with his teacher and classmates, were singing songs and dancing and with two prompts, the student indicated on the attendance chart that he was present (id.). The observation report reflected that the student waited his turn to return to his seat for snack time, but then "required some encouragement to eat" the snack provided, instead retrieving a toy and playing with it (id. at p. 2). According to the observation report, the teacher provided the student with a different snack and encouraged him to eat (id.).

On February 14, 2008, the student's preschool speech-language pathologist completed a speech-language progress report (Dist. Ex. 7). The speech-language pathologist reported that the student demonstrated severe receptive and expressive language deficits, "use[d] language for a narrow range of function[s]," and had difficulty taking turns with his peers (id. at p. 1). The speech-language pathologist further reported that the student functioned within the "mild autistic range" (id.). The speech-language pathologist indicated that the student had demonstrated progress in labeling common objects and actions when provided with extensive structure but that he "require[d] extensive verbal modeling to appropriately request desired objects" and that his "ability to follow one [to] two step commands was often compromised by poor attention and compliance issues" (id.). The speech-language pathologist continued to recommend two 30-minute individual speech-language therapy sessions weekly (id.).

In February and March 2008, the district school psychologist who had conducted the preschool teacher interview and classroom observation conducted a psychoeducational reevaluation of the student (Dist. Ex. 3; see Dist. Exs. 5; 10). The school psychologist reported that the student was being reevaluated to determine his eligibility for the continuation of special education services as he entered kindergarten and that at that time he attended a 12:1+1 preschool special class where he received speech-language therapy and OT (Dist. Ex. 3 at p. 1). The school psychologist indicated that the parents reported that during a June 2007 evaluation, the student exhibited hyperactivity and impulsivity as well as a speech delay (id.). The school psychologist reported that during the psychologist's assessment of the student, the student's 1:1 behavioral management paraprofessional was present to facilitate the student's cooperation (id. at p. 2). The school psychologist also indicated that the student "established some eye contact but did not maintain it" and that the student appeared to be "very small and underweight for his age" (id.). The school psychologist reported that the student exhibited impulsive behavior, evidenced by his playing with other objects in the room rather than engaging in the testing (id.). The school psychologist further reported that the student also demonstrated difficulty maintaining his attention as indicated by his ability to only engage in a task for a limited amount of time (id.). The school psychologist reported that the student's receptive and expressive language skills were delayed as he exhibited difficulty expressing himself and following directions (id.). The school psychologist also noted that the student exhibited fine motor difficulties as indicated by his awkward pencil grasp (id.). The school psychologist reported that the student "avoided all challenges as he easily became frustrated when he was unable to do something" (id.).

The school psychologist further reported that formal testing was discontinued due to the student's lack of cooperation and that a Wechsler Preschool and Primary Scale of Intelligence - Third Edition (WPPSI – III) full scale IQ score was unattainable (Dist. Ex. 3 at p. 2). The school psychologist opined that in performance related tasks, the student demonstrated that he was "very concrete in his thinking" and that he did not have the ability to follow directions and required simplified questions (id. at p. 3). The school psychologist also indicated that in verbal related tasks, the student "clearly struggle[d]" and "often use[d] one word phrases and hand gestures to express himself" (id.). The school psychologist reported that the student could not answer rudimentary questions and "perseverated with his answers as he carried over the same response from one question to the next" (id.). Additionally, the school psychologist indicated that the student "demonstrated great hardships in being able to define meanings of words such as shoe and telephone as he rather pointed to his foot and ear respectively" (id.).

Administration of the Childhood Autism Rating Scale (CARS) yielded a score of 46.5, which the school psychologist determined was in the severely autistic range (Dist. Ex. 3 at p. 3). The psychoeducational evaluation report indicated that the CARS ratings were based on the student's teacher's responses and the evaluator's observations in the areas of social interaction, behavior, and communication (id.). Administration of the Vineland-II Adaptive Behavior Scales (Vineland-II) indicated that in the language and communication domain, the student was able to name at least ten objects and three major body parts, use first names of siblings, and state his own name (id.). The student was able to recite at least 50 words, recognize at least 10 letters of the alphabet, and follow instructions in an "if-then" format (id.). In the daily living skills domain, the student was learning to clean up his play area and "sip[]" from a "sippy" cup (id. at pp. 3-4). In the socialization domain, the student demonstrated an interest in playing with children that were younger, sharing toys, playing cooperatively, and "cope[d] with frustration" (id. at p. 4). In the fine and gross motor domains, the student was able to kick a ball, walk down stairs, jump with both feet, and throw a ball; however, he displayed difficulty with catching a ball, walking up the stairs with alternating feet, using scissors, stacking blocks, and making recognizable letters or numbers (id.). The school psychologist indicated, that as reported by the student's teacher and 1:1 behavioral management paraprofessional, the student had made "a lot of progress over the year" including improvement in the areas of fine motor, self-help skills, and age appropriate gross motor skills, and that he "tantrum[ed] less, and [was] more vocal and [was] working with peers" (id.). According to the school psychologist, the student's teacher and 1:1 behavioral management paraprofessional described the student as an "adorable and enthusiastic child" who enjoyed being praised for positive behavior and who continued to demonstrate delays in language, fine motor skills, attention, and communication (id.). The school psychologist reported that according to the teacher and the 1:1 behavioral management paraprofessional, the student was "echolalic and imitate[d] everything he hear[d]" (id.). The school psychologist indicated that the teacher further reported that the student "d[id] not know how" to engage in activities and therefore became "physical and pushe[d] the other children in an attempt to initiate interaction" (id.). The school psychologist reported that the student required a "structured environment with set rules and routines to aid him in staying on task" (id.).

On March 28, 2008, the student's preschool occupational therapist completed an OT progress report (Dist. Ex. 8). The occupational therapist reported that the student maintained adequate eye contact with verbal cues, appeared "happy," and greeted others (id. at p. 1). The occupational therapist also reported that the student demonstrated impulsivity and distractibility and at times had difficulty transitioning (id.). Regarding the student's gross motor skills, the student was able to jump, broad jump with feet off the ground, throw a ball underhanded, and catch

a ball with 50 percent accuracy with verbal prompts (id.). The occupational therapist indicated that the student required maximum cues to complete a two-step gross motor task (id.). Regarding the student's fine motor and visual perceptual skills, the student displayed a pincer grasp while stringing beads using bilateral coordination (id.). The occupational therapist also indicated that the student colored beyond the outline of pictures and imitated circles and vertical and horizontal lines (id.). The occupational therapist reported that the student required assistance while using scissors for initial positioning of the scissors and to stabilize the paper and that the student was able to complete a ten piece insert puzzle (id.). The occupational therapist indicated that the student had made progress with his play skills as indicated by his enjoyment of reciprocal play including sharing and turn taking (id.). The occupational therapist also indicated that the student independently "dons/doffs his socks and jacket," required minimal assistance to "don" his shoes, and was able to independently zip, after receiving assistance to hook the zipper (id.). The occupational therapist reported that the student was able to wash and dry his hands with verbal prompts and that the student had the ability to prepare for lunch time, including opening small packages and a juice box (id. at pp. 1-2). The occupational therapist indicated that the student displayed a pronated grasp when using eating utensils (id. at p. 2). The occupational therapist recommended the student continue to receive two 30-minute individual OT sessions weekly to address fine and gross motor skills, visual-perceptual skills, sensory processing, and activities of daily living (id.).

Also on March 28, 2008, the student's preschool speech-language pathologist completed a speech-language progress report of the student (Dist. Ex. 6). The speech-language pathologist reported that the student attended a preschool program five days per week with one teacher, one teacher assistant, and 12 other students and that he received two 30-minute individual speech-language therapy sessions weekly (id. at p. 1). The speech-language pathologist reported that the student was able to transition from the classroom to the therapy room with minimal verbal and visual prompting (id.). The speech-language pathologist further reported that the student "ha[d] a strong preference for repetitive, sensory games and demonstrate[d] a recent emerging ability to engage in pretend play games" (id.). The speech-language pathologist indicated that the student continued to demonstrate significant delays in receptive and expressive language skills and that the student's receptive language skills included following one step directions with verbal prompts and comprehension of simple "wh" questions with verbal prompts (id.). The speech-language pathologist reported that the student continued to require "extensive visual modeling" to identify spatial concepts during play activities (id.). She further reported that the student had made progress in expressing "his needs and wants;" however, the student continued to need verbal prompting to express all of his needs and demonstrated difficulty communicating his physical ailments (id.). The speech-language pathologist also indicated that the "structure and function of [the student's] articulators [we]re intact and judged to be adequate for speech purposes" and that the student demonstrated fair intelligibility of speech; however, he continued to demonstrate below age appropriate skills in this area (id.).

The speech-language pathologist further reported that the student's speech-language therapy addressed language development and assisted the student "to use language for a variety of functions" as well as increase[ed] the student's ability to engage in turn taking behavior with his classmates (Dist. Ex. 6 at pp. 1-2). The speech-language pathologist indicated that the student's turn taking skills were emerging during play times and that he also demonstrated an emerging ability to interact with other students and greeted them independently (id. at p. 2). The speech-language pathologist also reported that the student had made progress in maintaining eye contact and joint attention but indicated that the student continued to demonstrate moderate to severe

delays in speech and language development compared to his chronological peers (id.). The speech-language pathologist recommended the student continue to receive two 30-minute individual speech-language therapy sessions weekly to address communication skills including following two to three step instructions, conveying his needs, increasing his ability to respond to interrogatives, expanding his length of utterance, engaging in "successful interactions with his peers" as well as developing an increased understanding of basic concepts (id.).

The Committee on Special Education (CSE) convened on April 16, 2008 for the student's "turning 5 review" and to develop his individualized education program (IEP) for the 2008-09 school year (Parent Ex. C). Attendees included the parents; the school psychologist who had conducted the preschool teacher interview, classroom observation, and psychoeducational evaluation and who also served as the district representative; a school social worker; and the student's preschool special education teacher who participated by telephone (id. at p. 2). The hearing record reflects that, on the same day, the parents signed a "declination letter" which indicated that they declined the participation of an additional parent member at the CSE meeting (Dist. Ex.14). The CSE determined that the student was eligible for special education services as a student with autism (Parent Ex. C at p. 1). The CSE recommended a 12-month 6:1+1 special class in a specialized school with a full-time 1:1 behavioral management paraprofessional, as well as related services of OT three times per week individually for 30 minutes and speech-language therapy twice per week individually for 30 minutes (id. at pp. 2, 12).

The resultant IEP dated April 16, 2008, indicated that the student's skills in decoding, reading comprehension, listening comprehension, writing, computation, and problem solving were at the pre-kindergarten to kindergarten level and provided the student with annual goals and short-term objectives in the areas of fine motor skills, visual-perceptual, attention, sensory integration, and speech-language (Parent Ex. C at pp. 3, 6-9). A behavioral intervention plan (BIP) was attached to the IEP (id. at p. 13). The BIP indicated that the student had difficulty with verbal expression and the initiation of social interactions with his peers (id.). The BIP reflected that the student tended to push other students due to a lack of ability to verbally communicate his needs and wants (id.). The BIP also noted that the student imitated the behavior of other students in the classroom, which interfered with his learning (id.). According to the BIP, the student exhibited low frustration tolerance, impulsivity, and a high activity level (id.). The behavioral goals for the student as indicated on the BIP were for the student to improve his verbal expression in order to decrease his need to push others (id.). Additionally, behavioral goals included in the BIP reflected the student's need to increase his ability to cope with frustration by "us[ing] his words" and asking for help when needed (id.). The BIP reflected the implementation of multiple strategies to address the student's behavior including positive reinforcement of appropriate behavior, use of breaks, token system, and modeling appropriate behavior (id.). According to the BIP, supports for the student regarding his behavior include a behavioral management paraprofessional, a small classroom setting, and related services (id.).

The April 2008 IEP indicated that the CSE determined that a general education program with supplemental aids and services would not meet the student's needs (Parent Ex. C at p. 11). Additionally, the IEP indicated that the CSE determined that a day treatment program was too restrictive for the student (id.). The student's mother stated that the April 2008 IEP accurately reflected her thoughts and opinions; however, she further testified that she believed that the IEP did not address the student's sensory integrative dysfunction (Tr. p. 257).

By final notice of recommendation (FNR) dated April 16, 2008, the district notified the parents that as a result of the CSE meeting held on that same day, the student was recommended

to attend a special class and receive the related services of speech-language therapy, OT, and a behavioral management paraprofessional at a particular identified district site/location (School A) (Parent Ex. U). The FNR also stated that if the parents wished to reject the IEP or arrange another CSE meeting, they could write to the contact person listed on the FNR (id.). The FNR contained in the hearing record reflects a handwritten notation that the "parent [was] accepting the related services, but rejected the site/school" (id.). The FNR contained in the hearing record was signed by one of the student's parents (id.).

By a second FNR dated June 11, 2008, the district recommended that the student attend a special class in specialized school (6:1+1) and receive the related services of speech-language therapy, OT, and a behavioral management paraprofessional at a different specified district site/location (School B) for the 2008-09 school year (Dist. Ex. 2; Parent Ex. V). Like the first FNR, the second FNR also stated that if the parents wished to reject the IEP or arrange another CSE meeting, they could write to the contact person listed on the FNR (id.).

By letter dated June 24, 2008, the student's father notified the district that on June 20, 2008, he had telephoned the school identified in the June 11, 2008 FNR and requested a site visit in order to view the recommended 6:1+1 special education class; however, he alleged that he was informed by school staff "that there was no such program" at that school (Parent Ex. D). As such, the student's father indicated in the letter that the parents were rejecting the school ("placement") offered in the June 11, 2008 FNR (id.).

On July 23, 2008, the parents visited the school identified in the June 11, 2008 FNR and rejected by them in their June 24, 2008 letter, and the school's unit coordinator gave them a tour, including the wing of the building where the recommended and specified 6:1+1 special education class was located (Tr. pp. 297-98, 260-61, 274). The parents also spoke with the 6:1+1 classroom teacher as part of the tour (Tr. p. 299).

By letter dated August 8, 2008, the Rebecca School program director informed the parents that the school was offering the student a placement at the Rebecca School for the 2008-09 school year (Parent Ex. G). The letter indicated that a contract for the 2008-09 school year, covering the 10-month time period from September 2008 through June 2009, was enclosed (id.). The letter further indicated that in February 2009, the parents would be able to choose a contract that would cover the summer months of July and August 2009 (id.). The letter requested that the parents sign and return the contract with a non-refundable deposit of \$10,000 by August 22, 2008 (id.).

By letter dated August 20, 2008, the student's father notified the district that the student had not been offered a placement for the 2008-09 school year, and that if a placement was not offered prior to the start of the school year, he would "have no choice" but to place the student at the Rebecca School in September 2008 (Parent Ex. F). The student's father also requested that the district "arrange for busing" (id.).

On December 12, 2008, a "Multidisciplinary Report of Progress" was completed by the student's providers at the Rebecca School (Parent Ex. H). The providers reported that the student attended the Rebecca School in an 8:1+4 classroom with seven other children who ranged in age from five to six years old and that the student received counseling, OT, physical therapy (PT), speech-language therapy, art therapy, music therapy, drama, and adapted physical education (id. at p. 1). The providers indicated that the student was "drawn towards people, peers, cars, and trains, and enjoy[ed] running, jumping on the trampoline, crashing in the roof, and rough-and-tumble play" (id.). The providers also indicated that in calm environments, the student was more

likely to maintain his attention rather than in "energetic environments" (id.). The providers reported that the student transitioned easily within the classroom and that he also transitioned easily to other areas of the school with "adequate time to process" (id.). The providers also reported that the student had made progress in his ability to "regulate" his attention and behavior and that the application of pressure to his arms and legs and talking softly helped the student to "co-regulate" (id.). The providers indicated that one of the student's goals was to support him in maintaining his attention across the full range of emotions and settings (id.). According to the progress report the student demonstrated strength in his ability to engage in relationships and appreciate the emotions of himself and others (id.). The providers reported that the student had made progress in his ability to communicate his emotions, but that the student spoke in "broken sentences" that were difficult to understand (id.). The providers indicated that the student initiated communication in many situations, however, "when he feels the need is urgent, [the student] may become overwhelmed easily and become unable to communicate" (id. at p. 2). The providers also indicated that the student engaged in play sequences; however, he demonstrated difficulty with communicating in a continuous flow and that when there were several activities to choose from, the student often "jump[ed]" between activities (id. at pp. 1, 2).

The student's occupational therapist at the Rebecca School reported that the student received two individual OT sessions weekly and two OT sessions in a group of four weekly (Parent Ex. H at p. 2). The occupational therapist further reported that the student was "able to open and close circles of communication to express his needs" and enjoyed playing with other children (id.). The occupational therapist indicated that the student "initiate[d] play often however, he [wa]s not always successful because he bec[ame] very excited and other children shy[ed] away" (id.). The occupational therapist reported that the goals of the student's individual OT sessions addressed the student's sensory, visual, motor and fine motor needs to assist the student to function more appropriately and independently in the classroom (id.). The occupational therapist reported that the student became "disregulated" when unable to express himself and during times of limit setting and transition and that the occupational therapist used deep pressure, deep breaths and joint compressions to assist the student to "calm down" (id.).

The student's physical therapist reported that the student received two 30-minute individual PT sessions weekly (Parent Ex. H at p. 3). The physical therapist reported that the student was able to "formulate a gross motor plan to negotiate through an obstacle course and complete simple problems solving activities when motivated" (id.). The physical therapist also reported that the student was able to catch and throw a ball with bilateral upper extremity and verbal prompts for preparation and "maintained engagement" (id.). She indicated that the student's PT goals were in the areas of strength, endurance, coordination, and motor planning/sequencing skills to increase his independence and safety within the school and at home (id. at p. 4).

The student's speech-language pathologist reported that the student received three individual speech-language therapy sessions weekly (Parent Ex. H at p. 3). The speech-language pathologist further reported that the primary focus of therapy continued to be in engagement/pragmatic, receptive and expressive language, and feeding skills (id.). Regarding engagement/pragmatic language skills, the student had made slow but steady progress; however, the student exhibited a limited repertoire of play schemes, a limited ability to perform shared problem solving, and difficulty maintaining interactions and circles of communication (id.). Regarding receptive language and auditory processing, the student demonstrated difficulty with responding to questions during therapy due to his limited attention (id.). Regarding expressive language, the student demonstrated moderate progress and was able to say the names of peers and

staff, and to label both items and actions during play (id. at p. 5). The speech-language pathologist also reported that the student was able to ask questions for social purposes; however, he continued to demonstrate difficulty with maintaining communication with peers and adults (Parent Ex. H at p. 5). The speech-language pathologist indicated that the student had made progress in his speech intelligibility when given verbal support to slow down his rate of speech (id.). She also indicated that the student was a "picky eater," as evidenced by his reluctance to eat new foods (id. at p. 3).

The student's counselor reported that the student received one individual counseling session weekly with the main intervention of the developmental individual difference relationship (DIR) floortime model (Parent Ex. H at p. 5).¹ The counselor further reported the student exhibited "solid" skills when calm; however, when "a demand [wa]s placed on him, he appear[ed] frustrated and distressed" (Parent Ex. H at p. 6). The counselor indicated that the student's counseling goals were "to increase frustration tolerance and impulse control, and remain regulated, engaged and communicative in situations that place demands on him" (id. at p. 5).

The student's music therapist reported that she implemented a child-centered approach to the student's music therapy and that he received one individual music therapy session weekly (Parent Ex. H at p. 6). The music therapist reported that the student had "many musical ideas, but rapidly jump[ed] from one idea to the next" (id.). The student's drama teacher reported that dramatic play was used along with the DIR model to assist the student with his feelings, social interaction, and development, and that the student's class participated in one half hour of dramatic play weekly (id. at pp. 6-7).

The student's classroom teacher reported that the student's goals were in the areas of engagement, imitation, receptive language and expressive language (Parent Ex. H at pp. 7-8). The teacher further reported that the student's reading activities facilitated the development of phonemic awareness skills, concepts in print, decoding skills, and vocabulary (id. at p. 8). The teacher indicated that the student engaged in a multisensory/kinesthetic approach to learn mathematics and that the student engaged in tasks to develop his number sense and patterns (id.). The multidisciplinary providers reported that the student had made progress; however, he continued to demonstrate difficulty in regulation, shared attention and engagement, which affected his sensory needs (id. at p. 9). The evaluators attached goals in the areas of DIR/floortime, PT, speech-language, counseling, and academics (id. at pp. 9-11).

On February 11, 2009, a district special education teacher conducted an observation of the student at the Rebecca School during his sensory diet and his art classes (Parent Ex. I). The evaluator reported that there were eight students and four adults in the classroom (id. at p. 1). The observation report reflected that the teacher assistant brushed the student's arms, legs, and back as a "calming sensation" (id.). According to the observation report, the student brought a small game to school that he continually asked to retrieve rather than preparing for art class (id.). The observation report reflected that a pressure vest was put on the student at that time (id.). According to the observation report, the student went to art class and worked with clay and then moved to another activity (id. at p. 2). The teacher assistant and the student then worked on a "fishing activity" with another student (id.). When the student was reminded that there were ten seconds

¹ The student's Rebecca School classroom teacher testified that in "floortime," the staff follows the student's lead and then "gently" brings the student back to a particular topic (Tr. p. 202). She also testified that during floortime, nonverbal methods such as "really high" affect, pointing, gestures, and funny faces are used because "the less language we use with [the student] during those [f]loortime sessions, the more language that comes from [the student]" (Tr. p. 203).

until the end art class, the student held up his fingers and correctly counted backwards from ten to one (id.). The classroom teacher reported to the evaluator that the student had "progressed in the length of time he attempt[ed] tasks, and interact[ed] with peers. Also the amount of time he tantrum[ed] ha[d] shortened" (id.). The district special education teacher who observed the student also reported that the student was "very verbal" using "words to express his needs, wants and emotions" (id.).

By due process complaint notice dated March 27, 2009, the parents, through an educational advocate, requested an impartial hearing and notified the district that they were challenging the April 16, 2008 IEP, on both procedural and substantive grounds (IHO Ex. I).² The parents asserted that: (1) they were not provided with a "Parent's Rights Book" or instructed in their rights under the Individuals with Disabilities Education Act (IDEA); (2) the goals and objectives contained in the April 2008 IEP did not reflect all of the student's educational, social, and emotional needs; (3) the goals and objectives were not developed at the CSE meeting, denying the parents input into the development of the IEP; (4) the parents were not provided with a copy of the IEP at the CSE meeting; (5) the CSE failed to recommend an appropriate placement for the student in a timely fashion; specifically, the teaching methodology at the proposed placement, the size of the school building, and the behavior management plan in the proposed classroom were inappropriate for the student; and (6) the CSE did not recommend a specific placement for the student at the CSE meeting, denying the parents meaningful participation in the placement process (id. at p. 2). As a form of relief, the parents proposed that the student required a 12-month full time special education program designed for "high-functioning students," and that the parents were entitled to: (1) direct tuition payments for the Rebecca School from July 2008 through June 30, 2009; (2) reimbursement for monies paid to the Rebecca School for the 2008-09 school year; and (3) costs and fees (id. at p. 3).

The district answered the parents' due process complaint notice by response dated April 3, 2009 (Parent Ex. B). The district denied all of the parents' allegations, except to admit that: (1) the CSE met on April 16, 2008 to review the student's eligibility for special education services; (2) the CSE classified the student as a student with autism; and (3) the CSE recommended that the student be placed in a 6:1+1 special class in a District 75 specialized school (Parent Ex. B at pp. 1, 2).³ The district also noted that the CSE relied upon a psychoeducational evaluation, classroom observations, related service progress reports/evaluations, a physical examination, and a "Child Outcomes Summary Form" in "making its decision" (id. at pp. 2-3). The district also noted that it considered a general education setting with special education teacher support services (SETSS), but rejected this option because it was "not supportive enough," and that it considered a State approved nonpublic day school, but rejected this option as being "too restrictive" (id. at p. 3). Finally, the district noted that an FNR was issued to the parents offering a placement at a specific district school (School C), which the hearing record reflects was located within School B (id.).

² Although the parents' due process complaint notice indicated that they were challenging the "4/6/08" IEP (IHO Ex. I at p. 2), this appears to be a clerical error as it is clear from the hearing record that the IEP at issue was developed on April 16, 2008 (Dist. Ex. 1).

³ Although the district's response indicated that the student's classification was changed to autism "based upon the following documentation," it did not indicate what specific documentation was relied upon (Parent Ex. B at p. 1).

The hearing record reflects that on or about June 5, 2009, the impartial hearing officer denied the parents' request to amend their due process complaint notice, stating that it would be reconsidered, if necessary, at the first impartial hearing date scheduled for June 9, 2009 (Tr. p. 5).

The impartial hearing convened on June 9, 2009, and concluded on August 7, 2009, after four days of testimony. By "Interim Order on Motion to Dismiss" dated July 3, 2009, the impartial hearing officer again denied the parents' motion to amend their due process complaint notice finding that the parents' original due process complaint notice dated March 27, 2009 was sufficient (IHO interim order at pp. 3, 5). The impartial hearing officer also denied the district's motion to dismiss the parents' due process complaint notice as failing to state a claim (*id.* at p. 5). The impartial hearing officer's interim order also reflected that the district moved to dismiss the parents' claims for reimbursement and direct funding at the Rebecca School alleging that the Rebecca School is a for profit school and therefore, tuition cannot be awarded for the student's attendance there, and that the parents were not entitled to direct funding (*id.* at pp. 5-9). The impartial hearing officer denied both of these motions (*id.* at pp. 7, 9).

The impartial hearing officer rendered a decision on August 18, 2009, after the conclusion of the impartial hearing concerning the merits of the parents' case. The impartial hearing officer determined that the district failed to offer the student a free appropriate public education (FAPE)⁴ for the 2008-09 school year on procedural grounds; specifically, that the district's June 11, 2008 FNR to the parents identifying the site location of the student's 6:1+1 classroom was defective (IHO Decision at p. 17). She first noted that the district offered the student a general education placement located at School A by FNR dated April 16, 2008; a placement that she concluded the district knew at the time it was offered, was not appropriate for the student (*id.* at p. 15). That conclusion is not contested by the district on appeal. The impartial hearing officer then determined that the district's second FNR, dated June 11, 2008, was "defective" because it failed to provide the parents with sufficient notice of the school the student would attend, such that the student was denied a FAPE (*id.* at pp. 15-17). The hearing record reveals and the impartial hearing officer noted that the parents acknowledge, that both School B identified on the June 11, 2008 FNR, and School C where the 6:1+1 class is situated, are located within the same building and have the same street address (*id.* at p. 15; Tr. pp. 298-99, 274-75). The impartial hearing officer concluded that because the June 11, 2008 FNR identified School B, instead of School C, as the school that the student would attend, the FNR was defective thereby failing to provide the parents with notice of where the IEP could be effectively implemented (IHO Decision at p. 16). The impartial hearing officer further found that, although the parents ultimately visited the proposed 6:1+1 class at School C prior to the start of the school year, they were never formally offered the site and therefore, were not in the position to accept or reject it (*id.* at pp. 15-16). The impartial hearing officer also noted that the identified school in the June 11, 2008 FNR (School B) was also "the second offer of a general education site that did not include general education services that could meet the needs of the [student]" (*id.*). Aside from the FNR issue, the impartial hearing officer did

⁴ 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).

not determine whether the IEP that the district and parents formulated at the April 2008 CSE meeting offered the student a FAPE.

The impartial hearing officer further determined that the Rebecca School was an appropriate placement for the student and that equitable considerations did not preclude an award of tuition reimbursement, and further, that the parents were entitled to an award of direct tuition payments (IHO Decision at pp. 17-19).

The district appeals, asserting among other things, that: (1) tuition reimbursement is not available under the IDEA because Rebecca School is a for profit entity; (2) the district offered the student a FAPE; (3) equitable considerations do not favor an award of reimbursement; and (4) direct tuition payment is not available under the IDEA. Specifically, the district argues that the impartial hearing officer erred in basing her decision that the district did not offer a FAPE on a clerical error in the June 11, 2008 FNR. The district argues that the impartial hearing officer improperly raised this issue sua sponte, as it was not raised in the parents' due process complaint notice. The district further argues that the clerical error in the FNR did not deny the student a FAPE and that the parents were able to visit the correct recommended 6:1+1 classroom. The district further argues that the issue of whether the student's sensory needs would be met at the recommended district placement was not raised in the parents' due process complaint notice. The district requests that the State Review Officer vacate the impartial hearing officer's decision in its entirety and deny the parents' requests for tuition reimbursement and direct tuition payment to the Rebecca School.⁵

The parents answer and assert, among other things, that the district failed to offer their son a FAPE because: (1) it placed him in a general education placement; (2) the FNR was defective because the school named on it did not have the recommended program; and (3) the student's April 2008 IEP contained no academic or social goals. The parents also assert that they did not waive any issues that were raised in their due process complaint notice at the impartial hearing, and that the issue of goals was addressed at the impartial hearing by both the district representative and by the parents. The parents also assert that the equities weigh in their favor.

Two purposes of the 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

⁵ The district does not appeal the impartial hearing officer's finding that the Rebecca School was an appropriate placement for the student for the 2008-09 school year.

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 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 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; 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a 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 (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 district asserts that it offered the student a FAPE for the 2008-09 school year. The district argues that the parents did not raise in their due process complaint notice whether the clerical issue in the June 11, 2008 FNR denied the student a FAPE and whether the recommended placement could have met the student's sensory needs; therefore, the impartial hearing officer erred in addressing those issues. In the alternative, the district argues that, if the issues were properly before the impartial hearing officer: (1) the error on the June 11, 2008 FNR was a clerical error, was de minimus, and did not rise to the level of a denial of a FAPE; and (2) the April 2008 IEP contained a goal for improving the student's sensory processing issues and recommended the use of vestibular and proprioceptive movements, movement breaks, and a weighted vest, and the proposed placement would have provided for the student's sensory needs.

Although the parents did not properly raise below the issue of the clerical error on the June 11, 2008 FNR, I have reviewed the hearing record with respect to this claim and find that such clerical error did not deny the student a FAPE. The district acknowledges that the June 11, 2008 FNR identified a school (School B) without specifying that the recommended school for the student that housed the 6:1+1 class was located in the same building as the school listed on the FNR. However, I agree with the district's assertion that given the facts of this case, where the parents obtained subsequent and timely actual knowledge of the name and location of the correct school and classroom to which the student was assigned prior to the start of the 2008-09 school year (see Cerra, 427 F.3d at 194), such a clerical error was de minimus and did not deny the student a FAPE (see Application of a Student with a Disability, Appeal No. 09-013).

According to the hearing record, the June 11, 2008 FNR identified the correct program and related services, namely a 6:1+1 special class in a special school and speech-language therapy, and OT services with a 1:1 "crisis paraprofessional," but did not indicate that the class was located within the public school building identified on the FNR (Dist. Ex. 2; Parent Ex. V). An important issue is whether the information on the June 11, 2008 FNR was insufficient such that the student was denied a FAPE in this case.

In this case, the hearing record demonstrates that the June 11, 2008 FNR the district provided to the parents had the correct address of the actual proposed special education class located in School C which was also the same address as School B (Dist. Ex. 2; Parent Ex. V). The student's mother testified that she received the June 11, 2008 FNR and sent a letter rejecting the school placement (Tr. pp. 259-60). Although the hearing record reflects that by letter to the district dated June 24, 2008, the student's father rejected the school recommended in the June 11, 2008 FNR, alleging that he had telephoned the school (School B) and had been told that the recommended classroom program did not exist at that school (Parent Ex. D); the hearing record also reflects that on July 23, 2008, the parents visited the correct building location and received a tour of School C and the 6:1+1 classroom (Tr. pp. 261, 274-75, 297). The student's mother testified that the parents spoke with someone at the school about the student's needs, specifically his need for skin brushing and a weighted vest, and what was on his IEP (Tr. pp. 261-262). A district unit coordinator at the site testified that on July 23, 2008, she provided the parents with a tour of the school, including the wing where the 6:1+1 class was located and the gym area, and that the parents had informed her during the tour that they had been given a placement for their son at that school in a 6:1+1 program that would begin in September 2008 (Tr. pp. 297-98). The unit coordinator further testified that the parents observed the 6:1+1 kindergarten class at the school and spoke with the classroom teacher who was teaching the class (Tr. p. 299). She also testified that in September 2008, because the school received more students, a second 6:1+1 kindergarten class was opened up at the school (id.).

Based on the evidence contained in the hearing record, I find that the parents received adequate notice of the student's classification, program, related services, and site/location where the student's program and services would be offered, prior to the start of the 2008-09 school year (20 U.S.C. § 1414[d][1][D][2][A]; 34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]). Any deficiency in the FNR did not, given the facts of this case, impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause 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]; see Cerra, 427 F.3d at 194; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419; Application of a Student with a Disability, Appeal No. 09-013).

Next, the district contends that the April 2008 IEP was appropriate and that the recommended program would have addressed the student's sensory needs. Although the district argues that the issue regarding the student's sensory needs was improperly raised below, I have reviewed the hearing record and find, as more fully discussed below, that the district offered the student a FAPE.

A review of the hearing record shows that the April 2008 CSE developed an IEP that accurately described the student's present levels of performance and developed annual goals and short-term objectives based on the student's needs. The hearing record shows that the student demonstrated delays in his attention and in his receptive, expressive, and pragmatic language skills, as well as difficulties with sensory integration, including delays in auditory, tactile, and proprioceptive processing (Tr. pp. 147-48; Dist. Ex. 3). The April 2008 IEP included annual goals and short-term objectives in the student's identified areas of need, as indicated in the present levels of performance and as identified in the February/March 2008 psychoeducational evaluation, and the February 2008 speech-language and March 2008 OT progress reports (compare Dist. Exs. 3; 6; 8, with Parent Ex. C at pp. 6-9).

According to the student's preschool special education teacher and the district's school psychologist, the student exhibited emerging skills in recognizing his name and letters, recognized at least ten letters of the alphabet, counted objects to 20, recognized numerals one to ten and demonstrated 1:1 correspondence (Dist Exs. 3 at p. 3; 10 at p. 8). The CSE indicated on the student's April 2008 IEP that based on classroom observations and parent interview, the student's skills in decoding, reading comprehension, listening comprehension, writing, computation, and problem solving were all at the pre-kindergarten to kindergarten level (Parent Ex. C at p. 3). Therefore, specific annual goals and short-term objectives regarding instruction in mathematics and reading were not required on the IEP (20 U.S.C. § 1414[d][1][A][i][II]; 34 § 300.320[a][2][i][A], [B]; 8 NYCRR 200.4[d][2][iii][a]).

Regarding the student's social/emotional needs, the hearing record shows that the student had difficulty initiating play with his peers and exhibited impulsivity, a decreased attention span, and limited frustration tolerances (Parent Ex. C at pp. 4, 13). Although the April 2008 IEP did not include specifically labeled "social/emotional goals," the IEP included annual goals and short-term objectives to address skills in the areas of using appropriate language to express feelings regarding social situations, greeting others and responding to greetings, turn taking, using classmates' correct names, initiating interactive games, engaging in joint attention with peers, and sharing toys (*id.*). Furthermore, the student's social/emotional needs were also addressed in the BIP that was attached to the IEP (*id.* at p. 13). The BIP indicated that the student had difficulty with verbal expression, impulsivity, and initiation of social interactions with his peers, and that he exhibited a low frustration tolerance (*id.*). The student tended to push or hit others in an attempt to convey a message (*id.*). The BIP reflected that multiple strategies would be implemented to address the student's behavior including positive reinforcement of appropriate behavior, use of breaks, a token system, modeling of appropriate behavior, and a 1:1 behavioral management paraprofessional (*id.*; Dist. Ex. 2 at p. 1). As described above, the April 2008 IEP appropriately addressed the student's identified social/emotional needs. Moreover, I note that the student's mother testified that she had provided meaningful input into the annual goals and short-term objectives at the April 16, 1008 CSE meeting (Tr. p. 257).

The parents also testified at the impartial hearing that the CSE developed an IEP that did not address the student's sensory integrative dysfunction (Tr. p. 257). The student's mother testified that her son had been on a sensory diet since preschool and that he responded very well to the sensory diet (Tr. pp. 275-76). The student's mother testified that while on the tour of the district's recommended school, the parent coordinator stated to her that the student would be the first student at the school to receive skin brushing or to use a weighted vest (Tr. pp. 262, 277). The student's mother further testified that the student needed the weighted vest and skin brushing to regulate himself (Tr. p. 262).

The student's April 2008 IEP recommended that the student receive individual 30-minute sessions of OT three times weekly to address his deficits in fine and gross motor skills, visual-perceptual skills, sensory processing, and activities of daily living (Parent Ex. C at pp. 2, 6, 12). The student's April 2008 IEP also included one annual goal and three corresponding short-term objectives specific to the student's sensory integration deficits (*id.* at p. 6). The annual goals and short-term objectives addressed the student's sensory integration needs through participation in vestibular and proprioceptive movements, movement breaks, and the use of a weighted vest (*id.*). The unit coordinator testified that if the student had attended the recommended 6:1+1 special class, the student's needs would have been met, including the provision and use of a weighted vest (Tr. pp. 300-01). The unit coordinator testified that although the adults in the classroom were not

trained in the use of a weighted vest or the application of deep pressure massage; the occupational therapist at the recommended school coordinated with the 6:1+1 teachers and could have helped to implement the goals on the student's April 2008 IEP (Tr. pp. 302-03, 304-05). The unit coordinator further testified that one of the students in the 6:1+1 special class received skin brushing (Tr. p. 305). The unit coordinator stated that the school worked with the parents of students in the 6:1+1 classes (*id.*). The special education teacher of the recommended class also testified that she worked with students in her class on their sensory integration needs (Tr. pp. 87, 89). The hearing record reveals that the student's needs in the areas of sensory integration as indicated in the student's March 2008 OT progress report would have been addressed by the student's individual OT sessions as well as within the recommended 6:1+1 classroom.

Having determined that the challenged IEP offered the student a FAPE for the 2008-09 school year, 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 need not address the parties' remaining contentions in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated August 18, 2009 is annulled in its entirety.

Dated: **Albany, New York**
 November 18, 2009

PAUL F. KELLY
STATE REVIEW OFFICER