



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-115

### **Application of the BOARD OF EDUCATION OF THE KINGSTON CITY SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Jeffrey J. Schiro, Esq., of counsel

Littman Krooks, LLP, attorneys for respondents, Dina B. Cohen, Esq., of counsel

#### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which determined, among other things, that the district must provide a full-time individual (1:1) aide for respondents' (the parents') son at the private school the student is attending for the 2009-10 school year. The appeal must be dismissed.

During the course of the impartial hearing, the student was attending tenth grade at a private parochial high school where he was receiving the support of a private 1:1 aide and district funded resource room and counseling services (Tr. pp. 41, 292, 451, 538-39; Dist. Ex. 8 at p. 1). The private parochial school, in which the parents voluntarily enrolled the student, has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student has received diagnoses of an attention deficit disorder (ADD) and Fragile X syndrome, described in the hearing record as "the most common genetic disorder associated with intellectual impairment" (Tr. p. 416; Parent Ex. 22). His cognitive skills are in the mildly mentally retarded range and he exhibits delays in social, speech-language, fine and gross motor skills, as well as anxiety, impulsivity, and sensory integration difficulties (Tr. p. 498). Although the student's academic skills were described in the hearing record as "weak," he was reportedly "at grade level" and "expected" to receive a Regents diploma (Tr. pp. 460-61, 549; Dist. Ex. 1 at p. 3). The student's eligibility for special education programs and services as a student with an other health impairment (OHI) is not in dispute in this appeal (34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The student received a diagnosis of Fragile X Syndrome in 2001 (Tr. p. 494; District Ex. 1). In fourth grade, the student began receiving 1:1 paraprofessional services while attending a district elementary school (Tr. pp. 500-01; Parent Ex. 19). During elementary school, the student

also received occupational therapy (OT) and speech-language therapy (Tr. p. 505). The student attended a district middle school for the 2004-05, 2005-06, and 2006-07 school years where the district provided the services of a 1:1 paraprofessional or teaching assistant as well as speech-language therapy and counseling services (Tr. pp. 200-02, 238-39, 245-46, 500; see Parent Exs. 32 at p. 1; 34 at p. 1; 38 at p. 1).

Over three dates in October 2006, a district school psychologist conducted a psychoeducational evaluation of the student as part of a triennial review (Dist. Ex 18).<sup>1</sup> The Wechsler Abbreviated Scale of Intelligence (WASI) was administered, which yielded a verbal IQ score of 73, a performance IQ score of 59 and a full scale IQ score of 64 (id. at pp. 1-2). The Wechsler Individual Achievement Test-Second Edition (WIAT-II) was also administered, which yielded the following standard scores: 72 (word reading), 62 (reading comprehension), 57 (pseudoword decoding), 57 (reading composite), 53 (numerical operations), 76 (mathematics reasoning), 60 (mathematics composite), 76 (spelling), 79 (written expression), and 76 (written language composite) (id. at p. 2). The Adaptive Behavior Evaluation Scales-Revised School Version was administered, resulting in scores that the school psychologist described as "indicat[ing] a range of adaptive behaviors" (id. at p. 4). The school psychologist reported that the student achieved average scores on subscales measuring self-care skills; functional home living, and leisure skills; knowledge of appropriate health and safety care; ability to self-direct, initiate tasks, and advocate for oneself; and basic functional academic skills (id.). The evaluation report indicated the presence of below average scores on subscales measuring communication and social skills, work readiness skills, and knowledge and use of community resources (id.). The school psychologist noted that testing results indicated that the student's intellectual functioning was in the "extremely low" range with commensurate achievement scores and that adaptive behavior assessment results were in the "average to extremely low" range; although she also noted that the student's effort and attention were variable during testing and that the scores may underestimate the student's true potential (id.). The school psychologist also noted that the student nonetheless was "[p]assing all of his classes and doing fairly well in school" due to hard work and because he "takes advantage of the supports offered" (id.). Lastly, she noted that "[w]ithout these [supports] in place, it would be very difficult for [the student] to be as successful as he has been" (id.).

On June 6, 2007, the Committee on Special Education (CSE) met to develop the student's individualized education program (IEP) for the 2007-08 school year (Dist. Ex. 14 at p. 1). Attendees included the parents, the CSE chairperson, a district school psychologist, a district teacher, a district speech-language therapist, a district resource room teacher, and a district 1:1 teaching assistant who had been the student's teaching assistant during middle school (id. at p. 6; Dist. Ex. 15). The resultant IEP recommended that the student continue to be eligible for special education programs and services as a student with an OHI and attend a 12:1+1 integrated special class in a district high school (Dist. Ex. 14 at p. 1). Related service recommendations included one 42-minute session of indirect consultant teacher services daily, two 30-minute sessions per month of individual counseling, and the services of a full-time 1:1 teaching assistant (id. at pp. 1-2). Testing accommodations included extended time, answers recorded, spelling requirements waived, special location, directions explained, tests read, and use of a calculator (id. at p. 2).

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<sup>1</sup> In September 2004, a private developmental and behavioral pediatrician evaluated the student (Tr. p. 416; Parent Ex. 76). Administration of cognitive testing, yielded a verbal IQ score of 65, a verbal comprehension IQ score of 70, a performance IQ score of 59, and a full scale IQ score of 59, which the pediatrician believed represented a "low estimate of [the student's] true abilities" due to the attention difficulties he exhibited during testing (Parent Ex. 76 at p. 3).

Program modifications included refocusing and redirection, preferential seating, use of graphic organizers, copies of class notes, checking for understanding, breaks as needed, an additional set of books, outlines of weekly assignments, and books on tape "as available" (id. at pp. 2-3). The CSE developed annual goals for the student in the areas of study skills, writing, mathematics, social/emotional skills, and cognitive/daily living skills (id. at pp. 7-8).

On August 29, 2007, the CSE reconvened to prepare an individualized education services program (IESP)<sup>2</sup> for the student in anticipation of the student being parentally placed in a private parochial school during the 2007-08 school year (Dist. Ex. 13 at p. 1). Attendees included the parents, the CSE chairperson, a district teacher, a district school psychologist, a district special education teacher, a teaching assistant, and the student's grandparents (id. at p. 6). The resultant IESP noted that the student was "[c]lassified PP [w]ithin [d]istrict [d]ual [e]nrollment" and that the student was parentally placed at a specific private parochial high school (id.). Related service recommendations included daily resource room in a group of five for 40 minutes and one 30-minute session of individual counseling per six-day cycle (id.). The IESP did not recommend a 1:1 teaching assistant (see id.). Recommended testing accommodations included extended time, answers recorded, spelling requirements waived, special location, directions explained, tests read, use of a calculator, and flexible scheduling (id. at pp. 10-12). Program modifications included refocusing and redirection, preferential seating, use of graphic organizers, copies of class notes, checking for understanding, breaks as needed, an additional set of books, outlines of weekly assignments, and books on tape "as available" (id. at p. 2). The CSE developed annual goals for the student in the areas of study skills, writing, mathematics, social/emotional skills, and cognitive/daily living skills (id. at pp. 7-8).

In September 2007, the student entered ninth grade at the private parochial high school without the services of a district provided 1:1 teaching assistant (Tr. pp. 292-95). The parents arranged for the student's grandmother, who is "certified as an aide," to provide him with full-time 1:1 aide services at the school (id.). The student's grandmother provided 1:1 aide services during the entire 2007-08 school year (id.).

On September 17, 2007, the parents filed a "state complaint"<sup>3</sup> against the district with the State Education Department regarding the August 2007 IESP (Parent Exs. 59; 60). The State Education Department issued a decision entitled "Allegation(s) and Findings of Complaint Investigation," which determined, among other things, that when the August 2007 CSE reconvened to develop the student's IESP, the district did not provide data or sufficient justification upon which to base its determination that the 1:1 teaching assistant was unnecessary for the student to make educational progress and ordered the district to reconvene the CSE, consider the findings of the complaint, and draft a new IESP for the student (Parent Ex. 59 at p. 2).

On January 3, 2008, the CSE reconvened pursuant to the State Education Department's order to create an IESP for the student (Dist. Ex. 8). Attendees included the parents, the student's

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<sup>2</sup> Pursuant to Education Law § 3602-c, boards of education of all school districts of the State shall furnish services to students who are residents of this State and who attend nonpublic schools located in such school districts upon the timely written request of the parent or person in parental relation of any such student. For the purpose of obtaining education for students with disabilities, such request shall be reviewed by the CSE of the school district of location, which shall develop an IESP for the student based on the student's individual needs (Educ. Law §§ 3602-c[2][a], [2][b][1][as amended by L.2007, c. 378, § 27, subd. d; L.2005, c. 352, § 22).

<sup>3</sup> See 8 NYCRR 200.5[l] for provisions relating to State complaint procedures.

grandfather, the CSE chairperson, a district school psychologist, an advocate, and the student's math teacher, English teacher, resource room teacher, and guidance counselor (*id.* at p. 6; Dist. Ex. 9). The resultant IESP noted that the student was "[c]lassified PP [w]ithin [d]istrict [d]ual [e]nrollment" and that the student was parentally placed at the private parochial school (Dist. Ex. 8 at p. 1). Related service, program modification, and testing accommodation recommendations remained consistent with those contained in the August 2007 IESP (compare Dist. Ex. 8 at pp. 1-3, with Dist. Ex. 13 at pp. 1-3). The January 2008 IESP stated that the CSE determined that the student was "capable of being educated in general education programs with [r]esource [r]oom and [c]ounseling" (Dist. Ex. 8 at p. 3). The January 2008 IESP modified or omitted sections of the August 2007 IESP relating to the student's abilities and needs in the areas of social and physical development, and his management needs (compare Dist. Ex. 8 at pp. 4-5, with Dist. Ex. 13 at pp. 4-5). Annual goals were added to the January 2008 IESP in the areas of reading, mathematics, and social/emotional skills (compare Dist. Ex. 8 at pp. 7-8, with Dist. Ex. 13 at pp. 7-8). The CSE did not recommend the services of a 1:1 aide or teaching assistant at the private parochial school (see Dist. Ex. 8).

On June 4, 2008, the CSE convened to develop an IESP for the student's 2008-09 school year (tenth grade) (Dist. Ex. 1 at p. 1). Attendees included the CSE chairperson, a district school psychologist, a "counselor," an English teacher, the student's grandmother who was the student's 1:1 aide at the private parochial school, a district math teacher, a district resource room teacher, an additional school psychologist, a school principal, the parents, two additional grandparents of the student, the student's sister, and the student (*id.* at p. 6; Dist. Ex. 2). The resultant IESP was substantially similar to the January 2008 IESP and recommended the same educational program and related services for the student (compare Dist. Ex. 8, with Dist. Ex. 1). Again, the CSE did not recommend a 1:1 aide or teaching assistant (see Dist. Ex. 1).

The student attended the private parochial school during the 2008-09 school year and continued to receive private 1:1 aide services at the school provided by his grandmother (Tr. pp. 292-95).<sup>4</sup> By due process complaint notice dated November 17, 2008, the parents, through their attorney, requested an impartial hearing (Parent Ex. 74). In their due process complaint notice, the parents argued that the district denied the student a free appropriate public education (FAPE)<sup>5</sup> by not providing the student with a 1:1 teaching assistant at the private parochial school, by failing to provide a sufficient explanation or rationale for denying the 1:1 teaching assistant, and by failing to implement the counseling and academic services listed in the June 6, 2007 IEP and the August 29, 2007 IESP (*id.* at pp. 1-3). The parents requested an order requiring the district to provide the student with a 1:1 teaching assistant at the private parochial school and requiring the district to provide the counseling and academic services the student needed (*id.* at p. 3). Additionally, the

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<sup>4</sup> The hearing record does not indicate that the district funded the 1:1 aide service.

<sup>5</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).

parents asserted that the student's pendency program<sup>6</sup> was set out in the June 6, 2007 IEP, which, in their opinion, was the last agreed upon IEP (*id.*).

An impartial hearing convened on January 6, 2009 for a prehearing conference and concluded on May 22, 2009, after four additional hearing dates (Tr. pp. 1, 194, 408, 582; IHO Ex. 2).<sup>7</sup> At the impartial hearing, the district called one witness and entered 23 exhibits into the hearing record (Tr. p. 36; Dist Exs. 1-23) and the parents called five witnesses and entered 74 exhibits into the hearing record (Tr. pp. 199, 291, 412, 438, 492, 586; Parent Exs. 1-73; 74-75). Additionally, the impartial hearing officer entered six exhibits into the hearing record (IHO Exs. 1-6).

On February 15, 2009, the impartial hearing officer rendered a decision on the parents' motion to determine the student's pendency program (IHO Ex. 4). The impartial hearing officer determined that the student's pendency program was that which was set forth in the "present placement" and the existing services that were being provided by the district to the student at the private parochial school pursuant to the IESPs (*id.* at p. 3). Thus, the impartial hearing officer noted that the student's pendency placement did not include a 1:1 teaching assistant (*id.*).

In a decision on the merits, dated September 2, 2009, the impartial hearing officer ordered the district to provide the service of a 1:1 aide for the student at the student's private school. The impartial hearing officer addressed the district's argument that there was no State or federal law that required the district to provide a 1:1 teaching assistant for the student in the private school, determining that no law required the district to provide the 1:1 teaching assistant, nor did any law prevent the district from doing so (*id.* at p. 10). The impartial hearing officer determined that the question was not whether the district must provide the 1:1 teaching assistant, but whether it should do so given the student's needs (*id.*). The impartial hearing officer noted that the student's grandmother had been acting as a 1:1 aide for the student at the private parochial school and that the district argued that increased independence should be a goal for the student (*id.*). The impartial hearing officer found that while "an attempt should be made to help [the student] achieve greater independence," he believed that it should not be "done all at once" and that the removal of the aide should be "phased in" over a period of time during which the student should receive counseling to assist him in the transition (*id.* at p. 11). The impartial hearing officer ordered the district to provide a 1:1 "aide"<sup>8</sup> for the student at the parochial school beginning at the start of the 2009-10 school year (*id.*).<sup>9</sup>

On appeal the district requests that the impartial hearing officer's decision be annulled and vacated because the district argues that the student was not entitled under federal or State law to a 1:1 teaching assistant at the private parochial school. The district further argues that the IESPs developed by the CSE for the student's 2007-08 and 2008-09 school years were procedurally

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<sup>6</sup> For relevant statutory provisions pertaining to a student's status during due process proceedings *see* 20 U.S.C. § 1415(j) and Educ. Law §§ 4404(4). *See* 34 C.F.R. § 300.518; 8 NYCRR 200.5(m) for relevant regulations.

<sup>7</sup> The impartial hearing officer is reminded to comply with 8 NYCRR 200.5(j)(3)(xi) which requires, in part, that "[a] transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer."

<sup>8</sup> The impartial hearing officer and the parties refer to the requested 1:1 support for the student as a 1:1 "aide" and a 1:1 "teaching assistant," interchangeably.

<sup>9</sup> The impartial hearing officer's order also included directives regarding the frequency and duration of the 1:1 aide service and the use of personnel to provide counseling and monitoring services.

appropriate, offered the student a FAPE and were reasonably calculated to confer meaningful educational benefits to the student. The district also argues that the parents have failed to meet their burden to demonstrate that the student required a 1:1 teaching assistant at the private parochial school.

Specifically, the district argues that the student is not entitled to a 1:1 teaching assistant at the private parochial school under federal law because the Individuals with Disabilities Education Act (IDEA), federal, and State regulations only require a district to identify students in private schools who may need special education services and to consult with representatives of the private school and the parents during the design and development of special education and related services. Further, the district contends that the federal regulations provide that a student placed in a private school by his or her parents does not have an individual right to the same education and services that the student would receive in a public school. The district also argues that the student is not entitled to a 1:1 teaching assistant at the private parochial school under State law because Education Law § 3602-c requires a parent to make a timely written request for dual enrollment special education services for parentally placed private school students. The district asserts that the parents did not make a written request for dual enrollment for either the 2007-08 or 2008-09 school years. Furthermore, the district contends that Education Law § 3602-c provides qualifying language that a district need only provide special education programs and services to dually enrolled students "on an equitable basis," as compared to special education programs and services provided to students with disabilities attending district schools. The district argues that this qualifying language confers upon it the discretion to determine that the student in this case did not require a 1:1 teaching assistant at the private parochial school because the student's educational needs could be met with the other supports provided for in the student's IESP and because the services of the 1:1 teaching assistant at the private parochial school would be counterproductive by fostering dependence in the student and interfering with his peer interactions.<sup>10</sup>

In their answer, the parents request that the district's petition be dismissed, that the impartial hearing officer's decision be upheld, and that a State Review Officer order that the district was obligated to provide the student with a 1:1 teaching assistant at the private parochial school during the 2007-08 and 2008-09 school years. Specifically, the parents argue that the district's claim that the parents' requests for dual enrollment were inadequate is raised for the first time on appeal and should have been raised at the impartial hearing.<sup>11</sup> In the event that this claim is addressed, the parents argue that a State Review Officer should find that the parents' requests were adequate because the CSE met and created IESPs for both the 2007-08 and 2008-09 school years, therefore, the district was aware that the parents were requesting dual enrollment for the student.

Additionally, the parents argue that the evidence and testimony gathered at the impartial hearing clearly shows that the student needed a 1:1 teaching assistant both while he was in public school and at the private parochial school in order to benefit from his education. The parents assert that at the August 29, 2007 CSE meeting that resulted in the removal of the student's 1:1 teaching assistant services, the CSE chairperson unilaterally decided to remove the 1:1 teaching assistant despite consensus by the other members of the CSE that the 1:1 teaching assistant should be continued. The parents argue that the district denied the student a FAPE because a single member

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<sup>10</sup> The district does not assert that the impartial hearing officer should have determined the parents' claims to be moot or that the impartial hearing officer's award of 1:1 aide services for the 2009-10 school year was premature or speculative as to the student's needs for the 2009-10 school year.

<sup>11</sup> The district did not file a reply to the parents' answer as allowed by 8 NYCRR 279.6.

of the CSE (the chairperson) arbitrarily removed the services of a 1:1 teaching assistant from the student's IESP. The parents further argue that the hearing record and the CSE chairperson's testimony at the impartial hearing show that her basis for removing the 1:1 teaching assistant was flawed because the CSE chairperson lacked a proper understanding of the student's needs and the circumstances at the private parochial school. The parents also argue that the district's denial of a 1:1 teaching assistant violated the IDEA and the State Education Law because the district's interpretation of the law is flawed in that Education Law § 3602-c, as interpreted by the courts, provides that where a student attends a private school and requires special education services and a requisite service can be effective only in that setting, the district must provide the services in that setting. Lastly, the parents argue that had the student attended the public school pursuant to the June 2007 IEP, he would have been provided with a 1:1 teaching assistant and that the district has not provided an adequate basis for why this service was removed from the August 2007 IESP.

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a],[b][2]). However, the IDEA confers no individual entitlement to special education or related services to students who are parentally placed in nonpublic schools (20 U.S.C. § 1412[a][10]). Although boards of education are required by the IDEA to provide some special education services to some students enrolled privately by their parents in nonpublic schools, no such students are individually entitled under the IDEA to any or all of the services they would receive if they were enrolled in a public school (20 U.S.C. § 1412[a][10],[a][3][A]; 34 C.F.R. §§ 300.137[a], 138[a][2]; see Analysis of Comments & Changes to 34 C.F.R. Parts 300 & 301, 71 Fed. Reg. 156 at 46,597 [Aug. 14, 2006]).

In contrast to the IDEA, New York State law provides:

"... the committee on special education of the school district of location [] shall develop an individualized education service program for the student based on the student's individual needs in the same manner and with the same contents as an individualized education program. The committee on special education shall assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district."

(Educ. Law § 3602-c[2][b][1] see Office of Vocational and Educational Services for Individuals with Disabilities (VESID) guidance memorandum dated September 2007 titled "Chapter 378 of the Laws of 2007 - Guidance on Parentally Placed Nonpublic Elementary and Secondary School

Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c").<sup>12</sup>

The IDEA authorizes the delivery of special education services to be provided to parentally placed private school students located within a district "on the premises of private, including religious, schools, to the extent consistent with law" (20 U.S.C. § 1412[a][10][A][i][III]). While subdivision 9 of Education Law 3602-c provides that such students "shall receive such services in regular classes of the public school and shall not be provided such services separately from pupils regularly attending the public schools," the New York State Court of Appeals has held that:

"[t]he statute does not limit the right and responsibility of educational authorities in the first instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise [citation omitted], but that is not a matter of statutory compulsion under section 3602-c."

(Bd. of Educ. v. Wieder, 72 N.Y.2d 174, 184 [1988]).

In Wieder, the court further stated "[t]he paramount principle that guides State law is concern for a handicapped child's educational needs, whether in public or private school" and that such children "are to be afforded suitable educational opportunities according to their individual needs" (Wieder, 72 N.Y.2d at 186). Moreover, the court concluded that school districts were not compelled to provide services exclusively at public or private school placements, and that "such a compulsion would be inconsistent with the regulatory scheme, which contemplates that the placement of children in programs will be guided generally by their individual educational needs" (Wieder, 72 N.Y.2d at 187-88). Section 3602-c of the Education Law does not mandate the location where services are to be provided to a student, but a contention that such services cannot be provided at a parochial school is not supportable in light of Wieder, 72 N.Y.2d 174 (1988) (see Board of Educ. v. Kain, 60 A.D.3d 851, 851-52 [2009]; Application of the Bd. of Educ., Appeal No. 04-079).

The hearing record reflects that the district had provided the student with the services of a 1:1 paraprofessional or 1:1 teaching assistant from fourth grade through eighth grade (Dist. Exs. 14 at p. 2; 19 at p. 1; Parent Exs. 19 at p. 1; 29 at p. 1; 32 at p. 1; 34 at p. 1). The specific duties of the 1:1 aide were described in the student's IEPs developed for those school years and included providing redirection, assisting the student in completing class work, assisting the student in learning new concepts presented by the teacher through reinforcement activities, implementing the student's behavior modification plan, and assisting the student with "handling" transitions and new situations (Parent Exs. 19 at p. 7; 29 at p. 7; 32 at p. 7; 34 at p. 7).

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<sup>12</sup> The request for such services is to be filed with the board of education on or before the first day of June preceding the school year for which the request is made (Educ. Law § 3602-c[2]). Although the district alleges for the first time on appeal that the parents' did not make timely requests for dual enrollment services and, therefore, their claim should be dismissed, I find the district's argument unpersuasive given that the argument was not raised below (see Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal Nos. 09-008 & 09-010) and because the hearing record demonstrates that the district has been treating the parents' son as if he were dually enrolled for the school years in dispute (see Application of a Child with a Disability, Appeal No. 02-035).

The district's full-time 1:1 teaching assistant who worked with the student during the 2005-06, 2006-07, and 2007-08 (sixth, seventh, and eighth grade) school years testified at length regarding the types of supports that he provided to the student (Tr. pp. 200-22, 235-37, 241, 247, 262-68, 284-85).

The hearing record reflects that the student's 1:1 teaching assistant attended the student's CSE meetings in February 2007, June 2007, and August 2007; and at all times, recommended that the student continue to receive the services of a 1:1 aide (Tr. pp. 224-30). The 1:1 teaching assistant testified that he believed that the student continued to require 1:1 aide services because the class sizes at the private school were "just as large" as in the district, and because the private school lacked "educators and assistants" (Tr. p. 228). Additionally, he testified that although by eighth grade the frequency of the student's "outburst[s]" had diminished, they had not been eliminated (*id.*). The 1:1 teaching assistant testified regarding his concerns about the student attending high school without 1:1 aide services, including his concerns that in the past when the student was provided with more independence he had "failed academically," had gotten assignments "wrong," and on a few occasions, had gotten lost in the building (Tr. p. 233). The 1:1 teaching assistant opined that part of the student's success was due to the 1:1 support he had received (Tr. pp. 233, 281-82).

The district's director of special education testified and the student's IESPs reflect that the district did not recommend 1:1 aide services for the student at the private school due to the private school's smaller environment and the district's belief that the student needed to develop independence (Tr. pp. 36, 68-69, 71; Dist. Exs. 1; 8; 13). However, as detailed above, the hearing record supports the conclusion that at the time the June and August 2007 IESPs were developed, the student required the 1:1 services of an additional adult in the classroom in order to access the general education curriculum and to address his attention, academic, social and behavioral needs; needs that were not necessarily related to the size of the school. Although the district's concern regarding the student's need to gain independence is valid, I note that if the student had remained at the district during the 2007-08 school year, he would have been provided with a 1:1 teaching assistant, and as further explained below, the student did demonstrate some gains in independence while attending the private parochial school with the presence of the private 1:1 aide (Tr. pp. 68-69; Dist. Ex. 14 at pp. 2, 6).<sup>13</sup>

The hearing record shows that the student received the services of a private 1:1 aide at the private parochial school during the 2007-08 and 2008-09 school years (Tr. pp. 293, 296, 351). The private 1:1 aide and the student's private parochial school English teacher testified that the private 1:1 aide assisted the student with organizing materials and tasks, prioritizing work, focusing, emphasizing material presented by the classroom teacher, defining words and concepts heard in the classroom, using manipulatives, and providing redirection (Tr. pp. 296-98, 308-10, 322-23, 334-35, 340-41, 441, 443, 446). Specifically, the private 1:1 aide testified how she explained math, science, and social studies concepts to the student by using manipulatives, reviewing vocabulary, and restating/clarifying the material for him (Tr. pp. 297-301, 305, 323-25). In English class, the 1:1 aide provided prompts to the student to expand his understanding of stories

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<sup>13</sup> The district's 1:1 teaching assistant testified that the student did not seek out help when needed and required assistance with transitions (Tr. pp. 221, 282-84). By eighth grade, according to the 1:1 teaching assistant, the student wanted to be more independent and he was provided with opportunities to work independently under the supervision of the teaching assistant (Tr. pp. 222-23). Although the student knew that the 1:1 teaching assistant was present, the 1:1 teaching assistant testified that he did not believe that the student used him as a "crutch" (Tr. pp. 221-22, 233-34).

and vocabulary and to help him focus on what to write about (Tr. pp. 306-07, 311-12, 325-26). Although the 1:1 aide testified that the student's need for scribing had decreased, she stated that during some exams requiring more extensive writing, she scribed for him (Tr. pp. 310-11). She also provided prompts to the student to increase the organization of his essays (Tr. pp. 311-12). During test administration, the private 1:1 aide read questions to the student, and provided prompts to take his time and use test-taking strategies (Tr. pp. 313-14, 335, 396-97). The hearing record reflects that the private 1:1 aide cued the student to use socially acceptable language/etiquette when in social situations (Tr. pp. 320, 444, 480). She further discussed with the student a different route to take between classes to increase his opportunities to socialize with peers (Tr. pp. 355-56). The hearing record indicates that the private 1:1 aide helped the student manage his anxiety around fire drills and events that occurred suddenly (Tr. pp. 320-22, 332).

Regarding the district's assertion that a 1:1 aide would limit the student's opportunities for independence, the private 1:1 aide testified that she did not accompany the student to lunch or physical education class in order to allow him to socialize with peers (Tr. pp. 302, 356-57). The 1:1 aide also testified that the student independently transitioned between classes; requiring a stop at the resource room to change books before the next class (Tr. pp. 338-39). Although the private 1:1 aide helped the student identify when he needed a break from the classroom, she stated that she did not accompany the student during breaks (Tr. pp. 316-17). According to the private 1:1 aide, the student independently sought assistance from the classroom teacher and asked questions during or after class (Tr. pp. 335-36, 347, 376-77). The private 1:1 aide testified that she instructed the student in techniques for self-monitoring in order to retain focus, outline written work, and understand test/assignment directions without assistance (Tr. pp. 364-66).

The student's private parochial school English teacher testified that although it would be possible for her to provide the student with redirection and testing accommodations if the student did not have a 1:1 aide, it would be to the "detriment" of other students in the room given the sum of her other responsibilities (Tr. pp. 447, 453, 481-84). She further stated that the resource room teacher would not be able to support the student in all of his classes and continue to provide services to other students (Tr. pp. 479-80). Similarly, the private 1:1 aide opined that a classroom teacher would not be able to provide the amount of support the student requires because it would cause too many interruptions and the level of prompting the student required was "constant" (Tr. pp. 302-03, 307, 361-63, 366-68). She further opined that the resource room teacher was "too removed" from the classroom and that the student needed help in the classroom at the time of the lesson (Tr. pp. 302-03, 370-71, 379-80). The private 1:1 aide testified that the level of academic support provided to the student remained the same over the course of the two years that she had worked with him (2007-08 and 2008-09) (Tr. pp. 312-14). She further testified that she did not view her assistance as a "crutch" for the student and testified that he could not perform to his "academic abilities and performance standards without some type of help" (Tr. pp. 336-37, 349). The private 1:1 aide testified that the student was "keeping up with in his academics with the other students and he [was] achieving, he [was] doing very well" (Tr. p. 388; see Tr. pp. 390-91). According to the 1:1 aide, the student's private school math and English teachers who participated in the student's CSE meetings lent "support for what I was doing as an aide for [the student]" (Tr. pp. 341-45; see Tr. pp. 360-61). When asked if attempting to reduce the number of hours per day that the student would have a 1:1 aide would be beneficial, the student's private school English teacher testified that it would be "worth trying" (Tr. pp. 486-87).

As illustrated above, the hearing record reflects that the district's 1:1 teaching assistant who had provided services to the student when he attended a district school and the private 1:1 aide at

the private school provided similar services to the student (compare Tr. pp. 200-22, 235-37, 241, 247, 262-68, 284-85, with Tr. pp. 293-301, 351, 305-14, 320-26, 332-36, 340-42, 355-56, 396-97, 441-46, 480). The hearing record supports the parent's assertion that the student's needs remained relatively constant over time, such that he continued to require the services of a 1:1 aide (Tr. pp. 513-16). Moreover, there is no evidence that the district conducted assessments of the student to determine his ability to function without the services of a 1:1 aide prior to removing the aide from his IESPs (id.). Therefore, based on the arguments and issues as presented by the parties, and the hearing record herein, I decline to modify the impartial hearing officer's determination that the provision of a 1:1 aide at the private school for the student at district expense is appropriate for the 2009-10 school year. Moreover, the hearing record supports the impartial hearing officer's order that an attempt be made to increase the student's independence and gradually reduce the student's need for a full-time 1:1 aide (Tr. pp. 68-69, 228, 302, 316-17, 338-39, 347, 356-57, 364-66, 276-77; Dist. Ex. 14 at pp. 2, 6).

I note that neither party has requested that the specifics of the impartial hearing officer's order be modified pertaining to the timeframe of the delivery of the ordered 1:1 aide services in terms of duration and frequency; therefore, I decline to make any modifications to the order. I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
December 21, 2009**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**