The University of the State of New York

The State Education Department
State Review Officer
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No. 09-119

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Educational Advocacy Services, attorneys for petitioner, Jennifer A. Tazzi, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmueller, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs at Kulanu Torah Academy (Kulanu) for the 2008-09 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student attended Kulanu. He was also receiving speech-language therapy, occupational therapy (OT), and counseling, which were provided by the district (Tr. pp. 216, 218, 253-54). Kulanu, a private school, 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's eligibility for special education programs and services as a student with mental retardation is not in dispute in this proceeding (Tr. p. 266; see 34 C.F.R. § 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

The student has exhibited cognitive, academic, and language delays from a young age (Dist. Ex. 3 at pp. 2, 9-10). According to the hearing record, as a high school age student, he continues to demonstrate deficits in reading, written language, and math and exhibits perceptual impairments, hyperactivity, and difficulty with "external stimuli controls" (id. at pp. 2, 10). The student's social skills are described as an area of strength (Tr. p. 148).

The student began receiving special education services through an Early Intervention Program in a different state at two years old to address his "developmental differences" (Tr. p. 262;

Dist. Ex. 3 at p. 2). Subsequently, while still living in a different state, the student received preschool special education services, and as a school-age student, attended both a state-approved school and a special class in a public school prior to placement by the out-of-state district in a special education program in a private school, which he attended through the 2007-08 school year (Tr. pp. 256-58, 262-65; Dist. Ex. 3 at p. 2).

On September 28, 2006, a school psychologist conducted a psychological evaluation of the student (Dist. Ex. 3). During a classroom observation, the student appeared to be engaged in the activity, enthusiastic, and did not appear to be distracted by others in the room (id. at p. 3). The evaluator noted the student exhibited "vestiges of a slight language weakness" that did not "negatively detract from his social interaction" (id.). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a verbal comprehension composite score of 55, a perceptual reasoning composite score of 53, a working memory composite score of 52, a processing speed composite score of 56, and a full scale IQ score of 44 (extremely low range) (id. at p. 1).[1] The student's performance on assessments of his perceptual motor functioning was, according to the evaluator, "considerably below age expectancy," noting difficulty with visual attention to details and organization, as well as visual-motor integration deficits (id. at pp. 4, 7). Assessments of the student's emotional functioning indicated to the evaluator that the student was "socially, emotionally and academically delayed, in which he is anxious at times and dependent upon other[s] to help him fulfill his needs" (id. at p. 4).

An October 2006 administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) to the student yielded the following composite standard scores: reading (42); mathematics (40); written language (41); oral language (45); with a total composite score of 40 (Dist. Ex. 3 at pp. 9, 12-13). The evaluator reported that testing revealed weaknesses in "most academic areas," with pseudoword decoding and spelling areas of relative strength and relative weaknesses in reading comprehension and math operations/reasoning skills (id. at pp. 11-12).

On October 24, 2006, an occupational therapist conducted an OT evaluation of the student (Dist. Ex. 6). The student's teacher reported to the occupational therapist that the student was often "overly sensitive to noise," making it difficult for him to focus (id. at p. 1). The teacher further reported that the student had difficulty accepting changes in his routine and could become easily frustrated (id.). The occupational therapist observed that the student was "talkative, friendly and willingly engaged in both gross and fine motor tasks," although he often spoke out of context, exhibited inconsistent eye contact, was "somewhat distractible" and required frequent redirection to task (id.). According to the occupational therapist, the student followed one to two step directions, exhibiting "slowed processing of verbal instructions" (id.). Following assessments measuring the student's visual motor, gross motor, activities of daily living (ADL), fine motor, sentence copy and visual-motor integration skills, the occupational therapist reported that the student exhibited "significant difficulties with processing information coming from his body senses (auditory, vestibular, proprioceptive and tactile)" and also that "[s]ensory dysfunction [was]

[1] According to the evaluator, a March 2004 administration of the Wechsler Intelligence Scale for Children-Third Edition (WISC-III) to the student yielded a verbal IQ score of 46, a performance IQ score of 48, and a full scale IQ score of 44; with all skills "determined to be in the deficient range" (Dist. Ex. 3 at p. 2). The evaluator reported that currently obtained WISC scores "mirror[ed]" those obtained in 2004; also noting similar results from perceptual motor and emotional functioning assessments to those obtained in 2004 (id. at p. 4).

noted in [the student's] decreased motor planning, body awareness, sensitivity to sound, ability to attend, and difficulty with handwriting" (id. at p. 3). The occupational therapist further concluded that the student's "most obvious area of impairment" was his visual motor and visual perceptual skills; affecting his ability to complete handwriting tasks, copy from the blackboard, and attend to his academics (id.). The occupational therapist stated that the student would benefit from the receipt of OT services "on a short term basis using a consultative model;" addressing fine motor coordination, sensory processing, prevocational skills, and visual motor/visual perceptual skills related to school performance (id.). Other recommendations included providing the student with a "sensory diet," trial of a slantboard for writing tasks, and keyboarding and home exercise programs (id.).

On October 27, 2006, an evaluator identified in the hearing record as a "[s]peech/[l]anguage [s]pecialist" conducted a speech-language evaluation of the student (Dist. Ex. 5). The evaluator reported that she was unable to administer an age appropriate language assessment to the student; rather she administered a language assessment standardized for a younger population in order to describe the student's performance on various language tasks (id. at p. 4). The evaluator concluded that the student's receptive and expressive language skills were in the "poor range," noting weaknesses in the areas of semantics and syntax (id. at pp. 4-5). She described the student as someone who "enjoys talking with people" and whose conversations were generally understood despite the omission of grammatical markers in spontaneous speech (id. at p. 5). The student's performance on tests measuring receptive and expressive vocabulary skills yielded scores in the "poor range" (id. at p. 4).

The student moved to the district in 2007 (Tr. p. 264). In a June 1, 2007 social history conducted by the district, the parent indicated that she liked the student's then current private school program particularly because it was located in a "mainstream" school (Dist. Ex. 4 at p. 1). The parent reported that the student was a "social young man," and that the mainstream environment provided the opportunity for him to be social and "work that strength" (id.). Although the student was not "mainstreamed" for any academic subjects, he participated in mainstream gym, lunch, and played on the "regular" basketball team (id.). The parent described the student as a "well behaved young man," and expressed her concern that her son mimicked others; therefore, she did not want him placed in a program with students who exhibited "behavioral issues" (id.). She indicated that she was pleased with the student's then current special education program in the private school, though was concerned that for the upcoming school year it would not include mainstreaming opportunities (id.). Because the parent felt very strongly that the student should be part of a mainstream environment, she was investigating alternative options; and she indicated that she was willing to visit a specific public school District 75 program "and might change her mind and like it" (id.). However, she also reportedly expressed that she did not think that either the District 75 program or a State-approved private program would be appropriate for her son because she believed that those schools were composed solely of students with disabilities (id.).

During the 2007-08 school year, the student continued to attend the out-of-State private school's special education program, in which he was placed in a self-contained classroom located within a mainstream high school (Tr. pp. 147-48). The student socialized with typically developing peers and participated with them at lunch, in extracurricular activities, and on the school basketball team (Tr. pp. 148-50). The special education program consisted of self-contained classes composed of students ages 14 to 21 whose functioning levels were in the

intellectually deficient range (Tr. pp. 146-47). According to a May 14, 2008 progress report prepared by the director of the private school (director), during the 2007-08 school year, the student's math skills were at a "K-1" level, his decoding skills were at a "1-2" level, and his reading comprehension skills were at a "2-3" level (Dist. Ex. 2). The report stated that the student exhibited strengths in calculator use, money awareness, reading comprehension, motivation and attitude; and weaknesses in computation, decoding, and "recalling rules related to literacy" (id.). The director reported that the student was able to organize his writing "in a coherent fashion," but exhibited poor spelling ability (id.). The report further noted that the student's graphomotor skills were weak, resulting in "slow" writing speed (id.). Socially, although the student could reportedly became "sad and upset," he rarely remained upset for more than a few minutes (id.). According to the director, the student struggled to maintain interactions with peers, describing his social skills as "immature" and on occasion "silly" (id.). With adults, the student reportedly appeared to be "eager to please," and behaved "respectfully" and "appropriately" (id.). The director did not recommend any changes to the student's program (id.).

On May 29, 2008, the Committee on Special Education (CSE) convened for the student's annual review and to prepare an individualized education program (IEP) for the 2008-09 school year (Parent Ex. C at pp. 1, 2).[2] Attendees included a school social worker who also acted as the district representative, a school psychologist, a district special education teacher, the parent, and by telephone, both the director of and a teacher from the private school the student was attending, and an advocate for the parent (id. at p. 2). The May 2008 CSE received information regarding the student's present levels of academic, social/emotional, health, and management skills from staff at the student's private school, which were discussed at the meeting and incorporated into the resultant IEP (Tr. pp. 23, 26-27; see Parent Ex. C at pp. 3-6). Present levels of performance contained in the May 2008 IEP indicated that the student's reading skills were at a first to second grade level, and his math skills were at a mid-kindergarten level (Parent Ex. C at p. 3). The IEP further indicated that the student was "well behaved," "attentive," and that his strong language and social skills "belie[d]" weaknesses in academic areas, critical thinking and memory skills (id.). The May 2008 CSE determined that the student exhibited "many challenges relating to academic and social performance," and difficulty processing abstract concepts and ideas, comprehending oral and written material, and "reading" social situations, which negatively affected his problem solving abilities (id. at p. 4). The CSE further determined that the student's behavior was "somewhat immature" and could be addressed by a special education teacher and counseling services (id. at p. 5). Additionally, the May 2008 IEP indicated that the student reportedly demonstrated fine motor difficulties (id. at p. 6). According to the school psychologist who participated in the May 2008 CSE meeting, the CSE used information provided by therapists, teacher reports, and recommendations from the director in writing the student's annual goals, which were "discussed thoroughly" at the meeting (Tr. pp. 28-30). The May 2008 IEP contained annual goals and short-term objectives in the areas of reading; math; written language; pragmatic, receptive and expressive language; "coping;" and fine-motor and graphomotor skills (Parent Ex. C at pp. 7-11). The May 2008 CSE developed a transition plan for the student, indicating that he would "integrate into the community with maximum support," and providing instructional

[2] The hearing record contains two copies of the May 2008 IEP labeled Dist. Ex. 1 and Parent Ex. C. Parent Ex. C is missing the final page of the IEP (compare Parent Ex. C, with Dist. Ex. 1; see Dist. Ex. 1 at p. 17); however, Dist. Ex. 1 is largely illegible.

activities including introduction to vocational and community opportunities, and receipt of vocational training and instruction in preparation of simple meals and cleaning activities (Dist. Ex. 1 at p. 17; Parent Ex. C at p. 15). The May 2008 CSE determined that the student would participate in alternate assessment and needed a "low student/teacher ratio, experiential learning with visual aides [and] manipulatives" (Parent Ex. C at pp. 3, 14).

The May 2008 CSE considered and rejected placement of the student in a 15:1 small class in a community school, as it determined that such a program would not meet the student's needs, including his need for a 12-month program (Tr. p. 44; Parent Ex. C at p. 13). According to the school psychologist, the need for a 12-month program was a determination made by the CSE "team" with participation from the student's then current private school staff (Tr. pp. 44-45). The CSE also considered and rejected placement of the student in an 8:1+4 small class in a specialized school, determining that it would be too restrictive for the student, and according to the school psychologist, students in that program exhibited more "severe behaviors" and cognitive, social, and academic delays compared to the student (Tr. p. 45; Parent Ex. C at p. 13). The school psychologist stated that because the student did not exhibit any "severe, overt behaviors" the CSE determined that his needs could be met in a 12:1+1 special class in a specialized school, which "[t]he team felt" (Tr. p. 43) was the "least restrictive" environment (Tr. pp. 31, 43-44). For the 2008-09 school year, the May 2008 CSE determined that the student was eligible for special education programs and services as a student with mental retardation and recommended placement of the student in a 12-month program in a 12:1+1 special class in a specialized school, with pull-out related services[3] consisting of one session per week of group counseling, two sessions per week of individual OT, two sessions per week of group speech-language therapy, and one session per week of individual speech-language therapy (Parent Ex. C at pp. 1, 14). The hearing record reflects that neither the parent, the director, the parent's advocate, nor the student's special education teacher voiced objections during the CSE meeting to any of the recommendations made at the May 2008 CSE meeting or to the development of the IEP (Tr. pp. 25-26, 31, 284).

The hearing record reflects that a Final Notice of Recommendation (FNR) dated June 14, 2008, was mailed to the parent on June 16, 2008 (Tr. p. 169). The hearing record also reflects that a second FNR was sent out "in the middle of July" (Tr. pp. 170, 171, 172). The FNR was dated June 14, 2008, the same date as the initial FNR (Tr. pp. 171-72). The district's second FNR offered the student a placement at a specific district school for the 2008-09 school year and reflected that the student would receive the special education program and services recommended on his May 2008 IEP (Dist. Ex. 7). The FNR also stated that if the parent wished to discuss the recommendations or arrange another meeting, they could contact the person listed on the FNR (id.). Subsequent to the parent's receipt of the district's FNR, the parent visited the recommended district program (Tr. pp. 271-76). By a handwritten note on the bottom of the FNR received by the district on July 28, 2008, the parent advised that she had "visited the recommended placement but did not find it appropriate for [the student] academically, socially [and] emotionally" (Tr. p. 173; Dist. Ex. 7). The parent did not provide the district with any specific reasons why she did not find the recommended placement to be appropriate (see Dist. Ex. 7). The parent informed the

[3] The term "related services" means, in part, "developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education" (20 U.S.C. § 1401[26]; 34 C.F.R. § 300.34; see also Educ. Law § 4401[2]; 8 NYCRR 200.1[qq]).

district that she was enrolling the student at Kulanu and would be requesting an impartial hearing seeking tuition reimbursement for the 2008-09 school year (id.).

By letter dated August 15, 2008, the parent, through her advocate, informed the district that the student would attend Kulanu for the 2008-09 school year, and that the letter served as "a 10-day notice letter as mandated by Federal law" (Parent Ex. F).[4] Also on that date, the parent signed an enrollment application for the student's attendance at Kulanu and on September 8, 2008, made the first tuition payment to the private school (Parent Exs. I; J at p. 2). The student commenced attendance at Kulanu in September 2008 for the 2008-09 school year (Tr. p. 264; see Parent Exs. I; J at p. 2; L).

By due process complaint notice dated November 25, 2008, the parent requested an impartial hearing (Parent Ex. A). Among other things, the parent alleged that the student was "denied a [free appropriate public education] (FAPE) for the 2008-09 school year;"[5] and that "his IEP [was] not reasonably calculated to offer him an opportunity to make academic, social and emotional progress for the 2008-09 school year" (id. at p. 1). The parent further acknowledged the she, the principal, a teacher from the student's then current private school, and an advocate participated in the CSE meeting held for the 2008-09 school year, but alleged that the parent "was not consulted and did not have the opportunity to review the drafted annual goals until she received her son's IEP" (id. at pp. 1-2). The parent also asserted that while she did receive an FNR dated June 14, 2008, it was postmarked on July 18, 2008 (id. at p. 2). The parent stated that she was able to visit and observe the recommended program and that she "spoke at length" with a school staff person (id.). The parent alleged that while visiting the school she "inquired concerning the mainstreaming opportunities" at the school (id.). The parent indicated that she considered the recommended placement, but rejected it because she "concluded that the other students in the program did not function at similar levels to [her son]" and she believed that the recommended placement was "too restrictive" for her son (id.). The parent maintained that the due process complaint notice was the "second notice" that she had enrolled the student in Kulanu for the 2008-09 school year (id.). The parent also stated that she maintained "the right to contest the appropriateness of [the student's] entire IEP including, but not limited to, the drafted annual goals,"

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[4] The August 15, 2008 letter appears to be a form letter, with the student's name and the name of the private school handwritten on the otherwise typewritten form (Parent Ex. F). The letter erroneously stated that the parent could not observe the district's recommended placement "and/or the [CSE] failed to offer [the student] a placement; and/or the [CSE] failed to conduct a timely annual review and draft an IEP" (id.); despite the fact that the parent had observed the recommended placement, a placement had been offered, a CSE meeting had been conducted, and an IEP had been drafted prior to the date of the letter (see Tr. pp. 271-76; Dist. Exs. 1; 7; Parent. Ex. C).

[5] 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).

which she contested were "overly broad and not specific and fail[ed] to contain a method of measurement as well as fail[ed] to contain a projected date of mastery" (id.). The parent also stated that she "retain[ed] the right to contest the appropriateness of the proposed recommended placement" (id. at pp. 2-3).

The parent proposed that the matter be resolved by: (1) the district reimbursing her for payment of the tuition to Kulanu for the 2008-09 school year "and[/]or" directly paying Kulanu the student's tuition for the 2008-09 school year; (2) the district providing the student "with the related services recommended on his IEP;" and (3) the district providing the student with his related services either directly or by providing the parent with a related services authorization (RSA) so that she could make arrangements for the provision of such services at the district's expense (Parent Ex. A at p. 3). The parent also requested that an impartial hearing officer order the district to provide bus transportation to and from Kulanu (id. at p. 2).

The impartial hearing began on February 25, 2009, and concluded on July 8, 2009, after five days of testimony. The impartial hearing officer rendered a decision dated September 1, 2009, denying the parent's request for tuition reimbursement at Kulanu for the 2008-09 school year (IHO Decision at p. 18).

The impartial hearing officer concluded that the district offered a FAPE to the student for the 2008-09 school year (IHO Decision at p. 16). The impartial hearing officer did not find merit to the parent's allegation that the district's FNR was untimely (id. at pp. 14-15). Regarding the parent's arguments with respect to the adequacy of the May 2008 IEP's annual goals and short-term objectives, the impartial hearing officer found that testimony at the impartial hearing established that the parent and the student's teacher from his then current private school participated in developing the IEP annual goals and short-term objectives (id. at p. 15). The impartial hearing officer further credited the parent's testimony that she did not object to the annual goals at the May 2008 CSE meeting, and that at the May 2008 CSE meeting, the parent agreed with the annual goals, classification, and program that was recommended (id.). The impartial hearing officer also found that the parent had an opportunity to participate in the decision-making process regarding the provision of a FAPE to the student and that while the district did have a set of draft annual goals, the annual goals were not predetermined (id.). She also found that the annual goals "were developed and discussed with each member of the [CSE] team" (id.). The impartial hearing officer found that while there was no description in the May 2008 IEP of how the student's progress toward meeting the annual goals and short-term objectives would be measured, the assistant principal from the recommended district school testified that the teachers at the school used "progress sheets and various methods to determine a student's mastery" (id.). Therefore, she found that this issue "did not rise to a denial of FAPE" (id.).

Regarding the parent's contention that the 12:1+1 placement at the recommended district school was not the student's least restrictive environment (LRE), the impartial hearing officer found that the staffing ratio at the district's recommended school (12:1+1) was less restrictive than the staffing ratio of the student's class at Kulanu (7:1+4) (IHO Decision at p. 16). The impartial hearing officer also concluded that testimony adduced at the impartial hearing "established that [the recommended school] provided opportunities for [the student] to model typically developing peers in the inclusion programs and in the recreation programs and on community trips and during transitional programs" (id.). Finally, the impartial hearing officer found that while "there were

typically developing peers at the Kulanu School for [the student] to model during lunch and gym and basketball.. the placement at the Kulanu School was more restrictive than the [recommended district school] " (id.).

With respect to the functioning levels of the student in the district's proposed class, the impartial hearing officer found that the class profile submitted into evidence by the district accurately portrayed the abilities of the students and satisfied the criteria in the State regulations to show that the student would have been appropriately grouped with students with similar academic needs with respect to reading, writing, and social development (IHO Decision at p. 16). Lastly, and with respect to the student's transition from school to post-school activities, the impartial hearing officer found that the recommended district school had "many 'shops'" for students to chose between for job skills training and also that the recommended placement "offered transitional services to transition from [the recommended school] to a job and coordination with other social agencies" (id.).

The impartial hearing officer also determined that the parent failed to meet her burden to show that the unilateral placement of the student at Kulanu was appropriate (IHO Decision at pp. 16, 17). In particular, the impartial hearing officer concluded that: (1) the parent did not offer any testimony as to how Kulanu could adequately educate the student in a 10-month program; (2) Kulanu did not provide the student with the related services mandated on the May 2008 IEP (i.e. speech-language therapy, OT, and counseling) and these services were provided to the student by the district through RSAs; (3) there were no transitional services from "other social agencies" to prepare students at Kulanu to transition from school; (4) while testimony established the benefits of the student socially interacting with his non-disabled peers, there was limited testimony as to any other academic benefits the student received at Kulanu; and (5) "there was no testimony provided based on personal knowledge," that other than the social opportunities provided by his vocational sites, "[the student] received any job training skills" during the 2008-09 school year at Kulanu (id. at p. 17). In addition, the impartial hearing officer determined that the equities did not favor the parent (id. at p. 17).

The parent appeals, contending that the impartial hearing officer erred in finding that the district offered the student a FAPE in the LRE for the 2008-09 school year, that the parent did not meet her burden to show that the unilateral placement was appropriate, and that equitable considerations do not support an award of tuition reimbursement to the parent.[6] With respect to the impartial hearing officer's conclusion that the district offered the student a FAPE in the LRE, the parent asserts that: (1) the district's May 2008 CSE was "improperly constituted" in that a regular education teacher did not participate at the May 2008 CSE meeting; (2) the impartial hearing officer erred in finding that the parent had an opportunity to participate in the decision-making process regarding the provision of a FAPE to the student at the May 2008 CSE meeting and in finding that the annual goals and short-term objectives stated in the May 2008 IEP corresponded to the student's needs and were appropriate; (3) the impartial hearing officer erred in

[6] The parent does not appeal the impartial hearing officer's findings that the district's FNR was timely, that the student would have been grouped in the district's recommended placement with students of similar needs, that the recommended placement had a number of recommended "shops" and work sites, and that the recommended placement offered transitional services and coordination with other social agencies (see IHO Decision at p. 16). Therefore, these findings are final and binding upon the parties (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

determining that the district's program would have been provided to the student in the LRE and that Kulanu was the more restrictive program; and (4) "based on the evidence," the proposed district placement did not offer the student an appropriate education in the LRE because there were no mainstreaming opportunities at that placement.

With respect to the appropriateness of the parent's unilateral placement, the parent contends that: (1) the evidence shows that Kulanu provided mainstreaming opportunities that were extremely important to the student's emotional, social, and academic growth and success; (2) the parent offered documentary and testimonial evidence of Kulanu staff who knew the student and could "credibly" testify to the student's program and his progress at Kulanu during the 2008-09 school year; (3) the impartial hearing officer's finding that the student's placement at Kulanu in a 7:1+4 class was more restrictive than the district's proposed placement in a 12:1+1 class was erroneous as a matter of law; (4) the impartial hearing officer erred in finding that there was limited testimony regarding the academic benefits to the student at Kulanu and that the impartial hearing officer understated the benefits of the student's social interaction with non-disabled peers, and (5) the impartial hearing officer erred in finding that the parent failed to offer testimony regarding how Kulanu could adequately educate the student in a 10-month program.

The parent also alleges that equitable considerations favor her request for reimbursement. Among other things, she asserts that she "fully cooperated" with the district, asked the district for an appropriate public school with mainstreaming, participated in the May 2008 CSE meeting, visited the recommended placement and found it to be inappropriate, and informed the district that she had rejected the placement and of her intention for the student to enroll in Kulanu. She further contends that she "genuinely considered" the district's recommended placement and "rejected it only because it offered no mainstreaming opportunities for her son."

The district answered the parent's petition asserting that the impartial hearing officer correctly determined that it had offered the student a FAPE for the 2008-09 school year. With respect to the appropriateness of its recommended program, the district asserts that: (1) the parent's contention that the May 2008 CSE was not properly constituted should not be considered on appeal as it was not raised in the parent's due process complaint notice or at the impartial hearing and further, that in this case, a regular education teacher was not a required member of the May 2008 CSE; (2) additional issues set forth in the parent's memorandum of law should not be considered as they were not raised in the parent's petition; (3) the impartial hearing officer properly found both that the parent fully participated in the development of the annual goals at the May 2008 IEP meeting and that the lack of methods of measurement and the number of progress reports in the IEP was not a denial of a FAPE; and (4) the recommended district placement was appropriate, would have provided the student with educational benefits, "offered [the student] appropriate mainstreaming opportunities, and was the least restrictive environment available to him."

With respect to the student's unilateral placement, the district asserts that the impartial hearing officer correctly determined that the parent's unilateral placement was not appropriate because: (1) the program at Kulanu was a 10-month program, not a 12-month program as was recommended in the student's May 2008 IEP; and (2) Kulanu did not provide the student with any of the related services mandated on the May 2008 IEP, as those services were provided by the district to the student through RSAs.

The district also alleges that equitable considerations do not favor the parent. The district asserts in particular that the parent did not give the appropriate notice required by 20 U.S.C. § 1412(a)(10)(c)(iii)(I) and agrees with the impartial hearing officer that the evidence demonstrates that the parent "had no intention of sending [the student] to a public placement, but rather only wanted him to go to Kulanu."

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114,

1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *6 [S.D.N.Y. Oct. 13, 2009]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087). An IEP must be reviewed periodically, but not less than annually, to determine whether the annual goals are being achieved and to make appropriate revisions (20 U.S.C. §§ 1414[d][4][A]; 34 C.F.R. § 300.324[b][1]; 8 NYCRR 200.4[f]). An eligible student's IEP must be in place at the beginning of each school year (20 U.S.C. § 1414[d][2][A]; 34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; see Cerra,427 F.3d at 194).

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 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).

The parent asserts that the impartial hearing officer erred in finding that the district offered the student a FAPE in the LRE and that the evidence shows that the district's proposed placement

did not offer the student mainstreaming opportunities. For the reasons explained below, I find that the district has not met its burden to show that the recommended placement offered the student a FAPE in the LRE.

A student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo,, 489 F.3d at108; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *36 [N.D.N.Y. Sept. 29, 2009]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering: (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). Determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to: "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). Further, in evaluating the second

factor, whether the school has mainstreamed the student to the maximum extent appropriate, a court must assess "whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate" (Newington, 546 F.3d at 121).

As discussed above, the May 2008 CSE recommended a special class in a specialized school with a student to staff ratio of 12:1+1, related services determined to be appropriate, and a 12-month school year (Tr. p. 31; Parent Ex. C at p. 1). The May 2008 IEP revealed that the CSE considered and rejected a small class in a community school with a 15:1 student to teacher ratio because it would not have met the student's needs at that time because those programs were "only for ten month students" and the CSE believed that the student needed a 12-month program (Tr. p. 44; Parent Ex. C at p. 13). The IEP also indicated that the CSE considered a small class in a specialized school with an 8:1+4 student to teacher ratio, but rejected the program because the CSE believed that it would have been too restrictive for the student (Parent Ex. C at p. 13; see Tr. p. 47). The hearing record, therefore, shows that the May 2008 CSE considered other program options on the continuum and believed that a 12:1+1 program was the LRE for the student. Neither the parent, her advocate, nor the participants from the student's then current private school objected to this determination at the time of the CSE meeting (Tr. pp. 31, 284). The May 2008 IEP further indicated that the student's "cognitive delays prevent[ed] his participation in the general education environment" (Parent Ex. C at p. 12). The parent does not assert that the student can be educated in a regular education classroom with supplementary aids and services (see Tr. pp. 265-66). The parent argues that the student's program, as it would have been implemented at the recommended district school, was too restrictive for the student because he would not have had contact with nondisabled peers.

The impartial hearing officer determined that the program recommended by the district for the student for the 2008-09 school year offered him a FAPE in the LRE, concluding that "testimony adduced at the [impartial] hearing established that the [district's recommended placement] provided opportunities for [the student] to model typically developing peers in the inclusion programs and in the recreation programs and on community trips and during transitional programs with representatives from VESID and Medicaid" (IHO Decision at p. 16).[7]

Contrary to the impartial hearing officer's conclusion, a careful review of the hearing record shows that the district has not met its evidentiary burden to demonstrate that it offered the student a FAPE in the LRE. While the hearing record suggests, as noted by the impartial hearing officer, that mainstreaming opportunities existed via programming and activities offered through the recommended placement, the hearing record does not show that such opportunities would have been available for this particular student during the 2008-09 school year.

It is undisputed that mainstreaming opportunities were appropriate for the student for the 2008-09 school year (Parent Ex. C at pp. 3, 12, 14; Tr. pp. 27, 48; 148-49). For example, the director testified that opportunities for the student to integrate with nondisabled peers "contributed significantly to his overall level of confidence" and self-esteem, observing that the student's integration with the mainstream students was "comfortable and was smooth and also very productive for him" (Tr. p. 157). Because the student was "somewhat immature socially," she

[7] Although undefined in the hearing record, it is presumed that "VESID" refers to the Office of Vocational and Educational Services for Individuals with Disabilities.

stressed the importance of mainstream opportunities that exposed the student to appropriate models and the "appropriate guides in terms of socialization at the high school level" (Tr. pp. 150, 154-55). The director opined that placement in a program without mainstream opportunities would be "devastating" to the student and that participation in activities with mainstream students was "educationally sound that he be integrated in that way" (Tr. pp. 154-55).

In addition, the assistant dean of the private school the student attended during the five years prior to the 2007-08 school year testified that while attending that school, the student was mainstreamed for a variety of activities including lunch and recess (Tr. pp. 258-59). She stated that the student "definitely" benefitted from inclusion in mainstream activities due to his ability to "mimic[]" and follow the behavior of peers around him, concluding that it was "very beneficial for [the student] to be with mainstream [students] so that he had appropriate social role models" (Tr. p. 259). The parent testified that her son had consistently "been in a mainstreaming environment" and that he would "rather be with the typically developing children" (Tr. pp. 268, 281).

The assistant principal of the district's recommended placement testified that it is a secondary school serving students from ages 14 through 21 who have received diagnoses of mental retardation and/or autism (Tr. pp. 50, 56, 113). The recommended school occupies an entire building and is composed of approximately 467 students (Tr. pp. 53, 132). The assistant principal testified that at the time of intake, students and parents are questioned about student preferences, and at the beginning of the school year, parents and school staff review student goals and adjust IEPs with parental consent (Tr. pp. 114, 129-30). Contact between school staff and parents was described as "ongoing," and parents are assisted in accessing related services and transition services with outside agencies (Tr. pp. 71-72). The school offers on-site "shops" such as a school store, coffee shop, bakery, and print shops that provide students with opportunities to learn job skills and school readiness skills (Tr. pp. 57-58, 117-19). The recommended placement also offers eleven work sites, offering students opportunities in the community to perform tasks in places such as nursing homes, hospitals, offices, and day care centers (Tr. p. 59). Students in the recommended program travel into the community to places such as the aquarium, the nature preserve, and museums (Tr. pp. 68-69). However, the assistant principal testified that the district's offered placement, similar to the parent's chosen private placement, does not offer any in-school opportunities for students to be educated with nondisabled peers, and that there are no "typically developing students" who attend the school (Tr. p. 105, see Tr. p. 132). The assistant principal also indicated that the school participates in an "inclusion program" with a high school "next door" (Tr. pp. 55-56).[8] According to testimony, students participate in a "screening" and visit the inclusion program, and teachers and parents provide recommendations (Tr. p. 56). Significantly, however, the hearing record is devoid of any additional information about the inclusion program and does not reflect that the student would have been able to participate in it, or that the inclusion program would have addressed the student's socialization needs and would have provided appropriate mainstreaming opportunities (Tr. p. 56).

Further, the district has not shown that the student would have participated in an out-of-school work site program during the 2008-09 school year. The assistant principal testified that "a

[8] The parent testified that during her visit to the recommended placement, she was told by school personnel that the placement did not have any mainstreaming opportunities and that the "school next door" did not have any "type of programs" for the student (Tr. pp. 274-75).

lot" of the programs that students from her school attended at the out-of-school worksites "have other schools there and many of them are co-op programs from other programs, high schools, so they do have interactions with other young people who are - - they're peers but nondisabled" (Tr. p. 67). However, the hearing record indicates that while the recommended placement did provide some students with opportunities for out-of-school work site experiences that included exposure to "nondisabled people," the student's schedule did not reflect that he would have been offered those opportunities during the 2008-09 school year and the assistant principal's testimony confirms that the student would not have participated in these opportunities because of his age (Tr. pp. 77, 135; Parent Exs. M; N at p. 2).

Based on the above, I find that the district has not met its burden to show that the May 2008 IEP, as it would have been implemented in the recommended placement, offered the student a FAPE in the LRE.

Having found that the district failed to offer the student a FAPE in the LRE, I must now consider whether the parent has met her burden of proving the appropriateness of her placement of the student at Kulanu for the 2008-09 school year (see Burlington, 471 U.S. at 369-70). A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

Based on a careful review of the hearing record, as more fully discussed below, I agree with the impartial hearing officer that the parent has not met her burden to show that Kulanu provided the student with educational instruction specially designed to meet the unique needs of the student (see Gagliardo, 489 F.3d at 112, citing Frank G., 459 F.3d at 364-65).

According to the hearing record, Kulanu is a school for students exhibiting cognitive deficits and autism (Tr. p. 217). Kulanu's educational programs are contained in a building "separated by a parking lot" from a general education high school that provides Kulanu students with mainstream opportunities (Tr. pp. 180-81, 217-18). Testimony from the student's special education teacher indicated that during the 2008-09 school year at Kulanu, the student received instruction in functional academics and life skills in a self-contained class with seven other students ages sixteen to nineteen and five adults (Tr. pp. 218-20, 223, 231-35; Parent Ex. M). The student's special education teacher further testified that the five adults in the student's classroom included one teacher and four paraprofessionals who were designated to assist other students (Tr. p. 219). The coordinator of vocational education at Kulanu (coordinator) testified that on multiple days during the school week, for approximately 1 1/2 to two hours at a time, the student attended vocational placements at a retail store and an assisted living facility (Tr. pp. 184-85, 198; see Tr. p. 248). The student received counseling, speech-language therapy, and OT at Kulanu and the student's teacher testified that she believed that those related services were funded by the district through RSAs (Tr. pp. 216, 218, 253-54).[9]

The hearing record reveals that the student exhibited delays in receptive and expressive language, pragmatic language, social, and fine-motor skills (Dist. Exs. 5; 6; Parent Ex. C at pp. 4-6). Additionally, the student's May 2008 IEP, which was developed with input from, and information provided by, the student's 2007-08 private school teacher and director of that private school, identified the student's difficulty comprehending oral and written material, processing abstract concepts and ideas, and reading social situations accurately (Tr. pp. 24-29, 30-31, 283-84;

[9] Neither of the student's 2008-09 class schedules from Kulanu contained in the hearing record indicated periods of the day designated to the provision of the student's related services (see Parent Exs. M; N at p. 2).

Parent Ex. C at pp. 2, 4-5). The May 2008 IEP further described the student's behavior as "somewhat immature" and indicated that he exhibited "fine-motor difficulties" (Parent Ex. C at pp. 5-6). The May 2008 IEP included annual goals and corresponding short-term objectives designed to improve the student's conversation and topic maintenance skills, use of appropriate body language and facial expressions, social problem solving skills, vocabulary and expressive language skills, frustration management, and upper body, fine-motor, and graphomotor skills (id. at pp. 9-11). The May 2008 CSE further recommended, as appropriate to the student's needs, that the student receive one weekly group session of counseling, two weekly individual sessions of OT, and two weekly group sessions and one weekly individual session of speech-language therapy (id. at p. 14). Testimony by the parent reflects that at the time of the May 2008 CSE meeting, she did not object to her son's IEP, annual goals, or the CSE's recommendations regarding the type, frequency, and duration of related services, nor did staff from the private school (Tr. p. 284; see Tr. p. 30). On appeal, the parent does not dispute the appropriateness of the recommended related services.

Testimony by both Kulanu's coordinator and special education teacher described the student's daily schedule as consisting of instruction in vocational activities and academics (Tr. pp. 184-86, 216-36). Specifically, the student's special education teacher testified that she provided the student with journal writing time; opportunities to use computer reading and math programs; and instruction in math, language arts, health and social skills, social studies, science and life skills (Tr. pp. 220-36). The special education teacher and the coordinator described how Kulanu provided the student with opportunities to go into the community, both with his self-contained class and as part of his vocational program (Tr. pp. 185, 224, 233). The coordinator testified that at the student's job sites, he completed "different task lists around the store," and while at the assisted living facility he participated in "food service" tasks and recreational activities with the residents (Tr. pp. 189-90). However, the hearing record is devoid of information regarding whether, how, and to what extent Kulanu provided instruction and/or services to address the student's unique related service needs described above. The impartial hearing officer found that Kulanu did not provide the student with his mandated related services and concluded that the student received these services through RSAs (IHO Decision at p. 17; see Tr. pp. 253-54). I note that these findings are not disputed by the parent on appeal.

Based on the above, the parent has not shown that Kulanu met the student's unique needs in the areas addressed by the related services of counseling, speech-language therapy, and OT as recommended by the May 2008 CSE and the resultant May 2008 IEP. While parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65), the school must offer appropriate individualized services to meet the student's unique, special education needs (Application of a Student with a Disability, Appeal No. 09-069; Application of the Dep't of Educ., Appeal No. 09-020; Application of the Dep't of Educ., Appeal No. 08-137; Application of a Student with a Disability, Appeal No. 08-119; Application of the Dep't of Educ., Appeal No. 08-029; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Dept' of Educ., Appeal No. 07-097; Application of a Student with a Disability, Appeal No. 07-034; Application of the Dep't of Educ., Appeal No. 07-018; Application of a Student with a Disability, Appeal No. 07-014; Application of a Child with a Disability, 06-127; Application of the Dep't of Educ., Appeal No. 06-114; see also Green v. New York City Dep't of Educ., 2008 WL 919609 at * 7 [S.D.N.Y. Mar. 31, 2008]; Thies v. New York

City Bd. of Educ., 2008 WL 344728, at *3 [S.D.N.Y. Feb. 4, 2008]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660 [S.D.N.Y. 2005]).

Additionally as stated above, the May 2008 CSE, which included participation by staff at the student's then current private school, determined that the student would benefit from a 12-month program (Tr. pp. 24, 44-45; Parent Ex. C at p. 2). The special education teacher testified that Kulanu offers a 10-month program (Tr. p. 243). Although she testified that Kulanu offered the student an appropriate education during the 2008-09 school year, I agree with the impartial hearing officer's determination that the hearing record does not reflect how Kulanu met the student's extended school year needs.

I concur with the impartial hearing officer that the hearing record does not demonstrate that the parent's private placement met the student's unique needs for which the services of speech therapy, OT, counseling, and 12-month programming were determined to be appropriate, and concur with her determination that the private placement was not appropriate. Having decided that the parent failed to show that her placement of the student at Kulanu was appropriate, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations support the parent's claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made above. Lastly, the hearing record shows that the student can be educated appropriately in a public school setting in the LRE. I encourage the parties to collaborate in good faith to devise an appropriate educational program for the student in the future.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision determining that the district offered the student a FAPE in the LRE is annulled.

Dated: **Albany, New York**
December 9, 2009

PAUL F. KELLY
STATE REVIEW OFFICER