The University of the State of New York

The State Education Department
State Review Officer
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No. 10-047

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

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Jessica C. Darpino, Esq., of counsel

Partnership for Children's Rights, attorneys for respondents, Erin McCormack-Herbert, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents) son and ordered it to reimburse the parents for their son's tuition costs at the Aaron School for the 2009-10 school year, and for expenses incurred in connection with obtaining related services for the student from September 1, 2009 through June 30, 2010. The parents cross-appeal the impartial hearing officer's decision to the extent that it did not address their allegation that the district's May 1, 2009 individualized education program (IEP) was procedurally deficient in that it failed to set forth the evaluative procedures to be used in measuring the student's progress toward annual goals. The appeal must be sustained in part. The cross-appeal must be dismissed.

The student has attended the Aaron School[1] since beginning preschool in September 2004, and is described in the hearing record as possessing cognitive abilities in the average to low average range and "academic skills … at or approaching grade level," with a particular aptitude for mathematical thinking (Tr. pp. 27, 267-68, 297, 351-55, 358, 394; Parent Exs. B at p. 3; AA at p.

[1] The Aaron 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).

2; BB at p. 3[2]; C at pp. 3, 5; D at p. 1). The student has received diagnoses of an attention deficit hyperactivity disorder (ADHD) and a central auditory processing disorder (CAPD) (Parent Exs. B at p. 4; H at p. 1; M). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The hearing record is sparse relative to the student's educational history. In November-December 2008, at the parents' request, the student was evaluated by an independent psychologist (Parent Ex. C). The evaluating psychologist noted that at the time of the evaluation, the student "attend[ed] a small, structured classroom at the Aaron School where he receive[d] occupational and language-based therapies, as well as social skills instruction" (id. at p. 1). Her review of teacher reports revealed that the student's academic progress had been "steady," but that his classroom challenges included "pragmatic language weakness, a tendency toward sensory overload and inconsistent attention" (id.). She further learned that the Aaron School employed a "sensory diet, which consist[ed] of movement breaks and various sensory tools" to aid him with focus and organization, and noted that the student received additional occupational therapy (OT) and speech-language therapy outside of school (id.).

The evaluating psychologist administered a battery of standardized tests to the student, including the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III), the Developmental Neuropsychological Assessment Test (NEPSY), and the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI) (Parent Ex. C at pp. 2, 7-8).[3] The student's results on these tests placed him within the average range for verbal comprehension and within the average to low average range for perceptual reasoning and working memory; the evaluating psychologist advised that "[p]rocessing [s]peed, and therefore [f]ull [s]cale [m]easures, could not be determined and are not currently appropriate for t[he student's] unique profile of intellectual strengths and developmental challenges" (id. at p. 2). She opined that the student had a "fine vocabulary and a solid ability for verbal reasoning" with an adequate fund of information, but noted that his "understanding and use of language [were] inconsistent and [could] be quite idiosyncratic, particularly when questions are abstract or involve complex social-emotional thinking" (id.). She further reported that the student had a "natural talent for arithmetic," despite inconsistent attention

[2] The hearing record contains duplicative exhibits. The impartial hearing officer admitted the May 1, 2009 IEP as Parent Exs. "B" and "BB." For the purposes of this decision, I refer only to the former citation. It is the responsibility of the impartial hearing officer to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of the Bd. of Educ., Appeal No. 10-014; Application of a Student with a Disability, Appeal No. 09-134; Application of the Bd. of Educ., Appeal No. 09-124; Application of a Student with a Disability, Appeal No. 09-096; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal No. 09-038; Application of a Child with a Disability, Appeal No. 07-119; Application of the Bd. of Educ., Appeal No. 06-074).

[3] The evaluating psychologist cautioned that the student's tendencies "toward distractibility and withdrawal … in combination with his language-processing difficulties" may have prevented these tests from accurately reflecting the student's intellectual prowess, and "advise[d] that the results be interpreted with caution" (Parent Ex. C at p. 2). She also noted that she excluded several timed subtests which required both speed and visual-motor precision from her assessment altogether, as she deemed these subtests inappropriate for the student given his aforementioned concerns (id.).

and difficulty with verbal processing, both of which impacted his ability to solve word problems (id. at p. 3). While acknowledging that the student "possesse[d] a solid grasp of visual and spatial relations," the evaluating psychologist commented that his attentional difficulties affected his ability to perform tasks, and that while his fine motor skills were developing, the student "continue[d] to have considerable difficulty achieving visual-motor coordination and precision" (id.).

With regard to the student's academic functioning, the evaluating psychologist reported that the student's academic scores indicated that he was performing at or near grade level, but when confronted with more challenging or time-consuming work, his "various learning challenges – his difficulty with complex, language-based information, his tendency toward sensory overload and his varying levels of attention – [became] prominent obstacles" (Parent Ex. C at p. 3). She observed that the student experienced trouble managing frustration and anxiety, especially when negotiating more complex tasks, and that these feelings prompted him to withdraw (id.). She assessed the student's listening comprehension as "variable," depending on the nature of the material; the more complex and nuanced the material, the more difficulty the student experienced (id.). During her classroom observation of the student, the evaluating psychologist characterized his attention and engagement as "inconsistent," and further noted his difficulty in working independently, often requiring teacher check-ins and reminders to stay focused (id. at pp. 3-4).

With respect to the student's attention/memory/executive functions, the evaluating psychologist theorized that the student's "attentional vulnerabilities are closely related to his problems with sensory overload, and to his need to modulate visual, verbal and social stimulation" (Parent Ex. C at p. 4). She also observed that "[i]f not provided with relief or support, he can eventually turn to sensory-motor outlets such as hand-flapping or jumping" (id.). Addressing language functioning, the evaluating psychologist described the student as a "motivated conversationalist" who possessed "a fine command of vocabulary" (id.). However, she added that when anxious or over-stimulated, the student's conversational ability diminished and he lost focus (id.). She identified "[c]omplex syntax, abstract ideas and spontaneous social speech" as weaknesses, and while acknowledging that the student's narrative abilities were developing, she reported that he required help "strengthening the expressive and receptive aspects of language" and "maintaining narrative structure and coherence" (id.). With regard to social/emotional development, she cited the student's "superb progress in all areas of development," but added "[t]he following capacities continue to need strengthening: [his] comprehension of abstract language; his grasp of complex social interactions; and self-management in the areas of attention, anxiety and over-stimulation" (id. at p. 5).

The evaluating psychologist concluded her report by offering several school-based and therapeutic recommendations for the student (Parent Ex. C at pp. 5-6). The former included: (1) "a small, structured classroom and teachers who are trained to work with special needs," following consistent routines and continuing to offer school-based occupational [OT] and language-based therapies;" (2) teacher interventions and reminders during independent work; (3) a sensory motor routine and the development of interior "coping mechanisms;" (4) testing accommodations including double time on tests, a quiet and distraction-free room, and reading and re-reading of directions, as needed; (5) additional teacher assistance with peer interactions; and (6) a continued program of academics and therapeutic services during the summer months consistent with the

levels afforded during the school year, including speech-language therapy, OT, play therapy, and continued supervision by a child psychiatrist (id.).

On December 2, 2008, the district's school psychologist conducted a classroom observation of the student at the Aaron School (Parent Ex. E). During her 30-minute observation in the student's reading class, the school psychologist observed that the student "appeared to have difficulty remaining on task and required teacher redirection" (id. at p. 2; see also Tr. pp. 33-34). On January 27, 2009 the student's mother executed an enrollment contract with the Aaron School, re-enrolling the student for the 2009-10 school year (Parent Ex. O; see Tr. p. 386).[4]

On April 21, 2009, the student's speech-language therapist outside of the Aaron School issued a related service progress report (Parent Ex. H; see Tr. pp. 393-94). Although acknowledging that the student "continue[d] to present with significant delays in receptive, expressive and pragmatic language skills," his outside speech-language therapist cited his improvements in oral motor function, conversational abilities with others, decoding and oral reading, functional receptive and expressive vocabularies, development of morphological and syntactic structures of language, and in his ability to follow unrelated three-step directives (Parent Ex. H at pp. 1-2). However, she also identified several continuing deficits, including pragmatic language skills and reading comprehension, and observed that "[t]he presence of significant attention deficits and sensory motor needs continue to compromise the completion of work in an independent manner" (id.).

The student's outside speech-language therapist opined that "it is imperative that [the student] continue to receive speech and language therapy. It is also imperative that services are rendered in 60 minute 1:1 sessions" in order to address the student's language processing, reading comprehension, cognitive problem solving, and difficulty working independently (Parent Ex. H at p. 3). She explained that hour-long sessions were necessary "to address all objectives in a single session, build stamina and focus towards independence, and allow for family training for follow-through" (id.). She confirmed that at the Aaron School, the student was currently receiving speech-language services in a 2:1 setting, and emphasized his need to continue to receive services outside of school on a 1:1 basis in order to "reach the ultimate goal of a least restrictive learning environment [LRE]" which, she opined, "he cannot achieve … without intensive support" (id.).

On May 1, 2009, the Committee on Special Education (CSE) convened for the student's annual review meeting to develop a program for the student for the 2009-10 school year (Parent Ex. B; see Tr. pp. 33, 81). In attendance were a district representative, school psychologist, special education teacher, and the student's mother; the student's special education teacher from the Aaron School for the 2008-09 school year participated telephonically (Parent Ex. B at p. 2; see Tr. p. 405).

[4] In the exhibit list included in the impartial hearing officer's April 14, 2010 decision, the impartial hearing officer ascribed a date of "January 22, 2009" to this exhibit; however, there is no reference to this date in the re-enrollment contract or elsewhere in the hearing record (compare IHO Decision at p. 19, with Parent Ex. O).

The student received a classification of a student with a speech or language impairment, and the May 1, 2009 CSE recommended a special class in a community school, in a 12:1+1[5] setting; pull-out related services consisting of OT, four times per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a 2:1 setting, and speech-language therapy, four times per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a 2:1 setting; program modifications consisting of visual and verbal cues, redirection, checklist, body breaks, sensory breaks and water breaks within the classroom as needed; testing accommodations consisting of extended time (2.0) and breaks after 40 minutes, separate location, questions read to student (except for reading exams), and directions read and reread aloud; and continuation of OT and speech-language therapy during summer 2009 (Parent Ex. B at pp. 1-3, 5-6, 13-15).

Additionally in May 2009, the Aaron School generated speech-language therapy and OT progress reports (Parent Exs. I; K). The student's speech-language therapist at the Aaron School advised that during the 2008-09 school year, the student received speech-language therapy at the school twice per week for 30 minutes per session in a 2:1 setting; additionally, he participated in an in-class social skills group once per week focusing on speech-language therapy (Parent Ex. I at p. 1). She explained that speech-language therapy sessions addressed increasing the student's expressive/receptive language, auditory processing, problem solving, and pragmatic language skills, and that the student's "team" met frequently "to collaborate on goals, ensure carryover and promote academic progress" (id.). Her assessment of the student's progress and continuing deficits is essentially consistent with that of the student's outside speech-language therapist as set forth in her April 21, 2009 report (compare Parent Ex. H, with Parent Ex. I).

The student's occupational therapist at the Aaron School confirmed that the student received OT twice per week for 30 minutes per session, once in a 2:1 setting and once in a 1:1 setting; additionally, he participated in two cursive handwriting groups per week, one lead by his occupational therapist and one lead by his homeroom teacher (Parent Ex. K at p. 1). With respect to sensory processing and regulation, the Aaron School occupational therapist observed that the student displayed "improved ability to self-regulate, to organize his materials, and to attend for longer periods of time during the school day.… However, he continue[d] to demonstrate difficulty attending even when his regulation needs are met and his arousal level is optimal" (id. at p. 2). In the areas of fine motor coordination and graphomotor skills, she reported that the student "continue[d] to demonstrate improvements with editing printed work and learning cursive letter formation for functional writing" but experienced difficulty doing so when completing classroom writing assignments without reminders (id. at p. 3). Relative to gross motor functioning, she opined that the student "demonstrate[d] slow improvements with skills related to strength, endurance, and balance" and "ha[d] shown increased motor planning and body awareness" (id. at p. 4). In the area of self-care skills, she noted that the student "ha[d] shown marked improvements in his ability to negotiate with peers for problem solving, taking turns, and engaging in various play situations" as well as "in his ability to cooperatively make decisions, but added that he continued to require adult support in this area (id.).

[5] This refers to a class consisting of no more than 12 students in which one supplementary school personnel assists the special education teacher (see 8 NYCRR 200.6[h][4][i]).

The hearing record indicates that on June 10, 2009, the student's mother received a final notice of recommendation (FNR) from the district identifying a placement for her son for the 2009-10 school year in accordance with the May 1, 2009 IEP (Parent Ex. M). On June 15, 2009, the student's mother visited the recommended placement and met with the school principal and the classroom teacher of the recommended 12:1+1 special class (id.; see Tr. pp. 374-78, 395-97).[6] On June 22, 2009, the student's mother rejected the recommended placement, stating that it "[did] not have the support or services that [the student] require[d] and that [were] necessary to address [his] academic and social and emotional needs," and requested another CSE meeting to discuss the recommended placement (Parent Ex. M). On August 5, 2009, the CSE convened again to discuss the recommended placement set forth in the May 1, 2009 IEP (Tr. pp. 247, 408; Parent Ex. N).[7] On August 6, 2009, the student's mother again wrote to the CSE, advising that her attempt to secure an alternative placement for the student from the district was unsuccessful (Parent Ex. N).

On November 5, 2009 the district representative conducted a classroom observation of the student at the Aaron School (Parent Ex. F). After a 30-minute observation of the student in his reading class, the district representative described the student as "unfocused most of the time" and noted that "[h]e did not actively participate in class activities" (id. at p. 2). In discussion with his reading teacher, the district representative learned that these behaviors were "semi typical" of the student (id.).[8]

On November 6, 2009, the parents, by counsel, filed a due process complaint notice,[9] adducing three principal allegations (Parent Ex. AA). They alleged that the district failed to offer the student a free appropriate public education (FAPE)[10] for the 2009-10 school year based upon three principal arguments: (1) the May 1, 2009 IEP was invalid, because the CSE did not include an additional parent member per 8 NYCRR 200.3(a)(1)(viii), and because the IEP failed to set

[6] The classroom teacher of the recommended placement stated that the student's mother visited his classroom in March 2009 (Tr. pp. 106-08).

[7] According to the hearing record, the August 5, 2009 CSE made no material changes to the program content of the May 1, 2009 IEP (see Tr. p. 263). It is unclear from the hearing record if the CSE generated an IEP after the August 5, 2009 CSE meeting, and the hearing record does not contain a subsequent IEP (see Tr. p. 264).

[8] According to the hearing record, a third classroom observation of the student was conducted on November 19, 2009, by an associate of the student's supervising psychiatrist (Parent Ex. G). During this observation, which lasted over two hours, the observer documented several examples of the student's inattention, need for redirection, and one example of his rapid hand flapping (id.; see Parent Ex. C at p. 4).

[9] Although the district's counsel refers to the notice as a "corrected" due process complaint notice in the petition (see Pet. ¶ 3), the hearing record contains neither a description of the nature of the correction, nor any indication that a prior due process complaint notice was ever filed. In the answer, the parents deny that the November 6, 2009 due process complaint notice was "corrected" (Answer ¶ 2).

[10] 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).

forth the evaluative criteria, procedures, and schedules relied upon by the CSE to measure the student's progress per 8 NYCRR 200.4(d)(2)(iii)(b)-(c); (2) the recommended program could not meet the student's academic and social/emotional issues because it lacked the necessary support to address his auditory processing disorder and sensory issues, because the size of the student population of the recommended placement would create sensory overload in the student, and because the student's mother would be unable to work collaboratively with the classroom teacher of the recommended class; and (3) the district refused to issue related services authorizations (RSAs) enabling the student to receive the level and frequency of related services recommended in the May 1, 2009 IEP during the 2009-10 school year (id. at pp. 2-5).[11] The parents sought an order from an impartial hearing officer: (1) determining that the Aaron School was the student's pendency placement; (2) directing the district to reimburse the parents for all tuition paid to the Aaron School for the 2009-10 school year; (3) directing the district to issue RSAs for both OT and speech-language therapy services at the levels and frequencies recommended in the May 1, 2009 IEP; (4) determining that the district failed to offer the student a FAPE for the 2009-10 school year; (5) determining that the Aaron School was the appropriate placement for the student for the 2009-10 school year; (6) directing the district to reimburse the parents for expenses incurred in connection with obtaining OT and speech-language therapy services for the student for the 2009-10 school year; and (7) determining that equitable considerations supported the parents' claims (id. at pp. 5-6).

On November 16, 2009 an impartial hearing convened, and concluded on March 3, 2010 after three days of testimony. On April 14, 2010 the impartial hearing officer issued a decision in favor of the parents (IHO Decision at pp. 16-18). The impartial hearing officer first determined that the May 1, 2009 IEP was not reasonably calculated to enable the student to make measurable gains, because: (1) the 12:1+1 setting was insufficient to address the student's significant needs for support, redirection, re-teaching, and supervision; (2) the evidence contained in the hearing record established that the student would be unable to learn in a 12:1+1 class because it lacked the requisite support to keep him on task given his significant internal distraction and sensory issues; and (3) the environment of the general education school in which the 12:1+1 class was situated would create a sensory overload for the student (id. at p. 16).[12]

Next, the impartial hearing officer found that the evidence contained in the hearing record supported a finding that the Aaron School was an appropriate program for the student for the 2009-10 school year, because: (1) its 9:3 student/teacher ratio provided the student with the significant support and supervision that he required in order to learn; (2) its reading and math programs addressed the student's needs by utilizing multisensory techniques, building upon previously

[11] In the due process complaint notice, the parents sought reimbursement for OT services privately obtained for the student for July and August 2009 (Parent Ex. AA at pp. 5-6); however, according to the hearing record, the student's mother acknowledged that the district did in fact issue RSAs for both OT and speech-language services for summer 2009 (see Tr. pp. 402-03).

[12] The impartial hearing officer's April 14, 2010 decision did not address the parents' allegations that the May 1, 2009 CSE was improperly composed due to the lack of an additional parent member, or that the May 1, 2009 IEP was deficient because it lacked evaluative criteria to measure the student's progress.

taught skills, and providing a leveled approach to instruction; and (3) its writing program targeted the student's deficits in language and organization (IHO Decision at p. 17).

Lastly, the impartial hearing officer determined that equitable considerations supported the parents' claim for reimbursement, insofar as the evidence contained in the hearing record established both that the parents cooperated fully with the CSE in the review process and that the student's mother communicated her concerns about the recommended placement to the CSE (IHO Decision at p. 17).

In the April 14, 2010 decision, the impartial hearing officer awarded the parents tuition reimbursement for the Aaron School 2009-10 school year and reimbursement for expenses incurred in connection with privately obtained OT and speech-language therapy, both at twice per week for 30 minutes per session in a 1:1 setting, from September 1, 2009 through June 30, 2010, at a rate not to exceed $90.00 per hour,[13] and directed the district to provide the parents with an RSA for speech-language therapy in the amount of twice per week for 30 minutes per session in a 1:1 setting, for the 2009-10 school year (IHO Decision at pp. 17-18).

The district appeals, and asserts four principal arguments: (1) the parents' claim for tuition reimbursement is barred because the Aaron School is a for-profit institution; (2) the district offered the student a FAPE for the 2009-10 school year; (3) the parents did not meet their burden of demonstrating that the Aaron School was appropriate for the student for the 2009-10 school year; and (4) equitable considerations preclude awarding relief to the parents. The district seeks annulment of the impartial hearing officer's decision in its entirety.[14]

The parents submitted an answer and cross-appeal, alleging that: (1) the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400-1482) (IDEA) does not bar parents whose disabled student has been denied a FAPE from obtaining reimbursement for the student's placement in a for-profit private school that meets the student's special education needs; (2) the district failed to offer the student a FAPE for the 2009-10 school year; (3) the parents met their burden of proving that the Aaron School was an appropriate placement for the student for the 2009-10 school year; (4) equitable considerations favor the parents and support a reimbursement award; and (5) even if a State Review Officer elects to annul the impartial hearing officer's decision, the district is still obligated to reimburse the parents for tuition paid to the Aaron School and to furnish RSAs covering the period from November 6, 2009 (the date they filed the due process complaint notice), through April 14, 2010 (the date the impartial hearing officer issued the decision pursuant to a

[13] According to the hearing record, the RSAs for OT and speech-language therapy previously provided by the district allowed for a rate of $90.00 per hour for each provider's session (see Tr. pp. 391-94).

[14] In the petition, the district "requests that [a] State Review Officer issue an Order annulling the April 26, 2010 [d]ecision (which amended an April 14, 2010 [d]ecision)" (Pet. at p. 20). However, there is neither any reference to an April 26, 2010 impartial hearing officer decision nor a copy of any such decision in the hearing record.

pendency order issued by the impartial hearing officer)[15] which the district did not appeal.[16] The parents raised an affirmative defense that during the impartial hearing, the district failed to allege insufficient 10-day notice pursuant to 20 U.S.C. § 1412(a)(10)(c)(iii)(I)(aa)-(bb) and 34 C.F.R. § 300.148(d)(1)(i)-(ii) and consequently is now barred from raising this issue on appeal.

The parents cross-appeal the impartial hearing officer's decision to the extent that it did not address their allegation that the May 1, 2009 IEP failed to set forth the evaluative procedures to be used in measuring the student's progress toward meeting each annual goal, as mandated by 8 NYCRR 200.4(d)(2)(iii)(b), a deficiency that they allege deprived the student of a FAPE. The parents also attach two pieces of additional documentary evidence to the answer, namely the written closing statements submitted by the parties to the impartial hearing officer prior to the rendering of the decision, and a letter dated August 24, 2009 from the parents' attorney to the CSE purporting to notify the district of the parents' intentions to re-enroll the student at the Aaron School for the 2009-10 school year and seek reimbursement from the district.

In its answer to the cross-appeal, the district argues that the CSE was not required to include the evaluative procedures it planned to use in measuring student progress in the May 1, 2009 IEP, and consequently, the absence of same did not deprive the student of a FAPE. The district also replies to the parents' answer to the petition. In its reply, the district consents to the introduction of the closing statements into the record on appeal, but objects to the inclusion of the parents' August 24, 2009 notification letter, and asserts that the parents' argument the district failed to raise the lack of 10-day notice below is erroneous, because the district preserved its equities argument in its closing statement.

At the outset, I will address the issue of the additional documentary evidence attached to the parents' answer. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 10-002; Application of a Student with a Disability, Appeal No. 09-104; Application of a

[15] According to the impartial hearing officer's April 14, 2010 decision, the pendency order was issued on November 18, 2009; in the answer, the parents state that the pendency order was issued on November 19, 2009, and "directed the [district] to fund [the student's] placement at the Aaron School and issue RSAs for four, 30-minute individual sessions of OT and [speech-language therapy] per week" (compare IHO Decision at p. 4, with Answer ¶ 114, n.5). The hearing record does not contain a copy of the subject pendency order, and there is no explanation in the hearing record accounting for this omission.

[16] According to the hearing record, the impartial hearing officer conducted a pendency hearing on November 16, 2009 (see Tr. pp. 1-12; IHO Decision at p. 4), at which time she placed on the record her intention to draft a pendency order based upon a prior decision from a different impartial hearing officer dated March 30, 2007 (Parent Ex. A), which, according to the impartial hearing officer in this appeal, constituted the student's last agreed upon placement (Tr. pp. 6-11). The March 30, 2007 decision relied upon a prior impartial hearing officer decision relative to the 2005-06 school year, which directed the district "to fund [the student's] placement during that year at the Aaron School … and to pay for additional services outside the school day," but did not specify the type of services or their levels (Parent Ex. A at pp. 3-5). The impartial hearing officer noted in the April 14, 2010 decision that she issued a pendency order on November 18, 2009, but did not specify its contents (IHO Decision at p. 4). The hearing record does not indicate that the district appealed the November 18, 2009 pendency order, and in its reply, the district does not refute the parents' assertion that it has not appealed from this pendency order.

Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068) (emphasis added).

In the instant appeal, the parents attach to the answer as "Appeal Exhibit I" the written closing statements submitted by the parties to the impartial hearing officer prior to the rendering of the decision, and as "Appeal Exhibit II" a letter dated August 24, 2009 from the parents' attorney to the CSE purporting to notify the district of the parents' intentions to re-enroll the student at the Aaron School for the 2009-10 school year and seek reimbursement from the district (Answer ¶ 104). The cross-appeal demonstrates that the parents are offering the closing statements to establish that the district failed to challenge the sufficiency of the parents' notice during the impartial hearing, and that they are offering the August 24, 2009 letter to establish that they complied with the notice requirements under the IDEA and federal regulations. As the district consents to the introduction of the closing statements into the record on appeal, I will consider them. However, the August 24, 2009 letter was available to the parents at the time of the impartial hearing, but they did not introduce it into the hearing record. Consequently, I decline to consider it in this appeal.

Turning to the merits of the issues presented by the parties, I will first address the threshold question of whether the parents may seek relief in the form of reimbursement for tuition at the Aaron School. In support of its argument that the parent is ineligible to seek the tuition reimbursement relief she requested, the district points to the express language of the IDEA, which in pertinent part, provides that:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment

(20 U.S.C. § 1412[a][10][C][ii] [emphasis added]; see 34 C.F.R. § 300.148[c]). An "elementary school" is defined in the IDEA as a "a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law" (20 U.S.C. § 1401[6]; see 34 C.F.R. § 300.13). A "secondary school" is defined as "a nonprofit institutional day or residential school, including a public secondary charter school, that

provides secondary education, as determined under State law, except that it does not include any education beyond grade 12" (20 U.S.C. § 1401[27]; see 34 C.F.R. § 300.36).[17]

However, in Forest Grove Sch. Dist. v. T.A (129 S.Ct. 2484 [2009]), the United States Supreme Court held that the statutory clause upon which the district has rested its argument in this case, clause (ii) of § 1412(a)(10)(C), is phrased permissively and does not foreclose tuition reimbursement in other circumstances (id. at 2493). The Supreme Court further indicated that clause (ii) lists "factors that may affect a reimbursement award" and that "[t]he clauses of § 1412(a)(10)(C) are . . . best read as elucidative rather than exhaustive" (id.; see Frank G. v. Bd. of Educ., 459 F.3d at 364, 368 [2d Cir. 2006]). In Forest Grove, the Supreme Court reaffirmed its holding in Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985) that hearing officers and courts have authority to "grant such relief as the court determines appropriate" (20 U.S.C. § 1415[i][2][C][iii]; see Forest Grove, 129 S.Ct. at 2494, 2496; see also Frank G., 459 F.3d at 368-69). The Supreme Court further explained that if a district failed to provide a FAPE and the parent's unilateral placement was appropriate for the student, with respect to relief, the hearing officer must "consider all relevant factors . . . in determining whether reimbursement for some or all of the cost of the child's private education is warranted" (Forest Grove, 129 S.Ct. at 2496; see Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 415-16 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. 2006]). In this case, although the parties do not dispute that the Aaron School is a for-profit entity (Pet. ¶ 31;[18] Answer ¶ 22; see Tr. p. 410), in view of the statutory text and the case law discussed above, I cannot conclude that the parents are categorically barred by § 1412(a)(10)(C)(ii) from seeking relief in the form of tuition reimbursement at a for-profit school (Application of a Student with a Disability, Appeal No. 09-085; Application of a Student with a Disability, Appeal No. 09-080).

Next I will address the parents' cross-appeal. Two purposes of the IDEA 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, 129 S. Ct. at 2491; 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

[17] The district continues to rely upon Arizona State Bd. For Charter Schools v. U.S. Dept. of Educ., 464 F.3d 1003 (9th Cir. 2006) and Letter to Chapman, 49 IDELR 163 (OSEP 2007) to support its argument that the parent is not entitled to reimbursement; however, as noted in Application of a Student with a Disability, Appeal No. 09-085, and Application of a Student with a Disability, Appeal No. 09-080, those authorities addressed how a state educational agency or school district may administer funds under federal programs when FAPE is not at issue. In contrast, this case involves whether a court or a hearing officer is prohibited by § 1412(a)(10)(C)(ii) from awarding a parent tuition reimbursement when FAPE is at issue and that statutory section is not addressed in Arizona State Bd. or Letter to Chapman.

[18] In the answer, the district erroneously cites to Tr. p. 198 as supporting this proposition.

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; 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]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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).

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 (see Application of the Bd. of Educ., Appeal No. 08-016).

In the cross-appeal, the parents contend that the May 1, 2009 IEP failed to set forth the evaluative procedures to be used in measuring the student's progress toward meeting each annual goal, as mandated by 8 NYCRR 200.4(d)(2)(iii)(b), a deficiency that they allege deprived the student of a FAPE. An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

The hearing record demonstrates that the May 1, 2009 IEP contained annual goals and corresponding short-term objectives specific to the student's multiple deficit areas that were consistent with the student's needs as identified in the present levels of performance and addressed his deficits in word attack and decoding, reading comprehension, handwriting, writing skills, sensory processing, grapho-motor/visual skills, motor planning, pragmatic skills, self-confidence and working independently, problem solving, and language comprehension (Parent Ex. B at pp. 7-12; see also Tr. pp. 42-51). Each of the 35 short-term objectives listed specified a skill the student needed to demonstrate, and 26 included a percentage of accuracy required (Parent Ex. B at pp. 7-12).[19] However, the parents have asserted that the method of measurement of the annual goals in the May 1, 2009 IEP was flawed because the columns for the coding system were left blank for every goal (id.).

The district's school psychologist, who participated in the May 1, 2009 CSE meeting, testified that these portions of the IEP were intentionally left blank by the CSE because "[i]t allows for the teachers or the individuals working with [the student] the flexibility to determine the best way to work with him. Everyone has their own methods, their own styles, and we purposely leave that blank to allow the individuals who work with him the ability to determine the best way," and

[19] For example, an annual goal to "develop word attack and decoding skills to his grade level" has a corresponding short-term objective that the student "identify 'VCVV,' 'VCCV,' [and] 'CVVC' syllabication rules to decode multi syllabic words with 90% accuracy" (Parent Ex. B at p. 7).

added that "it is the teacher that should determine that, rather than the CSE review team" (Tr. pp. 59-61; see Tr. p. 83). She also confirmed that many of the recommendations for annual goals and short-term objectives found in the May 1, 2009 IEP were based upon reports provided to the CSE by the student's parents, which she deemed to be reliable and accurate descriptions of the student's then-current level of functioning and special education needs (Tr. pp. 61-62; see Parent Exs. C; I; K). The special education teacher of the district's recommended 12:1+1 special class explained during the impartial hearing the specific methods he would have used in order to address the student's annual goals and short-term objectives, including the student's progress, during the school year relative to the development of word attack and decoding skills (Tr. pp. 119-21), reading comprehension and improvement of the student's literal and inferential reading skills (Tr. pp. 121-23), handwriting (Tr. pp. 123-24), writing skills (Tr. p. 124), improvement of sensory processing for self-regulation (Tr. pp. 125-26), pragmatic skills (Tr. pp. 127-28), and problem solving (Tr. pp. 128-30). With respect to the student's speech-language annual goals and short-term objectives, the districts' speech-language therapist at the recommended placement specifically described how she would have addressed the student's needs in spatial and linguistic temporal concepts (Tr. pp. 170-72), improvement in the student's knowledge of semantics (Tr. pp. 172-73) and syntax (Tr. pp. 173-74), pragmatic language (id.), oral language skills (Tr. pp. 174-75), and improvement of the student's critical thinking and verbal reasoning skills (Tr. pp. 175-76; see Tr. pp. 178-81). The parents did not refute this testimony. Furthermore, the May 1, 2009 IEP indicated that progress reports would be written three times per year, and listed methods of measurement options (Parent Ex. B at pp. 7-10).

Under these circumstances, I find convincing the testimony of the district's school psychologist that the specific measurement option used to assess and measure the student's progress would be determined by the teacher implementing each particular goal (Tr. pp. 59-61; see Tr. p. 83). I also conclude that the hearing record establishes that the proposed placement had evaluative mechanisms in place to assess the student, to measure the student's progress made on his goals, and to alter those goals and objectives if reevaluation indicated such a course were warranted. Although I find that the May 1, 2009 IEP did not comport with State and federal regulations in this instance, I also find that there is no evidence contained in the hearing record establishing that the fact that the coding system was left blank would have deprived the student of a FAPE (W.T. v. Bd. of Educ., 2010 WL 1737756, at *16-*17 [S.D.N.Y. Apr. 15, 2010]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *2-*4 [N.D.N.Y. June 19, 2009]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294-95 [S.D.N.Y. 2009]; Application of the Dep't of Educ., Appeal No. 08-096; Application of the Dep't of Educ., Appeal No. 08-095; Application of a Student with a Disability, Appeal No. 08-086). However, I strongly encourage the district to include in its IEPs the evaluative criteria, evaluation procedures and schedules to be used to measure student progress in accordance with the State and federal regulations. Accordingly, I will dismiss the parents' cross-appeal.

Next, I will address the district's argument that an additional parent member was not a required participant at the May 1, 2009 CSE meeting.[20] Although not required by the IDEA (20

[20] Although it is not disputed by the parties that an additional parent member did not attend the May 1, 2009 CSE meeting, and there is no indication in the hearing record that the student's mother signed a declination letter (see Tr. p. 59; Parent Ex. B at p. 2), the parents do not raise this issue in the answer or cross-appeal.

U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.344), New York State law requires the presence of an additional parent member at the CSE meeting that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-105; Application of the Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). New York State law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]). New York State law further provides that when a district is permitted to convene a CSE subcommittee, the subcommittee need not include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]-[5]; see Application of the Dep't of Educ., Appeal No. 09-078).[21]

In this case, it is undisputed that an additional parent member did not attend the May 1, 2009 CSE meeting (Pet. ¶ 36 at n.3; Parent Ex. AA at p. 2). Furthermore, there is no parental waiver of the additional parent member in the hearing record. While the lack of an additional parent member, absent a proper waiver, is a procedural error and contrary to State law and regulations, I am not convinced that the absence of an additional parent member was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419). Although the parents allege that the absence of an additional parent member rendered the May 1, 2009 IEP "invalid," the hearing record reflects that the student's mother had an opportunity to participate in the May 1, 2009 CSE meeting (Tr. pp. 250-51, 257, 259; Parent Ex. AA at p. 2). The student's mother, when describing the May 1, 2009 CSE meeting, testified "I felt it was a productive meeting.… [H]is teachers from the Aaron School had prepared reports. So I think that [the school psychologist] and [the district representative] had a lot of material that described what [the student's] issues were, and they both I think had observed him at that point" (Tr. p. 405). She added that "The [student's] classroom teacher [at the Aaron School] was on the phone with us. So I think it was not confrontational at all" and acknowledged that, other than expressing concern about the level of individual support that the program afforded the student, and about the student being "pulled out" of the classroom to receive his related services, she lodged no

[21] On appeal, the district argues that an additional parent member was not a required member of the May 1, 2009 CSE, intimating that the May 1, 2009 CSE was in fact a subcommittee on special education, whose membership is not required to include an additional parent member (Pet. ¶ 36 at n.3). The district did not raise this argument during the impartial hearing, and cites to no evidence in the hearing record to support this contention. The May 1, 2009 IEP identified the meeting as a "CSE Review" meeting, and the hearing record indicates that the meeting was an annual review requested by the district (Tr. p. 81; Parent Ex. B at p. 2). Accordingly, the district has not sufficiently demonstrated that the May 1, 2009 meeting was a subcommittee meeting and I will therefore evaluate the composition argument in accordance with the regulations setting forth the required membership of a CSE. For the purpose of this decision, I will continue to refer to the May 1, 2009 meeting as a "CSE" meeting.

specific objections during the May 1, 2009 meeting to the 12:1+1 program or related services recommended by the CSE (Tr. pp. 362, 365, 403-05). The hearing record also reflects that the student's mother had previous familiarity with the IEP process (Tr. pp. 359, 392, 404-05). Furthermore, the parents do not allege that the absence of an additional parent member was responsible for, or the cause of, any particular defect in the May 1, 2009 IEP.

Based on the foregoing, I find that there is no evidence contained in the hearing record demonstrating that the absence of an additional parent member impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits, and therefore, it did not rise to the level of a denial of a FAPE (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., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419). I caution the district however to ensure that it complies with the requirements of State regulations pertaining to the attendance of the additional parent member at CSE meetings.

The impartial hearing officer concluded that the district failed to offer the student a FAPE for the 2009-10 school year because the May 1, 2009 IEP was not reasonably calculated to enable the student to make measurable gains, and because the placement site for the 12:1+1 special class, a general education school consisting of 800 students, "would create a sensory overload" for the student which would adversely affect both his ability to learn and "his mental and emotional state" (IHO Decision at p. 16). However, I find that a careful review of the evidence contained in the hearing record does not support this conclusion.

In developing the May 1, 2009 IEP, the hearing record establishes that the CSE considered the independent psychologist's report provided by the parents, Aaron School teacher reports, Aaron School speech-language and OT progress reports, and information gathered at the CSE meeting from the student's mother and his Aaron School teacher (Tr. pp. 35-36, 41, 45, 48). The IEP assessed the student's present levels of academic achievement as ranging from a 3.0 to 3.8 grade level in reading, math and writing skills, and reflected that the student displayed delays in receptive, expressive and pragmatic language, reading comprehension, processing complex linguistic structure and abstract concepts, problem solving, and interpretation of social cues, in addition to difficulties with graphomotor skills (Parent Ex. B at pp. 3-4). With regard to social/emotional development, the IEP placed the student's cognitive abilities in the low average to average range, and identified attention, executive functions, stable eye contact, turn-taking skills, social information processing, conversational skills and topic maintenance as areas of difficulty, adding that he became "overwhelmed and fatigued" when tasks were "time-consuming, novel or ambiguous" (id. at p. 5).

The May 1, 2009 IEP contained 9 annual goals and 35 corresponding short-term objectives addressing the student's needs in reading, handwriting, writing, sensory regulation, graphomotor/visual skills, motor planning, pragmatic language skills, self-confidence, independent work, problem-solving, and language comprehension skills (Parent Ex. B at pp. 7-12). Consistent with the description of the student's present levels of performance, the annual goals and short-term objectives addressed decoding skills, reading comprehension, use of correct spacing regarding handwriting, accurate copying from blackboard, abstract thinking, editing skills, and recognition of the need for sensory breaks across home and school settings (id. at pp. 7-10, 12). The annual goals and corresponding short-term objectives also related to the identification of

the student's emotions during his interactions with peers, development of strategies to foster independence, and specific motor planning skills such as shoelace tying (id. at pp. 10-11). Moreover, the school psychologist advised that in order to address the student's needs, the May 1, 2009 CSE developed annual goals and corresponding short-term objectives in the areas of reading comprehension, handwriting skills, motor planning, graphomotor, written expression, pragmatic language delays, self confidence, independent work and problem solving, and language comprehension (Tr. pp. 42-51; see Parent Ex. B at pp. 7-12).

To implement the annual goals and short-term objectives, the May 1, 2009 CSE recommended placing the student in a 12:1+1 special class in a community school (Dist. Ex. B at p. 1). The May 1, 2009 IEP indicated that the CSE considered recommending a 12:1 special class, but rejected this option as "insufficiently supportive" given the student's need for "continuous redirection [which] warrant[ed] the additional support of a paraprofessional within the classroom" (id. at p. 14; see Tr. pp. 54-55). The CSE also considered recommending a 12:1+1 special class in a community school without speech-language therapy and OT services for July and August 2009, but also rejected this option for the same reason (id.). During the impartial hearing, the school psychologist explained that the additional adult in the classroom would both provide the student with redirection and facilitate sensory breaks, and advised that all CSE members, including the student's mother and his teacher from the Aaron School, agreed with the recommendation of the 12:1+1 special class in a community school (Tr. pp. 54-55, 63).

The special education teacher of the recommended placement advised that at the start of the 2009-10 school year, the roster of the proposed 12:1+1 featured seven students, including one student with a classification of speech or language impairment, another student with a classification of an emotional disturbance,[22] and five students with a classification of learning disability (Tr. pp. 92-93; see Dist. Ex. 1).[23] Three of the students were nine years of age, and four were ten years of age (Dist. Ex. 1 at p. 3). The special education teacher described a typical day in the 12:1+1 special class as consisting of a morning meeting, then a review of a daily schedule of events, followed by a "problem of the day" (Tr. pp. 93-94). The students engaged in shared reading, which included examination of a piece of literature, a reading lesson, and then independent reading (Tr. p. 94). He also advised that the students engaged in writing, which included a teacher demonstration of "the skill of the day," followed by "engagement with each other" and a writing exercise, and that during reading and writing instruction, the students engaged in small group work led by the teacher and the classroom paraprofessional (Tr. pp. 94-95). The students also participated in a "cluster class" which included either music, computer, science, physical education, library or English language arts (ELA) led by a literacy coach (Tr. p. 95). After the lunch period, the students completed vocabulary work, copied their homework assignment, engaged in a "read aloud," and then received social studies instruction (id.). The special education teacher confirmed that all students in his class qualified for a 37-1/2 minute "extended day" period, during which the students received small group instruction in specific deficit areas targeting their particular areas of need (Tr. pp. 95-96, 102). However, the student's mother contended that her

[22] According to the class profile contained in the hearing record, there were two students in the recommended class with a classification of emotional disturbance (Dist. Ex. 1 at p. 2).

[23] According to the hearing record, during the course of the 2009-10 school year, three additional students were added to the class roster, bringing the total number of students in the recommended class to ten.

son required the assistance of a teacher and that the additional paraprofessional provided within a 12:1+1 special class was insufficient to meet her son's needs (Tr. p. 362).

The special education teacher explained that he utilized the Teacher's College reading and writing project method of instruction within his classroom, which he explained as a methodology designed to empower students, allowing for differentiated instruction, and promoting development of higher level skills for higher functioning students (Tr. pp. 99-100). The special education teacher opined that had he enrolled in the recommended class, the student would have been considered a higher functioning student in both ELA and math skills compared to the other students in the class (Tr. p. 146). Additionally, the special education teacher explained that he engaged in differential instruction to provide learning opportunities for students of differing levels in his classroom by engaging in small group work and the provision of strategies and accommodations (Tr. pp. 100-02), adding that he selected reading and writing material for his lessons that have "multi-level" concepts so as to appeal to students of varying functional levels (Tr. pp. 229-30).

The special education teacher further testified that he collaborated with the recommended school's guidance counselor, speech-language pathologist, occupational therapist, and physical therapist approximately one to two times per week; for example, he would inform the guidance counselor of a student's needs and the guidance counselor would address those needs during a session, or the speech-language pathologist would inform the special education teacher of topics addressed during a therapy session and then the special education teacher would provide instruction related to those topics in the classroom (Tr. pp. 104-05).

Noting that the student benefited from prompts, the special education teacher advised that he used verbal and visual prompts within his class, as well as a step by step teaching process (Tr. pp. 110-11). He explained that he developed instructional content based on its relevance to the students, and tailored instruction to each student's individual achievement level in order to achieve success and build confidence (Tr. p. 111). He opined that the student's social/emotional needs were similar to the needs of the students in his class, and stated that in order to address the student's anxiety, he would "build a community of trust and acceptance" and reiterate concepts as needed to enable the student to learn (Tr. pp. 112-13). The special education teacher advised that the student would have received individual and small group instruction in the recommended class, and that in order to address their social/emotional management needs, he permitted students to take a break or walk with the guidance counselor (Tr. pp. 113-16). He confirmed that the recommended class afforded students access to sensory tools and computer time, and that in order to decrease the student's anxiety, the student would have been allowed to engage in cooperative play for 5 to 10 minutes, twice per day (Tr. pp . 116-19).

The special education teacher advised that he would have addressed the student's annual goals and short-term objectives related to reading comprehension and decoding skills by implementation of the Wilson reading program,[24] guided reading, shared reading, and individual instruction (Tr. pp. 119-21). To address his handwriting deficits, the class would have engaged in

[24] The special education teacher explained that the Wilson reading program "is essentially based on original [research] in this area, Orton & Gillingham, their method of teaching phonics and word attack skills, and there are six levels to it. It takes about two years to complete" (Tr. p. 120).

handwriting activities for 10 to 15 minutes per day with access to a spacing tool, with additional therapy afforded by the occupational therapist during OT sessions (Tr. pp. 123-24). The special education teacher would have provided instruction regarding punctuation and grammar on a consistent basis in order to implement the student's written expression annual goals and short-term objectives (Tr. p. 124). The special education teacher advised that he, the student's guidance counselor, and the student's occupational therapist would have implemented the student's annual goals related to sensory regulation through sensory breaks, and would have engaged the student in exercises and afforded him access to sensory tools (Tr. pp. 125-26). The special education teacher added that he and the student's guidance counselor would have implemented the student's pragmatic language annual goals regarding social interactions through reading exercises and verbal mediation (Tr. pp. 127-28).

The special education teacher confirmed that the student's parents would have been afforded access to contact him at any time during the school year to discuss the student's progress, and opined that based upon his review of the May 1, 2009 IEP and previous meetings with the student's mother, the proposed 12:1+1 special class with related services was an appropriate setting for the student "since he would be a higher functioning student in the room" and "he would develop a lot of confidence in his abilities while he was in the room" (Tr. pp. 126-27, 132, 233-35).[25]

The district's speech-language pathologist also testified during the impartial hearing. She advised that she "tailor[s] the program depending on the student" and varied her instruction depending on student need (Tr. pp. 166-67). She further opined that the student's needs in the areas of language processing, decoding, and reading comprehension were similar to the needs of her other students, and explained that she provided students with strategies and tools based upon their individual needs (Tr. pp. 167, 169-70, 171-72, 177). She commented that both the May 1, 2009 IEP and the Aaron School speech-language progress report indicated that the student exhibited deficits in language processing, receptive language, oral language and pragmatic language (Tr. pp. 169-70). She specifically detailed how she would have addressed the student's speech-language needs, as outlined in the Aaron School speech-language progress report, in the areas of pragmatic language, knowledge of semantics and syntax and understanding of spatial, linguistic and temporal concepts, oral language, critical thinking and verbal reasoning skills (Tr. pp. 170-76; see Parent Ex. I at pp. 4-5). The speech-language pathologist advised that she could conduct sessions either on a "push-in" or "pull out" basis depending on a student's needs, but acknowledged that in the student's case, she would be required to follow the mandate of the May 1, 2009 IEP, which called for "pull-out" speech-language services five sessions per week (Tr. p. 190; see Parent Ex. B at pp. 1-2, 5, 15). She added that she would have implemented a positive reinforcement system with the student entitled the "star system," wherein the student earned stars

[25] According to the class profile contained in the hearing record, with respect to reading levels, one of the students in the recommended class was reading at a grade level of .5 – 1.5, three were reading at a grade level of 1.6 – 2.5, and three were reading at a grade level of 2.6 – 3.5 (Dist. Ex. 1 at p. 1). In math, one student was functioning at a grade level of 1.6 – 2.5, four were functioning at a grade level of 2.6 – 3.5, and two were functioning at a grade level of 3.6 – 4.5 (id.). With regard to communication skills/language skills, with respect to oral-expressive language, two students were functioning at below average ability, while five were functioning at an age-appropriate level; in oral-receptive language, three students were functioning at below average ability, while four were functioning at an age-appropriate level; and in written skills, six students were functioning at below average ability, while one student was functioning at an age-appropriate level (id.).

for appropriate behavior and homework completion (Tr. p. 202). To assist the student with transitions, the speech-language pathologist would have utilized strategies such as verbal cues, use of a timer, and use of manipulative toys (Tr. pp. 203-04). She too opined that based upon her review of the May 1, 2009 IEP and the Aaron School speech-language progress report, the 12:1+1 special class recommended by the CSE was appropriate to meet the student's needs (Tr. p. 185).

During the impartial hearing, the district's school psychologist advised that all CSE members, including the student's special education teacher from the Aaron School, had an opportunity to participate during the one hour meeting on May 1, 2009 (Tr. pp. 35, 40, 42). She reported that annual goals and short-term objectives were developed to address the student's specific areas of need, clarifying that the OT and speech-language goals offered by the parents, which had been developed by the student's therapists, were in fact included in the May 1, 2009 IEP (Tr. pp. 42-51; compare Parent Ex. B at pp. 7-12, with Parent Exs. C at pp. 5-6, and H at p. 3, and I at pp. 4-5, and K at pp. 4-5). The school psychologist confirmed that all CSE members, including the student's special education teacher from the Aaron School, agreed that the annual goals in the areas of OT and speech-language were appropriate to meet the student's needs (Tr. pp. 45-46, 48, 51). She advised that the May 1, 2009 CSE recommended OT and speech-language therapy in a small group setting, in addition to 1:1 services, in order to develop the student's social skills and pragmatic language skills, and denied that any CSE member objected to the student working with a peer during therapy sessions (Tr. pp. 52-53). Although the hearing record reflects that the student's mother expressed concern during the May 1, 2009 CSE meeting that her son would be "pulled out of the classroom" for related services (Tr. p. 365), the school psychologist opined that the removal of the student from class to receive OT and speech-language therapy would not have been detrimental to the student "[g]iven his high level of distractibility and the role of related services, which is to support a student academically" (Tr. p. 78).[26] The school psychologist observed that the student demonstrated difficulties with sensory regulation, attention, executive functions, social skills and graphomotor skills, and explained that the student's related services would have been coordinated to assist the student with transitions between OT/speech-language therapy sessions and the classroom (Tr. pp. 71, 73-74, 79). She confirmed that all CSE members agreed with the recommendation of OT and speech-language therapy for the student on a 12-month basis (Tr. pp. 53-54).

The school psychologist further opined that the student needed opportunities to interact with nondisabled peers because of his approximately average academic skills and low average to average cognitive abilities (Tr. p. 56). She explained that the 12:1+1 special class in a community

[26] During the impartial hearing, the student's homeroom teacher at the Aaron School for the 2009-10 school year opined that if the student were to be pulled out of the classroom for the five hours per week of speech-language therapy and OT recommended in the May 1, 2009 IEP, "from a teacher's perspective, because he's so easily distracted and because … without constant redirection, already misses so much in terms of capturing content, I think it would have a serious impact on … how much classroom/academic time he is having," adding "[i]t would seriously further impact his academic progress" (Tr. pp. 313-14). However, she also acknowledged that "I can't speak from a speech and language or [OT] perspective, although those are two areas that [the student] can really benefit from, especially the speech and the OT in terms of regulation of his body," adding that "I do understand that … in terms of OT and stuff, he could do with that as well" (id.). Neither of the student's related service providers from the Aaron School testified during the impartial hearing. I also note that the student's homeroom teacher at the Aaron School for the 2009-10 school year did not attend the May 1, 2009 CSE meeting (compare Tr. pp. 242-43, 265-68, with Tr. pp. 36, 405, and Parent Ex. B at p. 2).

school was an appropriate placement for the student because it would afford him access to the general education curriculum and general education students thereby allowing for peer modeling and socialization (Tr. pp. 55-56). She advised that peer modeling opportunities for the student at the recommended program included a program in which he would play chess with non-disabled students (Tr. pp. 183-84). The hearing record also indicates that the student would have been afforded an opportunity to fully participate in "lunch, assemblies, trips, and/or other school activities with non-disabled students," although it does not indicate the extent of such opportunities.

The student's mother characterized the May 1, 2009 CSE meeting as a "productive meeting" and confirmed that her son's "outside therapist … actually helped craft a lot of his goals" (Tr. p. 405).[27] Other than expressing concern over the level of support the recommended program provided to her son and the number of "pull-outs" from the classroom for him to receive related services, she denied voicing any objection to the 12:1+1 special class or the related services recommended by the CSE, and described the May 1, 2009 CSE meeting as "not confrontational at all," while acknowledging that the other CSE members listened to her at the meeting (Tr. pp. 362, 365, 403-05, 407). However, she maintained that during the subsequent CSE meeting on August 5, 2009, she did express concern that the recommended placement would not address her son's needs and was inappropriate because of the distractions and lack of adequate support within the classroom (Tr. pp. 378-80, 407-09).

The impartial hearing officer found that the student "would not be able to tolerate the large setting [of the recommended placement], gathering with 350 students before class starts or manage lunch time in a cafeteria and playground with approximately 130 children" (IHO Decision at p. 16). The student's homeroom teacher at the Aaron School testified that at the Aaron School, the student shared a lunch period with 19 other students and 3 – 4 adults, and that he sometimes wore earplugs due to the noise (Tr. pp. 309, 343-44). She added that at the Aaron School, the largest group that she observed the student in was an auditorium gathering with approximately 60 students, and remarked "those times are difficult for him, but even our lunchroom is difficult for him. He really does not like the noise" (Tr. pp. 310-13).

With regard to the recommended placement, the special education teacher advised that there were approximately 800 students in total at the community school where the 12:1+1 special class was located (Tr. p. 98). Upon arrival at the school in the morning, the students assembled either on the playground outside the school or in the school auditorium, under the supervision of the assistant principal and a school aide; when approximately 350 students arrived, the school aide blew a whistle, the students lined up in their respective classes, and their respective teachers arrived and led them into the building to their homerooms (Tr. pp. 135-36). The special education teacher reported that he provided accommodations for students to assist with the transition to classroom activities (Tr. pp. 137-38). Upon the transition to the classroom, the special education teacher provided verbal prompts and circulated around the classroom room to prompt the students to

[27] Although not specifically stated in the hearing record, the student's mother presumably refers to the independent psychologist who evaluated the student in November-December 2008 (see Tr. p. 36; Parent Ex. C).

engage in classroom activities while the paraprofessional collected homework assignments (Tr. pp. 137-39).

With respect to lunch, the special education teacher explained that the entire fourth grade class, consisting of approximately 130 students, attended lunch together, under the supervision of one school administrator and two paraprofessionals (Tr. pp. 98, 221). The student's mother expressed concerned regarding the size of the school, particularly the number of students who attended lunch together "with not very much supervision" (Tr. pp. 376-77). However, the special education teacher of the recommended placement advised that "the principal and the assistant principal are very much aware of my classroom and the student[s] in it," and "if one of them is not having a good day I'm always going to let them know that," adding that the school would accommodate students "who were getting over stimulated in the cafeteria," and "give that child a break or leeway or whatever it is they need;" for example, the school afforded students the option of remaining inside during playground recess, where "they were allowed to stay by the office where they were supervised and they had some action figures that they got to play with. And then they'd go down in the lunchroom and sit in the lunchroom.… And then later on they were able to play on the playground without a problem" (Tr. pp. 235-36).

During the impartial hearing, the student's homeroom teacher at the Aaron School opined that "it would be tremendously difficult" for the student if he had to eat lunch in a room with 135 other students (Tr. p. 310-11). However, she identified as her primary concern that the student "would find a place to go off on his own and sit quietly. And my concern is that [the student's] awareness of what's going on around him is not really great …" (Tr. p. 311). She cautioned that "it would have to be a place that [is] micromanaged, because he will need redirection in terms of when it's time to leave.… I think he would have a really hard time in terms of the amount of people and the noise. But my concern would also be … if he wanders off if it's not supervised" (Tr. pp. 311-12). The evidence contained in the hearing record demonstrates that the recommended placement would have assisted the student with transitions from large group settings upon both arrival at the school and lunch and recess back to a classroom environment under supervision; moreover, the hearing record indicates that school personnel would have been able to accommodate the student's difficulties with crowds and loud noises,[28] further facilitating his transitions within the school and addressing his Aaron School homeroom teacher's recommendation for a "micromanaged" school environment.

Based upon a careful review of the evidence contained in the hearing record, I disagree with the impartial hearing officer, and conclude that the district's recommended special education program and related services in the proposed May 1, 2009 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefit in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y.] citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386 at 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Student with a Disability, Appeal No.

[28] For example, according to the hearing record, staff at the Aaron School occasionally permitted the student to wear ear plugs during lunch period and assemblies (Tr. p. 309). There is no indication in the hearing record that such an accommodation could not have been afforded the student at the recommended placement if he required it.

09-034; Application of the Dep't of Educ., Appeal No. 08-045; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021).

Having determined that the May 1, 2009 IEP offered the student a FAPE for the 2009-10 school year, I need not reach the issue of whether the parents' placement was appropriate, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Dep't of Educ., Appeal No. 09-053; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

Finally, I turn to the parents' assertion that even if a State Review Officer were to annul the impartial hearing officer's April 14, 2010 decision, the district is still obligated to reimburse the parents for tuition paid to the Aaron School and for RSAs covering the balance of the 2009-10 school year from the date of the parents' November 6, 2009 due process complaint notice pursuant to an unappealed pendency order.

The IDEA and the New York State Education Law require that a student remain in his or her current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 09-053; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). In addition, during the pendency of administrative and judicial proceedings, a student remains at his current educational placement, "unless the State or local educational agency and the parents or guardian otherwise agree" (20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). Moreover, a prior unappealed impartial hearing officer's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 10-002; Application of a Student with a Disability, Appeal No. 09-125; Application of a Student with a Disability, Appeal No. 08-130; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

In the appeal at bar, the parties do not dispute that the impartial hearing officer issued a pendency order on November 18, 2009 directing the district to fund the student's placement at the Aaron School and issue RSAs for four 30-minute individual sessions of OT and speech-language therapy per week, or that neither of the parties appealed this pendency order. As neither party

timely appealed the pendency order to a State Review Officer, it is final and binding upon the parties (20 U.S.C. § 1415[i][1][A]; 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]); Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of a Child with a Disability, Appeal No. 07-077; Application of a Child with a Disability, Appeal No. 06-131).

I have examined the parties' remaining contentions and find that it is unnecessary for me to address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's decision dated April 14, 2010 is annulled to the extent that it determined that: (1) the petitioner failed to offer the student an appropriate program for the 2009-10 school year and (2) the respondents were entitled to tuition reimbursement for the Aaron School for the entire 2009-10 school year, reimbursement for expenses incurred in connection with privately obtained OT and speech-language therapy from September 1, 2009 through June 30, 2010, and an RSA for two 30-minute sessions of speech-language therapy from September 1, 2009 through June 30, 2010.

IT IS FURTHER ORDERED that the petitioner partially reimburse the respondents for tuition for the Aaron School for the period from November 6, 2009 to June 30, 2010, and for expenses incurred in connection with privately obtained OT and speech-language therapy, both at twice per week for 30 minutes per session in a 1:1 setting, from November 6, 2009 to June 30, 2010, at a rate not to exceed $90.00 per hour.

Dated: **Albany, New York**
August 5, 2010

PAUL F. KELLY
STATE REVIEW OFFICER