The University of the State of New York

The State Education Department

State Review Officer

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No. 11-002

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

Appearances:

Law Offices of Lauren A. Baum, P.C., attorneys for petitioners, Lauren A. Baum, Esq., of counsel

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

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for the cost of their daughter's 1:1 special education itinerant teacher (SEIT) and related services for the 2010-11 school year.[1] Respondent (the district) cross-appeals from the impartial hearing officer's determination that it failed to demonstrate that it had offered an appropriate educational program to the student for that year. The appeal must be sustained in part. The cross-appeal must be sustained.

At the time of the impartial hearing, the student was attending a general education kindergarten class at the Gan Yisroel School (Gan Yisroel) and was receiving 25 hours per week of individual SEIT services, three 30-minute individual occupational therapy (OT) sessions per week, one 30-minute individual physical therapy (PT) session per week, and five 45-minute individual speech-language therapy sessions per week (Tr. pp. 4, 12, 236, 347). Gan Yisroel has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[1] Education Law defines special education itinerant services (commonly referred to as "SEIT") as "an approved program provided by a certified special education teacher. . . , at a site. . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]). Although it appears to be misidentified in the hearing record insofar as a SEIT does not provide services to school-aged children, I will continue to refer to the student's school age 1:1 special education teacher as a "SEIT" where documented, to remain consistent with the hearing record and to avoid confusion in this decision.

According to the student's mother, the student has received a diagnosis of a pervasive developmental disorder not otherwise specified (PDD-NOS) (Tr. pp. 327-28). The student is reportedly "Yiddish dominant" and exhibits both receptive and expressive language delays (Dist. Ex. 3 at p. 4). She is also described as highly distractible and impulsive, and having great difficulty sustaining attention to tasks (id.). She demonstrates delays in socialization skills and play skills, difficulty expressing herself to her peers, and physical aggression to others when upset or frustrated (id.). The student's eligibility to receive special education programs and services as a student with a speech or language impairment is not disputed by the parties (Dist. Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

Background

The student's mother reported that she first noticed that the student was not developing as expected when the student was approximately two and a half years of age and had not yet begun to speak (Tr. pp. 325-26). The parent sought an evaluation which confirmed that the student had a significant speech-language delay (Tr. p. 326). The student then began receiving speech-language therapy services twice per week (id.). Shortly thereafter, the student's speech-language therapist indicated that the student appeared to have additional needs warranting further evaluation (Tr. pp. 326-27). According to the parent, the student underwent an evaluation by a private psychologist and the resultant report reflected a diagnosis of a PDD (Tr. p. 327).[2] The parent reported that she provided a copy of the private psychological evaluation to the Committee on Preschool Special Education (CPSE), that the CPSE also evaluated the student, and that, as a result, the student received applied behavioral analysis (ABA) therapy, OT, PT, and increased speech-language therapy (Tr. pp. 327-28).

The CPSE convened on August 20, 2009, when the student was four years of age, for an annual review of the student and to develop her program for the 2009-10 school year (Parent Ex. D at p. 3). The resultant individualized education program (IEP) recommended a 12-month program including 25 hours per week of SEIT services, speech-language therapy, OT, and PT (id. at pp. 1-3, 20). During the 2009-10 school year, the student received her SEIT services at a State-approved nonpublic school, part of the time in a pull-out environment and part of the time in a general education classroom for socialization purposes (Tr. pp. 153-54, 163, 277-79, 330).[3] The student received some of her related services at home (Tr. p. 330).

A November 2009 progress report by the student's occupational therapist reflected that the student had made progress in graphomotor skills, scissor skills, and attention/focusing abilities (Dist. Ex. 5 at p. 1). The student was reported to utilize a dynamic tripod or static tripod grasp and was able to copy vertical and horizontal lines and a circle (id.). She demonstrated the ability to cut around a circle within one inch of the border although she lacked continuous smooth movement and required minimal to moderate assistance in negotiating turns while stabilizing the paper (id.). With regard to attending skills, the progress report reflected that the student was able to participate

[2] The private psychological evaluation containing the student's PDD diagnosis is not contained in the hearing record.

[3] Although testimony by one of the student's SEIT providers indicates that the student was integrated into a general education setting, the provider's testimony also indicates that the classroom into which the student was integrated was staffed by both a regular education teacher and a special education teacher (Tr. p. 163).

in an object finding game for 12 minutes with occasional cueing (id.). The occupational therapist indicated that the student should continue to receive OT services (id.).

On November 30, 2009, two of the student's SEIT providers completed a district "Teacher Report" which reflected the student's then-current levels of functioning with regard to her behavior in the classroom, with peers, and with adults (Dist. Ex. 4 at p. 1). In the classroom, the student was reported to have difficulty accepting limits, completing tasks without 1:1 directives, keeping up with group instruction, and that the student was unaware of boundaries (id.). The report illustrated that the student demonstrated difficulty sharing and negotiating with peers, responding to adult intervention, and that she exhibited aggressive behaviors when upset due to her inability to verbalize her needs appropriately (id.). The SEIT providers indicated that the student's areas of weakness included attending skills, engaging in play with peers, accepting limits, and responding to interventions (id.).

On December 7, 2009, the student's SEIT providers completed a progress report in which the student was described as having delays in cognitive, speech-language, social, and motor skills (Dist. Ex. 8 at p. 1). According to the progress report, she demonstrated beginning readiness skills including knowing her first and last name; labeling and identifying shapes, colors and body parts; rote counting to ten with assistance; categorizing objects, foods and animals; and labeling simple objects and their functions (id.). She did not yet demonstrate 1:1 correspondence or understanding of most quantitative concepts; had difficulty sequencing, following a pattern, and classifying; and did not yet demonstrate consistent comprehension of "wh" questions or use pronouns correctly (id.). Although the student reportedly followed classroom routines, she was unable to follow simple commands and required multiple repetitions, constant models, visual prompts, and 1:1 attention to complete tasks due to her short attention span and distractibility (id.). Socially, although the student enjoyed being around her peers, she did not engage in elaborate dramatic or symbolic play either alone or with peers and had difficulty sharing toys and possessions without prompting or facilitation (id.). The report referenced the student's tendency to respond with aggressive behaviors when she was upset or unable to verbalize her needs appropriately (id.). The report reflected that the student had made progress in her ability to respond to teacher intervention and a reinforcement schedule, and intangible reinforcers such as praise (id.). The student also demonstrated improvement in her conversational skills and was able to stay on topic more often and join peers in an activity with greater independence (id.). The SEIT providers indicated that although she had shown some progress, the student continued to present with global delays and suggested that the student continue receiving services to address her needs (id. at p. 2).

On December 12, 2009, the student's speech-language pathologist completed a progress report which indicated that the student was functioning with significantly impaired receptive, expressive, and pragmatic language skills (Dist. Ex. 6 at p. 1).[4] The report reflected that the student's receptive delays were characterized by difficulty following directions; comprehending pronouns, negatives, descriptive and quantity concepts; and that she had difficulty understanding inferences (id.). The student's expressive language delays included difficulty describing how objects were used, answering questions logically, responding to "where" and "why" questions, and completing analogies (id.). With regard to pragmatic language, the student reportedly said things that were not appropriate for the context and did not verbalize her frustrations but rather "yelled"

[4] The exhibit list contained in the impartial hearing officer's decision identifies this document as dated December 20, 2009 (IHO Decision at p. 9).

and at times, physically lashed out (id.). The progress report reflected that the student had shown significant improvement in her ability to focus and attend to task and in her ability to relate to peers and adults (id.). The student made comments, requested items, asked questions using good eye contact with peers and teachers, answered questions, comprehended short stories that were read to her, and used language to describe things (id.).[5]

The student's physical therapist also completed a progress report in preparation for the student's annual review (Dist. Ex. 7 at p. 1).[6] The undated report reflected that the student demonstrated decreased body awareness, poor trunk control, and decreased attention span, and that she required constant verbal cues to remain focused on a task (id.). According to the physical therapist, the student had made progress in negotiating steps and was alternating between a "step to and an alternating gait pattern" (id.). The student also demonstrated improved balance and jumping skills (id.). Areas of concern indicated by the physical therapist included the student's inconsistent use of an alternating gait pattern when negotiating steps and difficulty using proper body mechanics to throw and catch a ball (id. at p. 2). The physical therapist indicated that although the student had made gains in all areas, she would benefit from continued PT services (id.).

On January 13, 2010, a bilingual Yiddish district school psychologist conducted a psychoeducational reevaluation of the student for the purpose of determining appropriate educational and related services for the student's 2010-11 school year as the student transitioned from the CPSE to the Committee on Special Education (CSE) system (Dist. Ex. 3 at p. 1). The evaluator indicated that Yiddish translation proved helpful for the student at times, that the student responded in English at times and in Yiddish at times, and that "a bilingual education environment can best facilitate maximum educational growth" (id. at p. 2). Behavioral observations made during the evaluation included that the student was highly distractible, that she demonstrated very limited ability to attend and remain focused on tasks, that she required frequent breaks, and that she became increasingly resistant as the session progressed (id. at p. 1).[7] The evaluator noted that the student exhibited difficulty processing language and frequently did not understand what was being asked of her (id. at pp. 1-2). The evaluator also noted that, at times, the student perseverated when responding or exhibited echolalic speech (id. at p. 2). Administration of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) yielded a full scale IQ in the borderline range of cognitive functioning (id. at p. 2).[8] Administration of the Kaufman Survey of Early Academic and Language Skills (K-Seals) yielded subtest scores described as well below average in vocabulary; below average in numbers, letters, words, and expressive skills; and as in

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[5] Although the December 12, 2009 speech-language progress report reflected that the student was age 3.7 at the time of the report, the speech-language pathologist who completed the report testified at the impartial hearing that this age was incorrect and that the student was actually one year older (Tr. pp. 285-86; Dist. Ex. 6 at p. 1).

[6] The undated progress report indicated that the student was four years and seven months of age at the time it was written (Dist. Ex. 7 at p. 1).

[7] The hearing record reflects that one of the student's SEIT providers was present during the reevaluation and that she provided reinforcers and performance breaks to increase the student's ability to attend during the testing (Tr. pp. 158-60).

[8] The evaluator indicated that, consistent with district procedures regarding evaluations of Limited English Proficiency Students, test results were reported in ranges rather than specific scores to accommodate for the fact that the testing instruments were not normed on a bilingual population, and that results were presented in a descriptive, qualitative manner and should be interpreted with caution (Dist. Ex. 3 at p. 2).

the lower extreme in receptive skills (id. at p. 3). The student achieved an early academic and language skills composite in the well below average range (id.). Administration of the adaptive behavior subtest of the Developmental Assessment of Young Children (DAYC) yielded a score within the below average range (id. at p. 4). Socially, the evaluator indicated that according to teacher report, although she was generally happy and outgoing, the student was immature, demonstrated immature play skills, had difficulty expressing herself to her peers, and could become physically aggressive toward others when upset or frustrated (id.).

The school psychologist also completed an observation of the student on January 13, 2010 with her SEIT and one other student for 20-30 minutes (Tr. pp. 33- 34; Dist. Ex. 2 at p. 1). The first activity observed by the school psychologist involved the students taking turns matching colored shapes on a game board (Dist. Ex. 2 at p. 1). The student responded to reminders to wait her turn and was able to place her pieces on the board appropriately (id.). The observation report indicated that the student enjoyed a playdough activity, was able to take her turn when directed, and behaved appropriately in that setting (id.).

On January 26, 2010, the district school psychologist completed a social history update of the student with the student's mother serving as informant (Dist. Ex. 11 at p. 1). The updated social history reflected that the student had made significant progress in her then-current program in expressive and receptive language, as well as socially and behaviorally, although she was still aggressive at times (id.). The parent indicated that she was very happy with the student's program and progress, and believed that it would be best for the student to continue with the same services for the 2010-11 school year (id.). The parent also indicated that the student was difficult to work with at home, was sometimes aggressive toward her siblings, and that she insisted on getting what she wanted (id.).

The CSE convened on March 3, 2010 to conduct a review and to develop the student's individualized education program (IEP) for the 2010-11 school year (Tr. p. 23; Dist. Ex. 1 at pp. 1-2). Meeting attendees included the student's mother, the district school psychologist who also acted as the district representative, and one of the student's SEIT providers (Tr. p. 23; Dist. Ex. 1 at p. 2). The parent signed a letter declining the participation of an additional parent member at the CSE meeting (Tr. p. 62; Dist. Ex. 9 at p. 1). The resultant IEP reflected that the student was classified as a student with a speech or language impairment and recommended a 10-month 12:1+1 special class with related services of one 30-minute counseling session per week in a group of three, two 30-minute individual OT sessions per week, one 30-minute individual PT session per week, and three 30-minute speech-language therapy sessions per week in a group of three (Dist. Ex. 1 at pp. 1, 21). The present levels of performance on the March 2010 IEP reflected information consistent with the January 2010 psychoeducational evaluation report and with the progress reports prepared by the student's related service and SEIT providers for the annual review (Dist. Exs. 1 at pp. 3-9; 3 at pp. 1-4; 4 at p. 1; 5 at p. 1; 6 at p. 1; 7 at pp. 1-2; 8 at pp. 1-2). The March 2010 IEP contained annual goals to address the student's needs in math; reading; writing; attention; social interaction; behavior; cognitive skills; expressive, receptive, and pragmatic language skills; sensory processing; visual motor skills; and gross motor skills (Dist. Ex. 1 at pp. 10-18). The student's mother signed a receipt dated March 3, 2010 indicating that she had received parental rights material (Dist. Ex. 10).[9]

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[9] The exhibit list contained in the impartial hearing officer's decision identifies this document as dated March 10, 2010 (IHO Decision at p. 9).

Subsequent to the March 2010 CSE meeting, the school psychologist completed a form which summarized the student's functional levels and indicated that the student needed a small, highly structured class to address her educational needs (Tr. pp. 66-67; Dist. Ex. 12 at p. 1). The school psychologist also noted that the student needed the support of related services (Dist. Ex. 12 at p. 1).

The district sent the parents a letter dated June 10, 2010 that reiterated the district's March 2010 recommended classification, program, and related services, and assigned the student to a specific school (Tr. pp. 341-42; Dist. Ex. 13 at p. 1).

The student's mother visited the recommended program at the assigned school during the last week of the 2009-10 school year for approximately one hour (Tr. pp. 342-44). By letter dated August 24, 2010, the parent informed the district that she rejected the district's offer (Tr. pp. 347-48; Parent Ex. G at pp. 1-4). The parent indicated in her letter that the particular class was not appropriate for her daughter because she was informed that the bilingual Yiddish teacher teaching the class during the 2009-10 school year "may not be there for the [2010-11] school year;" the classroom was not visually stimulating enough and did not contain age appropriate toys which could cause the student to tantrum or become aggressive; the students she observed in the 12:1+1class appeared to be at a lower functional level than her daughter and would not provide the student with appropriate models for behavior; there was not adequate 1:1 instruction to meet the student's attention needs; the building was too large and the student could easily become lost and afraid; and because the student required a trusting relationship with her teachers and without 1:1 attention, she would become withdrawn and not interact which would effect her speech-language and social skills (Parent Ex. G at pp. 1-4). The parent indicated in her letter that she remained willing to consider any appropriate program offered by the district but, in the interim, would place the student at Gan Yisroel and seek reimbursement/funding for that placement (id. at p. 4). The parent signed a contract with Gan Yisroel at approximately the end of August or beginning of September 2010 (Tr. p. 348).

Due Process Complaint Notice

The parents filed a "corrected" due process complaint notice dated August 27, 2010 (Parent Ex. A).[10, 11] They alleged that the student's 2010-11 IEP was invalid and that there was no appropriate offer of placement (id. at p. 1). They also alleged, upon information and belief, that the March 2010 CSE was improperly constituted, failed to fully evaluate the student in all of her areas of suspected disability, failed to adequately consider sufficient and appropriate evaluative and documentary material to justify its recommendations and goals, recommended changes without sufficient or appropriate justification, and failed to provide them with meaningful opportunity to participate in the decision making process (id.).

[10] The exhibit list contained in the impartial hearing officer's decision identifies this document as dated September 8, 2010 and a facsimile transmission report in the document reflects that the document was transmitted on September 8, 2010 (IHO Decision at p. 9; Parent Ex. A at p. 5). The pleadings in this case are similarly not in agreement as to the date that the corrected due process complaint was filed (compare Pet. ¶ 39, with Answer and Cross Appeal ¶¶ 5, 11 and Answer to Cross Appeal ¶ 3).

[11] The hearing record also contains a due process complaint notice dated August 26, 2010 and an amended due process complaint notice dated August 27, 2010 (Parent Exs. B; C).

In order to make measurable academic and social/emotional progress and avoid regression, the parents contended that the student needed "a small class of typically developing students, in a small educational environment, with 1:1 attention from a special education teacher trained to work with students having issues such as those [the student] has, and trained in using methodologies, such as ABA, that have proven effective with those issues, as well as appropriate levels of speech and language therapy, occupational and physical therapy" (Parent Ex. A at p. 2).

The parents requested that the impartial hearing officer find that the district failed to provide the student with a FAPE for the 2010-11 school year, and requested reimbursement of the student's tuition at the unilateral placement, costs and fees, 25 hours per week of behavior modification/ABA therapy, transportation, and related services (Parent Ex. A at p. 4).

The district provided a response to the due process complaint notice dated November 3, 2010 which stated, among other things, that an IEP team met on March 3, 2010, changed the student's classification to speech or language impairment, and recommended a special class in a 12:1+1 setting (Parent Ex. F at pp. 1-2).[12] The district also stated that a final notice of recommendation (FNR) was issued on June 10, 2010 and offered the student a public school placement that was reasonably calculated to enable the student to obtain meaningful educational benefits (id. at p. 3).

Impartial Hearing Officer Decision

An impartial hearing convened on September 15, 2010 and concluded on November 8, 2010 after three days of proceedings (Tr. pp. 1-369). At the impartial hearing, the parents withdrew their request for tuition reimbursement at the unilateral placement but maintained their request for funding of a SEIT and related services (Tr. p. 351).

The impartial hearing officer issued an interim decision dated October 21, 2010 and stated that the parties had agreed that the student's pendency placement was 25 hours per week of individual SEIT services in school at the provider's rate and related services of individual OT three times per week for 30 minutes each session, individual PT once per week for 30 minutes, and individual speech and language therapy five times per week for 45 minutes each session (IHO Interim Decision at p. 2). The impartial hearing officer ordered that the program, placement and services as stated on the student's August 2009 IEP, as identified above, was the student's pendency placement (id.).

The impartial hearing officer issued a decision dated November 24, 2010. She found that the CSE failed to do an observation in the student's classroom as required by State regulation, observing the student instead with her SEIT teacher only, and that the failure was particularly significant because the CSE recommended the student be placed in a 12:1+1 class as compared to a general education class (IHO Decision at p. 5). The impartial hearing officer stated that the CSE's recommendation could not be upheld because the recommendation was not based upon a complete evaluation, including a classroom observation (id.). Moreover, although the parents had not raised an issue with the student's classification, the impartial hearing officer determined that the student was misclassified and that the student's behaviors were descriptive of the definition of a student with autism under the IDEA (id. at p. 6). The impartial hearing officer also found that the student's "current general education class" could not meet her needs (id.). She stated that the

[12] The hearing record also contains a due process response dated September 3, 2010 (Parent Ex. E).

parents want to correct the placement by providing a 1:1 SEIT for the student, but that a SEIT is not a substitute for an appropriate program (id. at p. 7).

Appeal for State-Level Review

This appeal ensued. The parents interpret the impartial hearing officer's decision to hold that the district failed to offer the student a FAPE for the 2010-11 school year, and to deny the parents' claim for reimbursement/funding for the student's SEIT/SETSS/ABA services and related services. The parents allege, among other things, that the impartial hearing officer failed to conduct the impartial hearing and draft the decision in accordance with State and federal regulations; that the impartial hearing officer erred in determining that the unilateral placement of the student, supported by SEIT/SETSS/ABA services, was inappropriate; that it was improper for the impartial hearing officer to make a finding on classification as that issue was not before her; and that the conclusions drawn by the impartial hearing officer and her denial of the parents request for continued provision of the student's SEIT/SETSS/ABA services and related services for the 2010-11 school year were improper and incorrect. The parents state that they are privately funding the student's tuition at the unilateral placement and are seeking continuation of funding for the student's SEIT/SETSS/ABA services and related services at levels previously mandated by the district CPSE.

The district submitted an answer to the parents' petition. The district also interprets the impartial hearing officer's decision to hold that the district had failed to offer the student a FAPE for the 2010-11 school year and that the parents' unilateral placement of the student was inappropriate. The district denies many of the allegations made by the parents and asserts that the impartial hearing officer was correct in finding that the student's unilateral placement was inappropriate. The district also cross-appeals, alleging that the district offered the student a FAPE and that the impartial hearing officer's finding on that issue should be overturned, that equities favor the district because the parents never intended to place the student in public school, and that the parents are not entitled to prospective funding.

In response to the district's cross-appeal, the parents deny many of the allegations made by the district. The parents assert that the impartial hearing officer correctly found that the district failed to offer the student a FAPE for the 2010-11 school year and that the student's March 3, 2010 IEP was not based upon a complete and appropriate evaluation of the student's needs and abilities. The parents also assert that, even if the validity of the student's evaluative data (classroom observation) was improperly considered, the district nonetheless committed numerous other procedural violations in developing the student's March 2010 IEP that rise to the level of a deprivation of a FAPE. The parents further assert that the student's March 2010 IEP is not reasonably calculated to provide meaningful educational benefit to the student and avoid regression, as it does not fully and accurately reflect the student's current levels of performance and does not offer special education and related services tailored to her unique needs. The parents assert that the district failed to demonstrate that it offered the student an appropriate placement in the least restrictive environment (LRE), particularly stating that the district failed to establish that the student could not succeed in a general education class with appropriate supports prior to placing her in a self-contained special education class. Regarding their request for reimbursement of the student's SEIT services and related services, the parents allege that the relevant inquiry is whether those services are specifically tailored to address the student's needs in the LRE, and further allege that they have proven the appropriateness of the services. The parents allege that the district incorrectly claims that the parents are seeking prospective funding of tuition.

Applicable Standards

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; 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).

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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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 burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Adequacy of the Impartial Hearing Officer Decision

As an initial matter, I will address the adequacy of the impartial hearing officer's decision. The parents allege that the impartial hearing officer's decision does not comport with the appropriate standard of legal practice. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). Moreover, State regulations further require that an impartial hearing officer "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable legal standards are the norm in "appropriate standard legal practice," and should be included in any impartial hearing officer decision (see Application of the

Dep't of Educ., Appeal No. 09-092; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-064).

Here, the impartial hearing officer offered a summary of the testimonial evidence in the hearing record with appropriate and accurate citations, and identified documentary exhibits entered into evidence (IHO Decision at pp. 2-9). The impartial hearing officer also set forth applicable legal standards with citations to applicable statutes and case law (id. at pp. 4-6). However, upon applying the legal standards, I note that the impartial hearing officer addressed only the parents' claim regarding the student's evaluation and failed to address most of the parties' arguments regarding whether the district's recommended IEP was appropriate (id. at pp. 5-7). In particular, I also note that the impartial hearing officer's decision does not clearly state whether she granted or denied the parents' claim for reimbursement (id. at p. 7). Nonetheless, it is apparent from a review of the pleadings in this appeal that both parties similarly interpreted the determinations of the impartial hearing officer with respect to the appropriateness of the placement offered by the district and the parents' claim for reimbursement, and the harm is therefore of little actual consequence (see Pet. ¶ 6; Answer and Cross Appeal ¶ 15). Accordingly, there is no need in this particular instance to disturb the impartial hearing officer's findings on the basis of the adequacy of her decision. However, I caution the impartial hearing officer to comply with State regulations.

Conduct of the Impartial Hearing

Issues Properly Before the Impartial Hearing Officer

The parents allege that it was improper for the impartial hearing officer to make a finding regarding the student's classification. The party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (Application of the Dept of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). The parents did not raise this issue in their due process complaint notice (Parent Ex. A) or at the impartial hearing. Therefore, although the impartial hearing officer's determination does not affect the remaining issues in this case, I find that the parents are correct insofar as the impartial hearing officer exceeded the scope of the impartial hearing in making a determination regarding an issue which was not properly before her.

Scope of Testimony at the Impartial Hearing

The parents also allege that the impartial hearing officer improperly limited the testimony of the student's mother and another witness during direct examination at the impartial hearing. An impartial hearing officer must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 C.F.R. § 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an impartial hearing officer has the discretion to limit or exclude evidence or testimony of witnesses that he or she deems to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c], [d], [e]), it is also an impartial hearing officer's responsibility to ensure that there is an adequate record upon which to

permit meaningful review (Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-003; Application of a Child with a Disability, Appeal No. 00-039; Application of a Child with a Disability, Appeal No. 00-021; Application of the Bd. of Educ., Appeal No. 97-92).

With respect the testimony of the student's mother and the other witness, a review of the relevant portions of the hearing record reveals that the impartial hearing officer interrupted the direct examination multiple times during the testimony of the student's mother and once during the testimony of the other witness to tell the parents' attorney that her questions were leading and to direct her to ask open-ended questions of the witnesses (Tr. pp. 165-66, 335-41). I note that the impartial hearing officer did not restrict the scope or content area of questioning by the parents' attorney, but rather appropriately instructed the parents' attorney to ask questions in a manner that would result in the development of an adequate hearing record and accordingly, I find that the impartial hearing officer did not improperly limit that witness's testimony.

March 2010 CSE Composition

Regular Education Teacher

Turning now to the issue of the composition of the March 2010 CSE, the parents allege that the lack of a regular education teacher seriously impeded the ability of the CSE to properly consider whether the student would have made appropriate academic and social progress in a less restrictive general education environment with appropriate supports. A district's CSE must include not less than one regular education teacher of the student if the student is, or may be, participating in the general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate," participate in the development of the IEP of the student, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel (20 U.S.C. § 1414[d][3][C]; see 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]).

The hearing record reflects that no regular education teacher participated in the March 2010 CSE meeting although the CSE considered a general education placement for the student (Tr. p. 62; Dist. Ex. 1 at pp. 2, 20). The district violated federal and State regulations by failing to have a regular education teacher at the CSE meeting (8 NYCRR 200.3[a][1][ii-iii]; see 34 C.F.R § 300.321[a][2-3]; Application of the Dep't of Educ., Appeal No. 10-073; Application of a Student with a Disability, Appeal No. 09-137; Application of the Dep't of Educ., Appeal No. 08-105). However, administrative hearing officers are constrained by federal and State regulations from finding that a procedural violation rose to the level of a denial of a FAPE unless the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, 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]; A.C., 553 F.3d at 172; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

Notwithstanding that the March 2010 CSE was not properly constituted, I find that the hearing record does not demonstrate that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. In the

absence of a regular education teacher, the hearing record reflects that the CSE was able to sufficiently consider whether a general education environment would have been appropriate for the student based on the overall identification of the student's needs and abilities, which were reflected in the reports before the CSE and by the participation of the student's mother and the student's SEIT, who had worked with the student in a setting that included the student's typically developing peers (Tr. pp. 160, 212-13, 335-36; see Dist. Exs. 2-7). Therefore, I find that the hearing record contains insufficient evidence to conclude that the failure to include a regular education teacher at the March 2010 CSE meeting rose to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see also Application of the Dep't of Educ., Appeal No. 10-073; Application of the Bd. of Educ., Appeal No. 10-022; Application of a Student with a Disability, Appeal No. 09-137; Application of the Dep't of Educ., Appeal No. 08-122; Application of the Dep't of Educ., Appeal No. 08-105; Application of a Student with a Disability, Appeal No. 08-064; Application of the Bd. of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-107; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). I strongly caution the district, however, to ensure that it complies with the regulatory requirements pertaining to the participation of a regular education teacher at CSE meetings, especially where, as here, a general education setting was considered by the CSE.

Additional Parent Member

Next, I will address the parents' argument that the March 2010 CSE was invalidly composed because it did not include an additional parent member. According to the parents, the district did not explain the role of the additional parent member to the student's mother so that she could make an informed decision about whether to waive the right to have an additional parent member present at the CSE meeting. The parents also allege that an additional parent member "would likely have pointed out that an IEP is meant to be a collaborative product and that it was very unusual for there to be only one [district] representative present who unilaterally decided what to include in the IEP." Although not required by the IDEA (20 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).

In this case, it is undisputed that an additional parent member did not attend the March 2010 CSE meeting and that the student's mother signed a waiver of the additional parent member (Dist. Ex. 9). Upon review of the hearing record, including the content of the waiver signed by

the student's mother, I am not persuaded by the parents' arguments. The signed waiver clearly states that the parents are entitled by law to the participation of an additional parent member and identifies who can fulfill the role of an additional parent member, and there is no indication in the hearing record that the waiver was improperly obtained or that the student's mother was unable to inquire about the role of an additional parent member at a CSE meeting prior to signing the waiver (id.). Moreover, even if the student's mother had not signed the waiver, 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). The student's mother testified that at the CSE meeting she answered questions, provided input regarding her view of the student's delays, and expressed her concerns (Tr. pp. 335-36). According to her testimony, she participated in discussions regarding the 12:1+1 recommended program and changes in the student's related services, and that she was afforded the opportunity to ask questions (Tr. pp. 338-40, 352).

Based on the foregoing, I find that the preponderance of the evidence contained in the hearing record does not show that the absence of a regular education teacher or additional parent member at the March 2010 CSE meeting denied the student a FAPE or significantly impeded the parent's opportunity to participate in the decision-making process.

Related Service Providers

The parents also argue that the district failed to request the participation of the student's speech-language therapy or OT providers at the March 2010 CSE meeting. New York State law provides that a CSE shall include "persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the school district or the parent(s) shall designate. The determination of knowledge or special expertise of such person shall be made by the party (parents or school district) who invited the individual" (8 NYCRR 200.3[a][1][ix]). Although the request by a district for the participation of a student's related service providers is to be encouraged, it is discretionary under State law and I find that the district did not violate any procedural requirements by not inviting the student's speech-language therapy provider and OT provider to participate. Further, I note that the hearing record reflects that the district conducted the March 2010 CSE meeting at the student's then-current preschool so that the student's providers could join the meeting (Tr. pp. 56-57). I also note that the parents were not precluded from inviting the student's related service providers to attend and participate in the meeting (8 NYCRR 200.3[a][1][ix]).

Evaluative Data

The district alleges that the impartial hearing officer should not have considered that the observation of the student was conducted with her SEIT and one other student present instead of in the classroom because it was not raised in the parents' due process complaint notice. State regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C.§ 1415[f][3][B]; 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. §1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see Snyder v.

Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 09-140). A review of the "corrected" due process complaint notice reveals that the parents claimed that the CSE "failed to fully evaluate [the student] in all areas of suspected disability" and "failed to adequately consider sufficient and appropriate evaluative and documentary material . . . " (Parent Ex. A at p. 1). I find that the allegations made by the parents in their "corrected" due process complaint notice may be reasonably read to include the issue of whether the evaluation of the student, which included an observation, was appropriately conducted, and that therefore it was proper for the impartial hearing officer to consider this issue.[13]

The hearing record reflects that the parents had concerns regarding the evaluative data and information considered by the March 2010 CSE. The district school psychologist conducted an observation of the student during a session with the student's SEIT and one other peer, not in her classroom setting as the parents allege the district should have (Tr. p. 30; Dist. Ex. 2 at p. 1). State regulations require that an initial evaluation of a student must include, among other things,

> an observation of the student in the student's learning environment (including the regular classroom setting) or, in the case of a student of less than school-age or out of school, an environment appropriate for a student of that age, to document the student's academic performance and behavior in the areas of difficulty

(8 NYCRR 200.4[b][1][iv]). I find that the setting for the observation of the student in this matter was appropriate under the circumstances of this case in which the student received SEIT services in both a pull-out environment and in a general education classroom, and where the classroom in which the student was integrated was staffed by both a regular education teacher and a special education teacher (see Tr. pp. 153-54, 163, 277-79, 330).

With regard to the parents' contention that the student's January 2010 psychoeducational evaluation was not conducted under appropriate conditions, given the characteristics of the student as previously described, and the availability of a SEIT to the student during the evaluation (Tr. pp. 43, 158-60), I am not persuaded that the results of the evaluation would have been different had the student been tested over the course of multiple shorter sessions, or as a result thereof would have necessitated a different recommendation in the March 2010 IEP. Additionally, the March 2010 CSE had available to it at the time of the development of the March 2010 IEP, other documents that described the needs and abilities of the student (Dist. Exs. 2; 4-6; 7 at pp. 1-2; 8 at pp. 1-2).

The parents also contend that the March 2010 IEP did not reflect that the student had received a diagnosis of PDD-NOS. Although the hearing record does not contain any documentary evidence showing that the student had received such a diagnosis, I note that the student's IEP reflected a description of the student's performance and needs that is consistent with a PDD-NOS diagnosis (Dist. Ex. 1 at pp. 3, 5-9).

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[13] I also note that nothing in State or federal regulations prevents a party from asking an impartial hearing officer to conference a case for the purpose of simplifying, clarifying or appropriately narrowing the range of issues that must be determined in an impartial hearing (see, e.g., 8 NYCRR 200.5[j][iii][ix]).

Despite the parents' concerns regarding the setting for the classroom observation, the manner in which the student's psychoeducational evaluation was administered, and that the March 2010 IEP does not state the student has a diagnosis of PDD-NOS, the hearing record reflects that the March 2010 CSE had adequate information regarding the student available to it at the time that it developed the March 2010 IEP. Although the district could have permissibly obtained additional information regarding the student by further observing the student in a classroom setting, the hearing record illustrates that the March 2010 CSE comported with State regulations and had sufficient other sources of information regarding the student's ability to function in a classroom setting (Tr. pp. 145-46, 150-51, 155, 160, 212-13; Dist. Exs. 4 at p. 1; 8 at pp. 1-2). Accordingly, the student was not denied a FAPE due to a lack of required evaluative data.

Present Levels of Performance

As described in greater detail below, the hearing record supports that the written statement of the student's present levels of performance were accurately reflected in the student's March 2010 IEP. The student's present levels of performance reflected a description of the student's behaviors, academic abilities and learning characteristics that was consistent with information provided in the January 2010 psychoeducational evaluation and in the reports from the student's related service and SEIT providers (see Dist. Exs. 1 at pp. 3-9; see also Dist. Exs. 3 at pp. 1-4; 6; 7 at pp. 1-2; 8 at pp. 1-2). The hearing record also reflects that one of the student's SEIT providers who worked with the student during the 2009-10 school year attended the March 2010 CSE meeting and provided input regarding the student's level of functioning, how she functioned in the classroom, and what the SEIT was working on with the student at that time (Tr. pp. 145-46, 160, 212-13).

Annual Goals

Although the parents, on appeal, do not challenge the appropriateness of the annual goals included in the student's March 2010 IEP, I note that the hearing record includes annual goals that are consistent with the student's identified needs in all areas, including academics (reading, mathematics and writing); attending skills; social/emotional and behavioral skills; receptive, expressive, and pragmatic language skills; sensory processing, visual motor skills, and gross motor skills (see Dist. Ex. 1 at pp. 3-9; see also Dist. Ex. 1 at pp. 10-18). I note also that the goals contain sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision (Dist. Ex. 1 at pp. 10-18).

Recommended Placement

The student's March 2010 IEP reflects a recommendation by the CSE for a 12:1+1 special class in a bilingual Yiddish learning environment with related services including counseling, OT, PT, and speech-language therapy (Dist. Ex. 1 at pp. 1, 21). The assistant principal of the assigned school testified that the teacher in the 12:1+1 bilingual Yiddish special class has bilingual certification, and that the counselor and speech-language therapists who provide services to the students in the 12:1+1 class are also bilingual Yiddish speaking (Tr. pp. 93-94, 117; Dist. Ex. 1 at p. 21). According to the assistant principal and the district school psychologist, the 12:1+1 bilingual special class is a "language enriched" program that could address the student's speech-language needs as identified on the March 2010 IEP (Tr. pp. 77, 95-96). The school psychologist testified that within the 12:1+1 class there is "a lot of focus on language," and that many of the group activities that take place in the classroom "focus[] on enhancing and developing both receptive and expressive language skills" (Tr. p. 77). The hearing record also shows that a 12:1+1

setting can employ various methodologies as well as manipulatives, reinforcement, repetition, and schedules (Tr. p. 128). The evidence also included examples of how social skills are integrated daily through lessons in the classroom, as is training in activities of daily living such as table manners, personal hygiene, and toileting skills (Tr. pp. 112-13). Additional testimony by the assistant principal indicated that each student's IEP must be considered, and that the 12:1+1 special class addresses the skills and provides the accommodations and modifications reflected in the students' IEPs (Tr. p. 121).

To address the student's need for positive behavior reinforcement, the hearing record reflects that the district's 12:1+1 special classes utilize classroom behavior management programs that are very specifically implemented and reinforce positive behaviors (Tr. pp. 74-75, 94-95). For example, a student might be reinforced with a penny for positive behavior such as completing an assigned task on time and at the end of the day, if the student had earned five pennies, he or she would get a reward (Tr. pp. 94-95). I note that information contained in the December 2009 SEIT progress report indicated that, at that time, the student was able to "work better under a reinforcement schedule" and had improved in her ability to respond to intangible reinforcers such as praise (Dist. Ex. 8 at p. 1). The assistant principal further testified that the behavior management systems used in the 12:1+1 special classes are designed based on the needs of the students as indicated in their IEPs, and that if a student comes into the class with a functional behavior analysis (FBA) or a behavior intervention plan (BIP) as part of the IEP, the individual BIP is followed (Tr. pp. 103-04). Additionally, if a teacher believes that a student requires more than the classroom behavior reinforcement program and does not have a BIP, the teacher can take the concern to the assistant principal (Tr. p. 123). According to the school psychologist, the school assessment team or the pupil personnel team would then meet with the student's parents to determine other ways to appropriately address the needs of the student (Tr. pp. 123-24). Based on the foregoing, I find that the recommended special class placement was appropriate given the individual needs of the student, and that it was reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

LRE

Turning to the parents' assertion that the recommended district program was too restrictive for the student, the IDEA requires that 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 111; Gagliardo, 489 F.3d at 105; 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, 995 F.2d at 1215; 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]).

To apply the principles described above, the Second Circuit adopted 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., 874 F.2d at 1048-50). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not 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). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[14]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In this case, I find that the hearing record evidences that the recommended placement in the March 2010 IEP was the LRE for the student. With regard to the first prong of the Newington test and whether the student could be educated satisfactorily in the general education classroom with supplemental aids and services, the present levels of performance identified in the student's March 2010 IEP reflected that during the student's psychoeducational testing, the student's performance was negatively affected by "distractibility, inattention, restlessness, immaturity and impulsivity," and that she was unable to complete visual processing subtests because she did not

[14] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington,546 F.3d at 120 n.4).

demonstrate the graphomotor skills or the attention required to complete the tasks involved (Dist. Ex. 1 at p. 3). The IEP further reflected that the student often did not attend to the stimuli presented and that her responses were often irrelevant, sometimes associated to a word in the question asked, echolalic, or perseverative (id.). The present levels of performance reflected that, at the time of the March 2010 CSE, the student had difficulty staying in her seat; required multiple repetitions, constant modeling and visual prompting in order to follow simple commands; and required 1:1 attention to complete school tasks and classroom activities (id. at pp. 5, 7). In addition, the March 2010 IEP reflected that the student also required adult prompting to share toys with peers and that, when upset or frustrated, the student may respond with aggressive behaviors such as physically lashing out since she was unable to verbalize her needs appropriately, which weighs negatively when considering the effect of inclusion on the other students in a general education class (id. at pp. 6-8). I also note that the March 2010 CSE meeting notes completed by the school psychologist reflected that the CSE considered providing supplementary aids and services in conjunction with a general education setting in the form of a collaborative team teaching classroom, but it was deemed insufficient to address the student's educational needs (Dist. Ex. 12 at p. 1). I also note that this description of the student's performance was developed for the purpose of identifying an appropriate public school placement, but at a time when the student exhibited global delays and already required 25 hours of individual SEIT services in a preschool setting (Parent Ex. D at p. 3). Based on the student's significant deficits in attention, cognition, academic skills, speech-language skills, social/emotional, and behavioral skills, I find that the CSE's decision to depart from the presumption that the student should be placed in a general education class with supplementary aids and services and that the student required a special class setting in order to be educated satisfactorily is supported by the hearing record (Dist. Exs. 1 at pp. 3-9; 3 at pp. 1-2; 4-6; 7 at p. 1; 8 at pp. 1-2).

Turning to the second prong, I am persuaded by the hearing record that although recommending a 12:1+1 special class setting, the recommended placement still permitted the student to access school programs with general education peers to the maximum extent appropriate (see 20 U.S.C. § 1412[a][5][A]; 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, 995 F.2d at 1215; North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; Watson, 325 F. Supp. 2d at 144; Mavis, 839 F. Supp. at 982). The district assistant principal testified that students in the 12:1+1 special class interact with the general education population of the school during music, on the playground, and during school assemblies which occur at various times during the school year (Tr. pp. 117-18, 120). The hearing record also reflects that the paraprofessional assigned to the 12:1+1 classroom accompanies the class to music, and both the paraprofessional and the special education teacher accompany the students to assemblies (Tr. pp. 119-20).

The hearing record reflects that the March 2010 CSE considered several other placements for the student (Tr. p. 77; Dist. Exs. 1 at p. 20; 12 at p. 1). The CSE considered a special class in a specialized school and rejected it because it was too restrictive an educational setting (Dist. Ex. 1 at p. 20). In addition to the collaborative team teaching class discussed above, the CSE also considered a general education setting without support and rejected it as it would not provide the support necessary for successful functioning in a school environment (id.). Additionally, the school psychologist who served as the CSE chairperson testified that she did not recommend continuation of a 1:1 SEIT in the general education setting because she believed that one of the main goals as a student gets older is to foster greater independence, and that extending the time that a student has a 1:1 SEIT can be counter productive as it can create greater dependence (Tr. p. 77). In light of the foregoing, the hearing record reflects that the CSE's recommendation of a

12:1+1 special class in the March 2010 IEP was not inconsistent with the IDEA's LRE requirement given the information it had before it regarding the student's needs and abilities.

Reduction in Related Services

With regard to the parents' concern that the amount of the student's recommended OT and speech-language services were reduced in her March 2010 IEP from the amount in the student's previous IEP, I note that the student's mother testified that during the March 2010 CSE meeting she stated that the student's OT services could be reduced because she did not think the student needed "that much because [the student] was better" (Tr. p. 340). The district school psychologist, who served as the CSE chairperson, testified that the recommendation to reduce the student's OT and speech-language services was based on what would appropriately address the student's needs considering the recommended classroom setting and how student had progressed in each of those domains (Tr. pp. 25-27). I note that the OT progress report, which the CSE had at the March 2010 meeting, indicated that the student had made progress in graphomotor skills, scissor skills and in attention/focusing, and that the district psychologist testified students' OT goals are addressed in the 12:1+1 special class in addition to during OT sessions (Tr. pp. 25-26; Dist. Ex. 5 at p. 1). Based on the foregoing, I am persuaded that the provision of two 30-minute individual OT sessions per week as recommended in the student's March 2010 IEP was appropriate to provide support for the student to function in the 12:1+1 setting (Tr. p. 25).

With regard to the modification of the speech-language therapy services from the student's previous IEP, the district school psychologist testified that based on the student's progress and on the small, language-enriched program that was recommended for her, she believed that three 30-minute speech-language therapy sessions would appropriately support the student in the recommended 12:1+1 special class (Tr. pp. 26-27). I note that the speech-language progress report that the March 2010 CSE had available to it at the time the IEP was developed indicated that the student had shown significant progress in all of her annual goals related to her receptive, expressive, and pragmatic language skills (Dist. Ex. 6 at p. 1). For example, the student was able to comment, request items, ask questions using good eye contact with friends and teachers, answer many questions, comprehend short stories read to her, use language to describe things, and had shown marked progress in her ability to relate to peers and adults (id.). Based on the student's progress and the description of the language-enriched program as described above, I am persuaded that the provision of three 30-minute speech-language therapy sessions would appropriately support the student in the 12:1+1 setting.

Additionally, I note that the March 2010 CSE also initiated a recommendation for counseling services to address the student's deficits in social interaction based on needs reported by the student's mother and reflected in reports available to the March 2010 CSE (Tr. p. 27). The assistant principal testified that both the counselor and speech-language therapist collaborate with the teacher in the 12:1+1 special class to let her know specifically what they are working on with a student and that the special education teacher provides follow through in the classroom (Tr. p. 124). I find that, in conjunction with the recommended placement, the recommended related services were reasonably designed to offer the student an appropriate level of support to in the recommended program.

Assigned School

Functional Grouping

The parents contend that the functional levels of the students in the proposed classroom at the assigned school were below the student's functional level, and that the functional and behavioral composition of the class would interfere with the student's ability to make adequate academic and social progress and avoid regression. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, the assistant principal of the assigned school testified that she was familiar with the IEPs of the students who were in the 12:1+1 bilingual special class at the assigned school during the 2010-11 school year and that, based on her review of the student's March 2010 IEP, the student was similar to the students in the 12:1+1 special class in that they were of kindergarten age;[15] they all received speech-language therapy, OT, and PT; and one student also received counseling services (Tr. pp. 91, 93, 105, 107). The assistant principal further indicated that some of the students in the class had paraprofessional support (Tr. p. 94).

With regard to the behavior of the students in the assigned class, the assistant principal testified that none of the students exhibited acting out behaviors and therefore would not interfere with the student's ability to make adequate academic and social progress and avoid regression (Tr. p. 103). Contrary to the parents' contention that the students in the assigned class were functionally lower than the student in the instant case, testimony by the assistant principal indicated that all of

[15] Testimony by the assistant principal indicated that there had initially been a second grade student in the 12:1+1 special class at the assigned school, but that the student was moved to a different class (Tr. p. 126).

the students in the class were had reached a level where they could state their name, age and how many ears they had (Tr. p. 106). The hearing record reflects that the student also demonstrated readiness skills including the ability to state her first and last name, although she did not reportedly state her age (Dist. Ex. 8 at p. 1). Students in the assigned class also demonstrated below average expressive and receptive language skills, as did the student in the instant case (Tr. p. 107; Dist. Ex. 6 at p. 1). Also, classifications of the students in the assigned class included mentally retarded, other health impairment, learning disabled, speech and language impaired and autistic (Tr. pp. 126-27).

Moreover, notwithstanding whether the student would have been grouped appropriately with regard to functional level, the hearing record shows that the district was prepared to address student's needs in accordance with her IEP. As noted above, testimony by the assistant principal indicated that teachers in the district 12:1+1 classes refer to and consider the IEPs of the students to guide their instruction of each student, and that the classes address the skills and provide the accommodations and modifications reflected in each students' IEPs (Tr. p. 121).

Based on the evidence in the hearing record, including the principal's and the teacher's testimony, I am not persuaded that, had the student been enrolled in the public school, the district would have failed to suitably group the student for instructional purposes in a manner consistent with the recommended 12:1+1 special class set forth on the student's IEP (see M.P.G., 2010 WL 3398256, at *10-*11 [noting that student was not denied a FAPE when the hearing record showed that the student was suitably grouped for instructional purposes]; W.T, 716 F.Supp.2d at 290-292 [S.D.N.Y. 2010]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

Proposed School Size

Turning to the parents' allegations that the size of the assigned school is too large for the student since she tends to run off or wander, I note that this issue is in part speculative insofar as the parents did not accept the recommendations of the CSE or the program offered by the district and, furthermore, I note that the hearing record, in its entirety, does not support the conclusion that, had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]). Additionally, the parents concerns are not adequately supported by the evidence in the hearing record. The hearing record reveals that the assigned classroom would have included approximately six paraprofessionals to assist the maximum of 12 students in the classroom, and that when the students leave the classroom for activities such as music, playground or assemblies, they are accompanied by either a paraprofessional, the special education teacher, or both (Tr. p. 120). In view of the forgoing, I find the parents' concerns regarding the size of the assigned school, had the district been required to implement the student's IEP, are not supported by the preponderance of the evidence contained in the hearing record (see generally, M.H. v. New York City Dept. of Educ., 2011 WL 609880 [S.D.N.Y. Feb. 16, 2011], citing Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]).

Based on the foregoing evidence in the hearing record, I find that the district offered the student a FAPE for the 2010-11 school year.

Conclusion

Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary to reach the issue of whether the 1:1 SEIT or related services were appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

Finally, I note that the parents allege that the district has failed to pay for services awarded pursuant to pendency and the district simply denies this allegation without explanation. Neither party has appealed the impartial hearing officer's interim decision regarding pendency (stay-put) and, therefore, it has become final and binding for the duration of the proceedings in this matter. Therefore, I will sustain that portion of the parents' appeal. If it has not done so already, the district is directed to comply with any outstanding provision contained in the impartial hearing officer's interim decision dated October 21, 2010.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the impartial hearing officer's November 24, 2010 decision which determined that the district failed to offer the student a FAPE is hereby annulled;

IT IS FURTHER ORDERED that, if it has not already done so, the district shall comply with any outstanding provision contained in the impartial hearing officer's interim decision dated October 21, 2010.

Dated: **Albany, New York**
March 24, 2011

JUSTYN. P. BATES
STATE REVIEW OFFICER