The University of the State of New York

The State Education Department
State Review Officer
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No. 11-050

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, Neha Dewan, Esq., of counsel

Law Offices of Regina Skyer and Associates, attorneys for respondents, Sonia Mendez-Castro, 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 2010-11 school year. The appeal must be sustained.

Background

At the time of the impartial hearing, the student was attending the fourth grade at the Aaron School (Tr. pp. 177, 330). The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

A review of the student's educational history reflects that a social history report dated October 19, 2007 was prepared by a district school social worker based upon an interview with the student's parents as part of an initial assessment to determine the student's eligibility for special education services (Dist. Ex. 10 at pp. 1, 3).[1] At the time of the social history report, the student was almost seven years old and attending first grade at a district school (id.). The social history

[1] The student was referred by his parents for evaluation due to "academic related difficulties" (Dist. Exs. 8 at p. 1; 10 at p. 1).

report described the student as motivated, although noted that he had difficulty maintaining focus on lessons and staying on task (id. at pp. 2-3). Once distracted, the student had difficulty completing assignments, following through with directions, or transitioning to another activity (id.). At the time of the social history report, the student was not reading at grade level and received intervention by a special education teacher on an "at risk" basis (id. at p. 2).[2] The student was receiving occupational therapy (OT) at a sensory gym (id.).

A psychoeducational evaluation of the student was conducted on November 14 and 21, 2007 by a district school psychologist (Dist. Ex. 8 at p. 1). The psychoeducational evaluation report indicated that the student struggled during the 2007-08 school year and received "at-risk academic services" as a regular education student since September 2007 (id.). The evaluation report further indicated that the student "responded well" to the at-risk intervention services and that he would benefit from an increase in services throughout the school day (id.). According to the evaluation report, the student's cognitive functioning fell within the average range, with a significant difference between the student's verbal and non-verbal skills, and between his working memory and processing speed skills (id. at pp. 2, 4). Academically, the report described the student's math skills as an area of relative strength and his reading comprehension skills as an area of relative weakness (id. at p. 5). The evaluator indicated that the student worked best with a multisensory approach (id. at p. 4).

A district OT evaluation was conducted on January 2, 2008 as part of the student's initial assessment for special education services (Dist. Ex. 6 at pp. 1, 5). The OT evaluator recommended that the student receive two individual 30-minute OT sessions in class or a separate location in order to address the student's fine motor coordination, visual motor integration, and graphomotor delays (id. at p. 5). The evaluator indicated that it was important for the student that all providers approach instruction in letter formation and writing in a consistent manner (id.). The evaluator also recommended that the student be provided with positive reinforcement as he appeared to lack confidence in his graphomotor abilities (id.). Additional recommendations were for consideration and implementation of a sensory diet to be used with the student in the classroom, to allow for an optimal level of alertness and attention throughout the day (id.). The evaluator indicated that it was important for the student to gain insight into his own needs and behaviors so that he could self-regulate to the best of his ability in the future (id.).

In January 2008, the Committee on Special Education (CSE) determined that the student was eligible for special education programs and related services as a student with a learning disability (Tr. p. 302). The January 2008 CSE recommended special education teacher support services (SETSS) and OT for the remainder of the 2007-08 school year (Tr. pp. 302-03). The hearing record is sparse as to information about the remainder of the 2007-08 school year. According to the student's mother, a district CSE referral to the CBST[3] did not result in an appropriate nonpublic school placement for the student, and the parent began searching for an appropriate private school for the student (Tr. pp. 304-07).

[2] According to the student's mother, the student received 37.5 minutes of "extra time for reading" every morning (Tr. p. 301).

[3] From the context of the hearing record, "CBST" appears to mean Central Based Support Team, which has the function of assigning a student to an appropriate State-approved nonpublic school (see Application of a Student with a Disability, Appeal No. 10-118).

A private neuropsychological evaluation of the student was conducted over the course of four dates in June 2008 (Dist. Ex. 11 at p. 1). Formal cognitive testing revealed significant variability within and between cognitive domains (id. at p. 8). The evaluator indicated that the student's test performance was negatively affected by his language-based learning difficulties and variable attention (id.). The evaluator further reported that the student's verbal abilities were uneven, with significant strength noted in his ability to conceptualize small amounts of verbal information in structured tasks, and with weakness noted in complex language processing, expression, and verbal fluency (id.). Nonverbal reasoning and visual-spatial analysis skills were strong and well-developed (id.). Weaknesses were noted by the evaluator in the student's processing speed and underdeveloped graphomotor skills (id.). According to the evaluation report, formal testing and parental report indicated weaknesses in attention, working memory, planning, and organization (id.). The evaluation report indicated that the student's difficulties in decoding, phonological knowledge, and verbal fluency were consistent with dyslexia, a language-based learning disability (id.). As a result of these language-based difficulties, the student's academic functioning was lower than expected in consideration of his age, grade, and intelligence (id. at pp. 5, 8). Emotionally, the evaluator described the student as aware of his learning difficulties, something that contributed to feelings of anxiety, particularly when he was confronted with academic tasks in which he felt he could not be successful (id. at pp. 7-8). Overall, the evaluator opined that the student was not making appropriate progress at the time and was at risk for further academic difficulties and potential regression (id. at pp. 8-9).

The evaluation report included recommendations for a small, supportive specialized education environment, with a small classroom and therapeutic environment (Dist. Ex. 11 at p. 9). Specific recommendations included a curriculum that would be effective in teaching students with dyslexia/language-based learning disorders; individualized support to facilitate the student's attention in the classroom; daily intense reading support from an "Orton-Gillingham or Wilson trained" reading specialist; integration of reading support in the classroom; specific teaching strategies for phonological skills; as well as audiological and auditory processing monitoring (id.). Additional recommendations included strategies to address the student's attention and executive function deficits (id. at p. 10). In addition, the evaluator recommended OT to address the student's graphomotor difficulties (id.). Possible psychotherapy was suggested pending results of suggested interventions, and periodic neuropsychological reevaluation (id.).

The student began attending the Aaron School for the 2008-09 school year when he was in second grade (Tr. pp. 305, 354). He continued to attend the Aaron School through the time of the impartial hearing during the 2010-11 school year (fourth grade) (id.).

Turning now to the 2009-10 school year, a district special education teacher conducted a classroom observation of the student at the Aaron School on October 28, 2009 (Dist. Ex. 9 at p. 1). The classroom observation report reflected that the student was observed in his art class consisting of 11 students, one teacher and one teacher assistant, as well as in his homeroom during a writing lesson (id. at pp. 1-2). The classroom observation report indicated that the student remained on task most of the time, even during unstructured periods (id. at p. 2). The report noted that the student participated, followed directions, and did not display disruptive behaviors (id.). In addition, the classroom observation report indicated that the student used complex sentence structures in his speech, displayed good fine motor skills and was able to draw straight and neat lines and fine details (id.). Later in the day the student was observed in his homeroom during a writing lesson and his behaviors were "consistent with what was observed during the art class" (id.).

A February 2010 mid-year report for 2009-10 from the Aaron School indicated that the student's struggles in school could be attributed to executive function, attention, and expressive and receptive language challenges (Dist. Ex. 7 at pp. 1, 10). The report noted in part that his homeroom class consisted of 12 students and that the class was equipped with an FM system to enhance auditory processing and attention (id. at p. 1). Within the homeroom class grouping, the student received instruction in language arts, writing, social studies, science, health, computer, art, movement, music, and library (id.). Reading and math instruction occurred in small groupings for 45 minutes daily (id. at pp. 1-2). Writing was incorporated into all academic areas (id. at p. 3). The student received OT two times per week for 30 minutes with a peer, as well as speech-language therapy one time per week for 30 minutes with a peer and counseling one time per week for 30 minutes with a peer (id. at p. 1).

By notice dated March 25, 2010, the district provided the parents with notice that the student's CSE reevaluation/annual review meeting was rescheduled to April 20, 2010 at the parents' request, to discuss the educational needs of the student and determine the student's continued eligibility for special education services as a student with an educational disability (Dist. Ex. 4).

The CSE met on April 20, 2010 for the student's annual review (Dist. Ex. 2 at pp. 1-2; see Dist. Ex. 3). Attendees included the district representative who also attended the CSE meeting as the district special education teacher,[4] a district regular education teacher, a district school psychologist, as well as the student's parents, and by telephone the student's special education teacher and a special education supervisor, both from the Aaron School (Tr. pp. 123-24, 142-43, 214; Dist. Exs. 2 at p. 2; 3). The April 2010 CSE continued the student's eligibility for special education programs and services as a student with a learning disability (Dist. Ex. 2 at p. 1). The April 2010 CSE recommended ten-month programming in a special class in a community school (12:1+1) (id. at pp. 1, 14).[5] The CSE also recommended continuing the student's individual OT and individual speech-language therapy sessions two times per week for 30-minutes for each related service, and small group counseling (1:2) one time per week for 30 minutes (id. at pp. 1, 16). In addition, the April 2010 CSE recommended classroom academic accommodations and modifications of repetition, visual and verbal cues and prompts, reminders, rephrases, use of manipulatives for math activities, and graphic organizers (id. at p. 3). As to social/emotional accommodations and supports, the CSE recommended sensory tools and sensory breaks to allow for greater processing of information, water breaks and body breaks throughout the school day, and teacher support to initiate social problem solving (id. at p. 4). The April 2010 IEP reflected that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher and that the student was already supported by the special education teacher and the student's related service providers (id.). The IEP also noted that the student's physical management needs warranted the recommendation for OT (id. at p. 5). The April 2010 CSE recommended testing accommodations of extended time (double), a separate location, questions read to the student except for reading exams, and directions read and reread aloud (id. at

[4] The district special education teacher who participated at the April 20, 2010 CSE meeting conducted the October 2009 classroom observation of the student at the Aaron School.

[5] The hearing record includes an April 20, 2010 "Notice of Recommended Deferred Placement: Annual Review of Reevaluation" indicating that the April 20, 2010 CSE believed it was in the best interest of the student to defer placement in the recommended program until September 13, 2010 although the parents had the right to an immediate placement for the student in a 12:1+1 special class in a community school with the recommended related services (Tr. p. 309; Dist. Ex. 5).

p. 16). During the April 2010 CSE meeting, the CSE discussed the student's specific constellation of needs, options other than the 12:1+1 placement in a community school for the student, and determined that the student continued to require the support and structure of a small classroom setting (id. at p. 15). The hearing record reflects that the parents and the student's teachers from the Aaron School participated in the CSE meeting and that their input helped the CSE develop the student's April 2010 IEP (Dist. Ex. 4).

In a letter dated August 6, 2010 from the district addressed to the student's parent, the district summarized the CSE's recommendations in the April 2010 IEP, and identified the school to which the district assigned the student (Dist. Ex. 12).

In a letter to the district dated August 11, 2010, the student's parents acknowledged receiving the district's August 6th letter (Parent Ex. F; see Dist. Ex. 12). The parents' letter indicated their intention to arrange for a visit to the assigned school when classes were in session in September 2010 (Parent Ex. F).

On August 24, 2010, the parents, through their attorney, notified the district of their intent to place the student at the Aaron School for the 2010-11 school year and to seek tuition reimbursement for such placement (Parent Ex. A at p. 1).[6]

In a letter to the district dated September 15, 2010, the parents indicated that they visited the recommended school and that the assigned school was inappropriate for the student (Parent Ex. G at pp. 1-2). The letter indicated that the assigned school did not provide the appropriate educational and related services mandated by the student's April 20, 2010 IEP, was too far from home; too noisy and too large a setting for the student to learn (id. at p. 2).

Due Process Complaint Notice

In a due process complaint notice dated September 16, 2010, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) (Dist. Ex. 1 at p. 1).[7] As to procedural grounds, the parents asserted that the student's April 20, 2010 IEP was drafted without an additional parent member in attendance at the CSE meeting; that the CSE did not comply with regulations establishing guidelines for participation in a CSE meeting by teleconference; and that the parents were not provided with a copy of the educational evaluation before the CSE meeting (id. at p. 2). In addition, the parents asserted that the CSE did not rely on necessary evaluations to properly measure the student's current skill levels and that teacher observation was the only assessment technique noted on the student's IEP for his current levels (id. at pp. 2-3). In addition, the parents asserted that the annual goals and short-term objectives on the student's IEP did not appropriately address all of the student's educational weaknesses and deficits, including math computation and problem solving; that the annual goals and short-term objectives were generic and vague; and that the IEP did not indicate a method of measurement when developing the annual goals (id.). The parents further asserted that, upon visiting the assigned class, they found that the 12:1+1 class at the assigned school was "wholly inappropriate" for the student (id. at p. 4). In support of their assertion, the parents indicated that the assigned school

[6] The parents also requested transportation to the Aaron School for the student as of the first day of school (Parent Ex. A at p. 1).

[7] The parents also asserted that the districted violated Section 504 of the Rehabilitation Act of 1973 (Dist. Ex. 1 at p. 1).

shared its building with another school for middle and high school students; that the number of students in the building would be about 700; that common spaces were shared by both schools; and that the environment could be noisy, making it "difficult" for the student (id.). In addition, the parents asserted that the CSE recommended the 12:1+1 program for the student without properly evaluating the student's ability to be placed in such a large and less supportive placement; and that the CSE ignored the input from the student's current teachers/providers who believed that the student needed a smaller, more supportive program in order to benefit educationally (id.). In addition, the parents asserted that the assigned class did not offer the student a suitable and functional peer group for instructional and social/emotional purposes (id.). The parents further asserted that the Aaron School is appropriate for the student for the 2010-11 school year and that equitable considerations favored the parents (id. at pp. 4-5). As relief, the parents sought reimbursement for the unilateral placement of the student at the Aaron School for the 2010-11 school year (id. at p. 5).

Impartial Hearing Officer Decision

The parties convened on November 22, 2010 for an impartial hearing, which concluded on March 14, 2011 after three days of testimony (Tr. pp. 1-432). In a decision dated April 8, 2011, the impartial hearing officer found that the district did not meet the burden of establishing that its recommended placement was appropriate and reasonably calculated to confer educational benefits (IHO Decision at p. 15). The impartial hearing officer found that although the CSE recommended a special class in a community school with a 12:1+1 student to staff ratio, the assigned class actually had a student to staff ratio of 3:3+1, which was "far too restrictive" (id.). In addition, the impartial hearing officer found that the three students in the class were functioning at an academically lower level than the student; that the class profile indicated that all three students were of below average ability; and that the intellectual functioning of one of the students was "disparate" from the others (id.). Next, the impartial hearing officer found that the parents met their burden of showing that the services obtained for the student were appropriate, and rejected the district's assertion that the Aaron School was not eligible for tuition reimbursement because it was a "private for profit school" (id. at pp. 15-16). As to equitable considerations, the impartial hearing officer found that the equities favored the parents (id. at p. 16).

Appeal for State-Level Review

On appeal, the district initially asserts that tuition reimbursement is barred because the Aaron School is operated as a for-profit business. Next, the district asserts that the impartial hearing officer's failure to address all substantive grounds alleged in the due process complaint notice constitutes rejection by the impartial hearing officer of those allegations. In addition, the district asserts that the impartial hearing officer erroneously rested her decision upon issues not raised in the due process complaint notice based upon the failure to allege in the due process complaint notice that the class size was too restrictive. Next, the district asserts that the district offered the student a FAPE. The district specifically asserts that the CSE was properly composed, that no parent member was required to attend the IEP meeting since it was a subcommittee meeting, and that, moreover, the lack of an additional parent member did not have a negative effect on the parents' participation in the CSE process. The district further asserts that the district reviewed and relied upon appropriate documentation; that although the members participating via teleconference were not provided with reports and evaluations and the district did not provide the parents with a copy of the educational evaluation before the CSE meeting, the parents failed to demonstrate how such procedural errors impeded the student's right to a FAPE. Moreover, the district asserts that the district listed appropriate goals and objectives on the IEP. The district

further asserts that the student was offered an appropriate program, that the students in the class were functionally grouped as mandated by regulation, and that the student would have been placed in a "smaller, more supportive setting." In addition, the district asserts that the parents' unilateral placement was inappropriate and that equitable considerations favored the district.

In an answer, the parents admit some allegations and deny some allegations. In particular, the parents assert that tuition reimbursement is not barred because the Aaron School is a for profit business; that no negative inferences should be made regarding the impartial hearing officer's failure to specifically respond to all of the parents' allegations in the due process complaint notice; that the impartial hearing officer based her decision on issues raised by the parents; and that the district failed to timely object to the parents' formulation of its arguments during the impartial hearing. In addition, the parents assert that the district failed to offer the student a FAPE. In support of its contention, the parents assert that there was no additional parent member present at the April 20, 2010 CSE meeting; that the April 2010 IEP was flawed because the district did not provide certain pages of a draft version of the IEP to the parents or school staff prior to the CSE meeting; that the IEP was not based on objective information regarding the student's academic levels; that the failure to provide the parents and staff with a copy of evaluations and reports impeded the parents' opportunity to participate in the decision making process and deprived the student of a FAPE. In addition, the parents assert that the IEP did not include sufficient goals in the area of math, or methods of measurement for progress regarding the goals. Moreover, the parents assert that functional grouping was inappropriate and that the placement offered by the district was too restrictive for the student as it was more than an hour from home and the class contained only three students and four adults, which would not provide the student with appropriate models for speech and socialization. In addition, the parents assert that the Aaron School was appropriate and that equitable considerations favored the parents.

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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234,

at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The 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]).

Scope of Review

Initially, I am going to determine the issues that may be appropriately considered on appeal from the April 8, 2011 impartial hearing officer decision. State regulations provide, in pertinent part, that "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). A review of the district's verified petition indicates that the impartial hearing officer's determination that the student was denied a FAPE based upon findings that the student would not have been grouped with students of similar functional ability, that the actual size of the assigned class was contrary to the IEP recommendation, and that the assigned class was too restrictive are challenged by the district on appeal (Pet ¶ 12).[8] State regulations further provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer (8 NYCRR 279.4[b]). Although the parents assert in their answer reasons, in addition to those delineated in the impartial hearing officer's April 2011 decision, to support their claim that the student was denied a FAPE, a review of the parents' verified answer indicates that the parents did not cross-appeal from the impartial hearing officer's April 2011 decision (see Answer). Raising additional issues in a respondent's answer without cross-appeal is not authorized by State Regulations and, in effect, deprives the petitioner of the opportunity to file responsive papers on the merits because State Regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). In essence, a party who fails to obtain a favorable ruling with respect to an issue submitted to an impartial hearing officer is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal.[9] Accordingly, regarding the first prong of the Burlington/Carter test, the only issues to be considered on appeal in this case concern whether the impartial hearing officer erred in finding that the student was denied a FAPE based upon findings that the student would not have been grouped with students of similar functional ability, that the size of the assigned class was contrary to the IEP recommendation, and that the assigned class was too restrictive.

Next, I will consider the district's assertion that the impartial hearing officer erroneously based her decision upon an issue not raised in the parents' September 16, 2010 due process complaint notice, specifically, the impartial hearing officer's finding that the size of the assigned

[8] The district's assertion that the impartial hearing officer's failure to decide issues raised in the parents' due process complaint notice should be construed as a finding by the impartial hearing officer that such issues raised do not constitute a basis for finding a denial of a FAPE is unpersuasive.

[9] An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

class was too restrictive (see 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii], 279.12[a]).[10] Upon review of the parents' September 2010 due process complaint notice, I find that it may be reasonably read to raise the issue that the class size was too restrictive based upon their assertion that the 12:1+1 special class was "wholly inappropriate" for the student and that the assigned class did not offer the student a suitable peer group for social/emotional purposes (see Dist. Ex. 1 at p. 4). I also note that the issue pertaining to the number of students enrolled in the 12:1+1 class was delineated in the parents' September 15, 2010 letter to the district (Parent Ex. G at p. 1).

Assigned Class

I will now consider the impartial hearing officer's finding that the student was denied a FAPE based upon findings that the student would not have been grouped with students with similar functional ability, that the size of the assigned class was contrary to the IEP recommendation, and that the assigned class was too restrictive (see IHO Decision at p. 15).

Functional Grouping

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).

[10] I note that the restrictiveness finding by the impartial hearing officer is based upon the actual number of students enrolled and staff present in the assigned class (see IHO Decision at p. 15), and not upon a finding that the recommended 12:1+1 placement was too restrictive, as it relates to the continuum of alternative placements 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).

In this case, a meaningful analysis of the parents' claim with regard to functional grouping would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]), and it is not asserted on appeal that the student's IEP is not appropriate. If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Thus, in this case, the issue of the functional levels of the students in the assigned school is in part speculative because the parent did not enroll the student in the public school and therefore the district was not required to establish that the student had been grouped appropriately upon the implementation of his IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 12:1+1 special class at the assigned district school provided the student with suitable grouping for instructional purposes that was designed to meet the student's needs.

Although the hearing record reflects that at the time of the first week of school for the 2010-11 school year there was only one student enrolled in the 12:1+1 class (Tr. pp. 24, 41-2), by mid to late October 2010, the class enrollment was up to three students (Tr. pp. 24, 42, 59).[11] The special education teacher testified that one student was eligible for special education services as a student with a speech or language impairment, and the other two students were eligible for special education services as students with a learning disability (Tr. p. 25). According to the class profile dated November 5, 2010, one student was seven years old; two students were nine years old (Dist. Ex. 13 at p. 3). The class profile indicates that one student in the class had a reading instructional level ranging from 0.5 to 1.5, and two students in the class had a reading instructional level ranging from 2.6 to 3.5 (id. at p. 1). In math, the class profile indicates one student in the class had a math instructional level ranging from 0.5 to 1.5, and two students in the class had a math instructional level ranging from 1.6 to 2.5 (id.). According to the instructional levels provided by the student's

[11] Testimony by the special education teacher of the recommended 12:1+1 class indicated that in addition to him, the class was staffed by a paraprofessional and two student teachers (Tr. p. 42). Testimony by the school psychologist indicated that a 12:1+1 class has 12 students (Tr. pp. 92-93). The hearing record reflects that the class size grew from the beginning of the school year to the time of the impartial hearing, and that the previous year the number of students in the district's 12:1+1 class fluctuated and grew to seven students (Tr. p. 323).

special education teachers from the Aaron School and as noted on the student's April 2010 IEP, the student's instructional level in reading ranged from 2.5-3.0 and in math from 1.8-2.0; the instructional levels for reading and math in the recommended 12:1 +1 class were similar in range to the instructional levels of the student (see Tr. pp. 82-3; compare Dist. Ex. 2 at p. 3, with Dist. Ex. 13 at p. 1). In addition, and consistent with the class profile, the three students enrolled in the class at the time of the impartial hearing each received speech-language therapy and counseling services (Tr. p. 63; Dist. Ex. 13 at p. 2). [12, 13] The special education teacher noted that similar to the student in the instant case, one student in the class exhibited auditory processing difficulties and the other two students exhibited attention difficulties; all three students "thrive(d)" with the use of visual supports (Tr. p. 67). All of the students participated in State assessments and received accommodations of extended time, a separate location, and questions and directions read and reread (Tr. pp. 59-60). At least one of the students in the class had a recommendation for promotion based on standard fourth grade promotional criteria (Tr. p. 61). Accordingly, upon review, I find that the evidence in the hearing record shows that the 12:1+1 special class at the assigned district school provided the student with suitable grouping for instructional purposes, designed to meet the student's needs.

Class Size

Regarding the determination by the impartial hearing officer that the size of the class at the time of the impartial hearing did not conform to the student's IEP and that the 12:1+1 class with only three students enrolled rendered the class too restrictive, depriving the student of a FAPE, I first note that the assigned class was identified as a 12:1+1 class, as recommended in the student's IEP (Dist. Ex. 12), and that the failure to have the maximum number of students enrolled in the 12:1+1 special class does not mean that the assigned class does not conform with the student's IEP. Moreover, I find that, similar to the discussion above regarding functional grouping, in this case, a meaningful analysis of the parents' claim would require me to determine what might have happened had the district been required to implement the student's IEP, and the district was not required to implement the student's IEP because the student was never enrolled in the district's school (see R.E., 2011 WL 924895, at *10; see also Grim, 346 F.3d at 381-82).

Moreover, I find 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]).

[12] According to the class profile, one student in the class displayed "much lower expressive and receptive language abilities" (Dist. Ex. 13 at p. 1).

[13] Testimony by the special education teacher of the recommended 12:1+1 class revealed that he prepared the class profile at the request of his principal; that the class profile included in the hearing record was the first formal written profile he ever developed; and that although the class profile indicated the level of intellectual functioning for all three students in the class was "Below Average Ability," the teacher indicated that when he prepared the class profile he meant below average grade level functioning, not intellectual functioning (Tr. pp. 53, 58).

Least Restrictive Environment

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 v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993] 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. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). 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, the parties agree that the student can not be educated satisfactorily in a general education environment for academic subjects, nor does either party suggest that such a placement would be appropriate. Consequently, the first prong of the Newington LRE test is resolved in favor of the district and I will therefore turn to the second prong, whether the district has provided mainstreaming opportunities to the student to the maximum extent appropriate (see J.G. v. Kiryas Joel Union Free Sch. Dist., 2011 WL 1346845, at *33 [S.D.N.Y. Mar. 31, 2011]). I note that neither party asserts that the district failed to include the student in school programs with nondisabled students to the maximum extent appropriate, but rather the impartial hearing officer found that because there were only three students with disabilities enrolled in the district's 12:1+1 class, the class was too restrictive, which does not constitute a basis for finding that a 12:1+1 class is too restrictive under the Newington test. The impartial hearing officer misapplied the LRE standard by analyzing the number of disabled peers in the student's special class instead of examining the extent to which the student was offered opportunities to interact with nondisabled peers. Moreover, I find that the hearing record reflects that the district provided mainstreaming opportunities to the student to the maximum extent possible. The special education teacher of the assigned 12:1+1 class indicated that the class consisted of third and fourth graders who stayed together for the entire day, but had lunch and recess with all third-graders and "mix[ed] in with the general ed kids" every possible opportunity (Tr. pp. 65, 75).[15] Accordingly, upon review of the hearing record, I find that at the time of the CSE meeting, the district's recommended placement was designed to mainstream the student to the maximum extent appropriate and therefore, satisfied the mandate that the student be offered a placement by the district in the LRE. Having reached this conclusion, along with the previous conclusions above, I find that the impartial hearing officer's finding that the district denied the student a FAPE for the 2010-11 school year is not supported by the hearing record.

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 Aaron School was 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

[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).

[15] According to the special education teacher's testimony, the 12:1+1 class participated in a "New York City Subway Study" in general education social studies with two other classes (27 other students) every week for 90 minutes; the 12:1+1 class had already gone on six or seven field trips with the other classes (Tr. pp. 39-40). In addition, one of the students in the 12:1+1 class goes to a general education book group that is appropriate to his reading level (Tr. p. 40). The 12:1+1 class also interacted with the general education population in chorus (id.).

of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the impartial hearing officer's decision which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered that the district provide tuition reimbursement for the student's attendance at the Aaron School is hereby annulled.

Dated: **Albany, New York**
July 1, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER