



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-057

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, attorneys for petitioner, John Tseng, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondents, Karen Newman, 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 the costs of their son's tuition at the Aaron School for the 2010-11 school year. The appeal must be sustained in part.

Background

At the time of the impartial hearing, the student was attending fifth grade at the Aaron School, where he has continuously attended school since kindergarten (Tr. pp. 531, 612-13; see Parent Exs. E-I).¹ During the 2010-11 school year at the Aaron School, the student received two 30-minute sessions of speech-language therapy per week with a peer, one 30-minute session of occupational therapy (OT) per week with a peer, and he participated in a weekly 30-minute "life skills group" with his entire class; the life skills group was led by both a speech-language pathologist and occupational therapist (see Tr. pp. 411-17, 468-72, 482-87, 492; Parent Ex. E at pp. 8-11). The student demonstrates academic and social deficits attributable to his difficulties with expressive language, higher order cognition, and memory (Dist. Ex. 9 at p. 1). According to the hearing record, the student's difficulties with expressive language hinder his ability to access

¹ 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).

information, retrieve words, formulate sentences, and generate novel ideas in stories and conversations (id. at p. 4; see Dist. Ex. 10). The student exhibits difficulty registering new information in content area classes and in writing (Dist. Ex. 9 at p. 4). In addition, the student demonstrates difficulty with self-regulation and motor planning (see Dist. Ex. 11). The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

In this case, the Committee on Special Education (CSE) convened on March 24, 2010 to conduct the student's annual review and to develop his individualized education program (IEP) for the 2010-11 school year (Dist. Ex. 5 at pp. 1-2). After reviewing the available information, the March CSE recommended placing the student in a 12:1+1 special class in a community school for the 2010-11 school year with the following related services: two 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of small group speech-language therapy; one 30-minute session per week of individual OT; and one 30-minute session per week of small group OT (id. at pp. 1-2, 15-16).

In discussing and considering other programs and services, the CSE included a notation in the student's IEP that he required the "ongoing support" of OT and speech-language therapy "over the summer to prevent a significant regression of skills" (see Dist. Ex. 5 at p. 15; see also Tr. pp. 533-34). However, the March IEP did not include a recommendation for speech-language therapy or OT services during summer 2010, and the CSE did not identify the student as eligible for 12-month services on the IEP (Tr. p. 64; see Dist. Ex. 5 at pp. 1-16).

After receiving the March IEP, the parents realized that it did not contain a recommendation for summer 2010 services and that the student's date of birth on the IEP was incorrect (Tr. pp. 540-41, 653). By letter dated April 19, 2010, the parents wrote to the district, indicating that the student's March 2010 IEP contained a "typo" regarding the student's date of birth and asked to correct the mistake (Parent Ex. B; see Tr. p. 653).² The parents also telephoned the district seeking to amend the student's IEP to incorporate a recommendation for summer services and to correct the student's date of birth (Tr. pp. 543-45, 648). At that time, the district advised the parents that the CSE would need to convene to add summer services, and asked the parents to provide 12-month services rationales to support their request for summer 2010 services (Tr. pp. 543-44). By letter dated May 24, 2010, the parents sent the district a 12-month services rationale for speech-language therapy services prepared by the student's speech-language pathologist at the Aaron School, as well as a 12-month services rationale prepared by his classroom teachers at the Aaron School for an educational program to assist in the student's retention of academic skills (Dist. Ex. 24 at pp. 1-3).

Pursuant to the parents' request, the CSE reconvened on June 15, 2010 (Dist. Ex. 18 at pp. 1-2; see Tr. pp. 543-45). After reviewing the available information—and in particular, the 12-month services rationales prepared by the Aaron School—the CSE amended the student's March 2010 IEP to correct the student's date of birth and to include a recommendation for two 30-minute sessions per week of small group speech-language therapy services to be provided to the student

² Aside from identifying the "typo" in the March IEP, the April 19, 2010 letter did not otherwise include objections to the March 2010 IEP (see Parent Ex. B).

during summer 2010 (Dist. Exs. 18 at pp. 1-2; 19; see Tr. pp. 545-48).³ The June CSE recommended speech-language therapy services for the student for "July and August 2010" within the section of the IEP entitled "Twelve Month School Year," and further noted in the June 2010 IEP that the student required the services "to prevent a significant regression of skills" (Dist. Ex. 18 at pp. 1-2, 15). However, similar to the March CSE, the June CSE—in the section of the IEP entitled "Twelve Month School Year"—placed a checkmark in the box labeled "no," and thus, did not identify the student as eligible for 12-month services on the IEP (see Dist. Exs. 18 at pp. 1-2, 15; 19; compare Dist. Ex. 5 at p. 1, with Dist. Ex. 18 at p. 1).⁴

At the June CSE meeting, the parents were given the name of a contact person to "call by July 1st" in order to obtain related services authorizations (RSAs) for the student's summer 2010 services (see Tr. pp. 545-48; Dist. Ex. 19). After exchanging telephone calls for approximately one week, the student's mother spoke with the contact person, who advised that the student was not eligible for summer services due to a "change of policy" that only allowed students attending "District 75" to receive summer services (Tr. pp. 547-49; see Parent Ex. K). The parents did not receive an RSA for the student's summer 2010 speech-language therapy services, and the parents did not otherwise obtain speech-language therapy services for the student during summer 2010 (Tr. pp. 548-49).

By notice dated July 9, 2010, the district advised the parents of the school to which the district assigned the student for the 2010-11 school year (Dist. Ex. 14).⁵ By letter dated August 24, 2010, the parents acknowledged receipt of the district's July 2010 notice, but noted that since the assigned school had been closed during the summer they had been unable to conduct an observation of the classroom (Parent Ex. C at p. 1). The parents indicated that they would visit the assigned school when it reopened in September, and requested that the district "immediately" provide them with a class profile and information about the "school and program" (id. at p. 1). However, without an opportunity to observe the classroom and to determine whether the student would be appropriately grouped both academically and socially, the parents advised the district that the student would continue to attend the Aaron School for the 2010-11 school year, and they would seek tuition reimbursement (id.).

³ At the impartial hearing, the parents' evidence included a 12-month services rationale for speech-language therapy services and a 12-month services rationale for an educational program, but did not include a 12-month services rationale for OT services (see Parent Ex. 24 at pp. 1-3). The district's school psychologist, who participated in both the March CSE and June CSE meetings, testified that the parents did not request "educational services" for summer 2010 at the June CSE meeting (Tr. pp. 80-82). The district's school psychologist testified that the CSE had received a 12-month services rationale for OT during summer 2010 for the student, but that the parents declined summer OT services at the June CSE meeting (Tr. pp. 18, 21, 42-43, 80-82; see Dist. Ex. 19). Testimony by the student's mother contradicts the testimony provided by the district's school psychologist with respect to the summer OT services (compare Tr. pp. 42-43, with Tr. pp. 544-47). The student's mother also testified that prior to summer 2010, the student had received both speech-language therapy services and OT services "every summer" (Tr. pp. 535-41; see Parent Ex. A at pp. 1-2, 15).

⁴ According to the June 2010 CSE meeting minutes, the June CSE reconvened to "address 12 month services" and noted that the student's IEP had been amended to include "12 month speech services" (Dist. Ex. 19).

⁵ The July 9, 2010 notice did not include any references to the June CSE's recommendation for speech-language therapy services during summer 2010 (see Dist. Ex. 14).

On September 8, 2010, the parents visited the assigned school and observed a 12:1+1 classroom (Parent Ex. D at p. 1). By letter dated September 15, 2010, the parents informed the district that, for reasons enunciated, the assigned school was not appropriate for the student (id.). The parents, therefore, declined the assigned school, and indicated that the student would continue to attend the Aaron School for the 2010-11 school year and that they would seek tuition reimbursement (id. at p. 2).

Due Process Complaint Notice

By amended due process complaint notice, dated December 9, 2010, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year, alleging both procedural and substantive violations (Dist. Ex. 15 at pp. 1-2).⁶ The parents alleged that both the March CSE and June CSE were invalidly composed, the March IEP and June IEP contained insufficient goals and objectives, and neither the regular education teacher nor the special education teacher would have been able to implement the student's proposed program (id. at p. 1). In addition, the parents asserted that the CSE process failed to comply with "appropriate CSE procedure," the CSE failed to review "the proper documentation," the CSE improperly relied upon teacher estimates to document the student's instructional levels, the IEPs did not include evaluations or current testing, and the district had not evaluated the student since 2004 (id.). The parents further alleged that the IEPs contained goals that were inadequate and not specific to the student's needs and that the goals failed to include any grade level expectations or methods of measurement (id.). Next, the parents asserted that the IEPs did not accurately reflect the student's learning issues and academic levels, noting that while the IEPs identified the student's instructional level as early third grade, the student's promotional criteria was "listed" as 75 percent of the fifth grade curriculum (id.).

In addition, the parents noted that although the June CSE added summer 2010 services to the June IEP, the district failed to issue an RSA for the recommended summer services (Dist. Ex. 15 at p. 1). The parents also explained that they could not consider the assigned school until September, and they had not been provided with a class profile as requested (id. at pp. 1-2). The parents asserted that the assigned school was not appropriate for the student (id. at p. 2). Specifically, the parents indicated that such a large environment would be overwhelming for the student's sensory issues; that the student would participate in classes "larger than 12 students for many periods each day" for his nonacademic classes (lunch, recess, physical education, and

⁶ State and federal regulations only allow a party to amend its due process complaint notice under two conditions: (1) if the opposing party "consents in writing to such amendment and is given the opportunity to resolve the complaint" through the resolution process, or (2) if the "impartial hearing officer grants permission, except that the impartial hearing officer may only grant such permission at any time not later than five days before an impartial due process hearing commences" (8 NYCRR 200.5[i][7][i]; [j][2]; 34 C.F.R. §§ 300.508[d][3], 300.510). The hearing record contains no information regarding which condition the parents satisfied that allowed them to amend their original due process complaint notice, dated October 19, 2010 (see Dist. Ex. 1). In addition, a review of the amended due process complaint notice indicates that the additional information included pertained to information that the parents had available to them as of October 19, 2010, the date of the original due process complaint notice (compare Dist. Ex. 15 at pp. 1-2, with Dist. Ex. 1 at pp. 1-2). Under the circumstances of this case, it appears that the filing of the amended due process complaint notice in December 2010 only served to further delay the impartial hearing. The parties and the impartial hearing officer are cautioned to ensure compliance with regulatory requirements for amending due process complaint notices as well as State regulations governing the timelines within which to conduct an impartial hearing (see 8 NYCRR 200.5[j][5]).

special); the student would use the auditorium during inclement weather; that the student would not receive sufficient physical activity needed to manage his sensory issues; and the large number of "non-native English speakers" would be "frightening and overwhelming" for the student's sensory issues (id.; compare Dist. Ex. 15 at p. 2, with Parent Ex. D at pp. 1-2). As relief, the parents sought reimbursement for the costs of the student's tuition at the Aaron School for the 2010-11 school year, as well as the provision of transportation and related services (Dist. Ex. 15 at p. 2).

Impartial Hearing Officer Decision

On January 12, 2011, the parties proceeded to an impartial hearing, which concluded on March 7, 2011, after four nonconsecutive days of testimony (Tr. pp. 1, 607). By decision dated April 28, 2011, the impartial hearing officer concluded that the district failed to offer the student a FAPE for the 2010-11 school year, and awarded the parents reimbursement for the costs of the student's tuition at the Aaron School (IHO Decision at pp. 19-26).

In her decision, the impartial hearing officer found that the hearing record failed to contain sufficient evidence that the regular education teacher or the special education teacher at the June CSE meeting would have been able to implement the student's proposed program (IHO Decision at pp. 19-20). She also determined that uncontested testimony established that the district did not offer the parents an RSA for the student's summer 2010 speech-language therapy services and that the CSE failed to discuss the annual goals at the June CSE meeting (id. at pp. 20, 22). In addition, the impartial hearing officer concluded that based upon the testimony presented, the parents and the student's related services providers at the Aaron School did not participate in developing or drafting the annual goals in the student's IEP (id. at p. 22). Moreover, the impartial hearing officer found that the failure to include goals to address the student's language processing and sensory processing needs, along with the failure to update the student's related services goals, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their son (id. at pp. 22-23). The impartial hearing officer also concluded that although the student's IEP mandated 35 periods per week of special education in a 12:1+1 special class in a community school, the evidence demonstrated that the student's participation in a mainstream setting for physical education, lunch, and specials would have precluded him from receiving the mandated amount of special education (id. at p. 22).

With regard to summer 2010, the impartial hearing officer found that the district's failure to provide the recommended summer 2010 speech-language therapy services denied the student a FAPE (IHO Decision at pp. 22-23). She further determined that the evidence established that the parents had requested OT services for summer 2010, and the district's failure to recommend and provide those services denied the student a FAPE (id. at p. 23). The impartial hearing officer also found the hearing record "devoid" of evidence to support a reduction of summer services or to support the "lack of special education services" during the student's nonacademic classes (id.). In addition, the impartial hearing officer determined that the district failed to sustain its burden to establish that the parents and the student's Aaron School teacher meaningfully participated in the decision-making process, and she further determined that the lack of evaluations to support the reduction of special education services during nonacademic classes "significantly impeded the parents' opportunity to participate in the decision-making process" (id.). She also found that the CSE did not consider the parents' and the Aaron School teacher's recommendation that the student

required a "full-time special education setting," which also denied the parents an opportunity to participate in the decision-making process (id.).

With regard to the appropriateness of the Aaron School, the impartial hearing officer found that the parents sustained their burden, and further, that the Aaron School was the student's least restrictive environment (LRE) (IHO Decision at pp. 23-25). According to the impartial hearing officer's decision, the evidence indicated that the student made "demonstrative" progress in his decoding, speech-language therapy, and OT goals; the student made progress in his ability to regulate his sensory processing needs; and that the Aaron School provided the student with a "small structured therapeutic setting" (id. at p. 24). The impartial hearing officer also noted that the student received speech-language therapy and OT services, and that the student's service providers coordinated with the student's classroom teacher to provide strategies within the classroom to assist the student (id.).

Finally, the impartial hearing officer addressed and dismissed the district's argument that the Aaron School's for-profit status precluded tuition reimbursement, and she found that equitable considerations did not preclude an award of tuition reimbursement in this case (IHO Decision at pp. 25-26). Thus, the impartial hearing officer directed the district to reimburse the parents for the costs of the student's tuition at the Aaron School for the 2010-11 school year upon the parents' presentation of proper proof of payment (id. at p. 26).

Appeal for State-Level Review

The district appeals, alleging that the impartial hearing officer erred in determining that the district failed to offer the student a FAPE for the 2010-11 school year. Initially, the district contends that the impartial hearing officer improperly considered issues the parents did not include in their amended due process complaint notice and improperly incorporated those issues into her decision. Next, the district contends that impartial hearing officer erred in finding that the district failed to include the participation of the student's Aaron School speech-language provider at the June 2010 CSE meeting. In addition, the district asserts that the weight of the evidence does not support the impartial hearing officer's finding that the parents requested OT services for summer 2010, or that the district's failure to update the annual goals for related services impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits.

Next, the district contends that the impartial hearing officer improperly found that the assigned school would not be able to provide the student with the mandated amount of special education, as recommended in the student's June IEP. In addition, the district argues that the impartial hearing officer improperly concluded that the large size of the assigned school would overwhelm the student's sensory needs and that the student would not be appropriately grouped in the recommended program.

Finally, the district concedes that it did not provide the student with speech-language therapy services during summer 2010, but contends that this failure should not result in finding that the district did not offer the student a FAPE. Alternatively, the district argues that even if the failure to provide summer services to the student denied the student a FAPE, the parents are not entitled to an award of tuition reimbursement to remedy this deficiency.

The district also asserts that the impartial hearing officer erred in finding that the Aaron School was appropriate to meet the student's needs because the Aaron School only offers a 10-month program with a summer camp and thus, cannot provide the student with the required 12-month related services. In addition, the district argues that equitable considerations preclude an award of tuition reimbursement in this case because the parents failed to provide timely notice of the student's reenrollment at the Aaron School and because the parents never truly considered placing the student in a public school.

In their answer, the parents respond to the district's allegations and seek to uphold the impartial hearing officer's decision in its entirety.

Discussion

As noted above, the district concedes in the petition that it did not provide the student with speech-language therapy services during summer 2010, but argues that the failure to provide these services should not result in finding that the district failed to offer the student a FAPE for the 2010-11 school year. The district's argument, however, must fail because it ignores the fact that pursuant to both State and federal regulations, the student in this case was eligible to receive 12-month school year services. Thus, as explained more fully below, I am constrained to find that the district's failure to provide the student with speech-language therapy services during summer 2010 constitutes a failure to implement a substantial or significant portion of the student's IEP, rising to the level of a denial of a FAPE for the 2010-11 school year.

Development of an IEP and 12-Month School Year Services

In developing an IEP for a student with a disability, a CSE "shall include" 12-month services in the IEP recommendations for students who meet the eligibility requirements (8 NYCRR 200.4[d][2][x]; see 34 C.F.R. § 300.106[a][1], [a][2] [requiring districts to "ensure that extended school year services are available as necessary to provide FAPE," and further requiring that extended school year services "must be provided" to a student if the CSE determines "that the services are necessary for the provision of a FAPE"], 34 C.F.R. § 300.106[b] [defining extended school year services as both "special education and related services" that are provided to a student with a disability beyond the "normal school year," in accordance with the student's IEP, and at no cost to the parents]).

To determine eligibility, State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression, if they are:"

students who are not in programs as described in subparagraphs (i) through (iv) of this paragraph during the period of September through June and who, because of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education

(8 NYCRR 200.6[k][1], [k][1][v]). State regulations define a 12-month special service and/or program as a

special education service and/or program provided on a year-round basis, for students determined to be eligible in accordance with sections 200.6(k)(1) . . . of this Part whose disabilities require a structured learning environment of up to 12 months duration to prevent substantial regression. A special service and/or program shall operate for at least 30 school days during the months of July and August, inclusive of legal holidays, except that a program consisting solely of related service(s) shall be provided with the frequency and duration specified in the student's individualized education program

(8 NYCRR 200.1[eee]).

Here, although neither the March CSE nor the June CSE identified the student as eligible for 12-month school year services on the March IEP or on the June IEP, it is undisputed that the June CSE ultimately included a recommendation in the student's June IEP for the student to receive speech-language therapy services during July and August 2010 in order to prevent a significant regression of skills (Dist. Exs. 5 at pp. 1, 15; 18 at pp. 1-2, 15).⁷ It is also undisputed that the June CSE specifically reconvened to amend the student's IEP to add a recommendation for the provision of speech-language therapy services during summer 2010, which strongly suggests that the June CSE believed that the student required such services in order to receive a FAPE for the 2010-11 school year (see Dist. Ex. 19; compare Dist. Ex. 5 at pp. 1, 15, with Dist. Ex. 18 at pp. 1-2, 15). It is further undisputed that the parents provided the June CSE with 12-month services rationales—as requested by the district to support a recommendation for summer 2010 services—prepared by the students' Aaron School providers (Dist. Ex. 24 at pp. 1-3; see Tr. pp. 543-44). Thus, regardless of whether the March CSE or June CSE identified the student as eligible for 12-month school year services, the facts of this case—and in particular, the recommendation in the June IEP to provide the student with related services during July and August 2010 in order to prevent a significant regression of skills—as well as State and federal regulations, dictate a different conclusion: namely, that the student satisfied the eligibility requirements to receive 12-month school year services during the 2010-11 school year.

⁷ At the impartial hearing, the district school psychologist testified that she did not consider the student as a 12-month school year student because the recommended summer services on the June IEP did not include an "academic component" (Tr. pp. 78-81). She further explained that "IEPs for 12-month students" were generally for "students with very significant delays" who "often" had "cognitive concerns" (Tr. pp. 80-81). The district's school psychologist also testified that she "routinely recommend[ed] students for a 12-month school year," but noted that "all" of those students attended "district 75" (Tr. p. 81). Notwithstanding the 12-month services rationales submitted by the parents to the June CSE, the district school psychologist testified that the student in this case did not exhibit "the regression . . . to the degree that he require[d] a 12-month school year" (Tr. pp. 81-82). The district school psychologist's explanation regarding why she believed the student was not eligible for 12-month school year services is untenable given its inconsistency with State regulations.

Failure to Implement the Student's 2010-11 IEP

Having established the student's entitlement to receive 12-month school year services in form of speech-language therapy services during summer 2010, I now turn to whether the district's conceded failure to provide the recommended related services during summer 2010 constitutes a failure to implement the student's IEP, denying the student a FAPE for the 2010-11 school year.⁸

To rise to the level of a denial of a FAPE, more than a de minimus failure to implement all elements of the IEP must be established, and instead it must be demonstrated that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the Individuals with Disabilities Education Act (IDEA), courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

Consistent with caselaw, I must conclude that the district's conceded failure in this case to provide the student's speech-language therapy services during summer 2010 constitutes more than just a few missed speech-language therapy services, as in Catalan, and more than just a minor discrepancy between the services provided and the services required in the student's IEP, as in Van Duyn, because the district did not provide any of the speech-language services required in the student's June IEP. In addition, the district's failure to provide the services is of particular concern because, as noted in State regulations, the recommended 12-month speech-language therapy services are designed to prevent a substantial regression of the student's skills (Dist. Ex. 18 at pp. 1-2, 15).⁹ Thus, the district's failure to implement the 12-month speech-language therapy services required in the student's June IEP demonstrates a failure to implement a substantial or significant portion of the student's IEP, which rises to the level of a denial of a FAPE for the 2010-11 school year.

⁸ As a matter of State law, the school year runs from July 1 through June 30; therefore, a 12-month school year begins on July 1 (see Educ. Law § 2[15]).

⁹ State regulation defines substantial regression as a student's "inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).

The Parents' Unilateral Placement

Next, the district argues that the impartial hearing officer erred in concluding that the parents sustained their burden to establish the appropriateness of the student's unilateral placement at the Aaron School for the 2010-11 school year because the Aaron School does not meet the student's unique needs, and in particular, does not provide the 12-month speech-language therapy services required by the student.

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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; 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]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 [1982] and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs

of a student (20 U.S.C. § 1401[29]; 34 C.F.R. § 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

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]).

Upon review of the hearing record and contrary to the impartial hearing officer's conclusion, the district correctly argues that the parents did not sustain their burden to establish that the Aaron School provided educational instruction specially designed to meet the unique needs of the student. Specifically, the Aaron School does not provide 12-month services—as recommended by the student's own speech-language pathologist at the Aaron School in the 12-month services rationale she prepared in support of the parents' requested summer 2010 services from the district. In addition, the hearing record indicates that although the student received speech-language therapy and OT services at the Aaron School, the amount and frequency of the student's related services were determined based upon the student's grade level, as opposed to the student's individual and unique needs, which weighs heavily against a finding that the Aaron School was appropriate to meet the student's unique needs.

12-Month Services

According to the uncontested evidence in the hearing record, the Aaron School operates a 10-month school year with a summer program characterized as "available" but "not obligatory" for "academics" (Tr. pp. 80-81, 324-25, 399; see Tr. pp. 233-34 [indicating that the 2010-11 school

year started on or around September 7th or 8th and ended in the "middle of June"]; Parent Exs. G-H [noting the student's attendance at the Aaron School from September 7, 2010, through June 16, 2010]; see generally Tr. pp. 324-25 [describing a summer program for special needs students offered through a university, which served "a lot of the Aaron School population"). Although the hearing record indicates that the available summer program provided for both "academics" and "social emotional" needs, the hearing record does not indicate that the summer program was available to provide 12-month related services, such as speech-language therapy or OT services (Tr. pp. 324-25 [indicating that the summer program included "academics, as well as team building activities, and a lot of collaborative activities"]).

Here, it is undisputed that the student requires 12-month services for speech-language therapy. In the 12-month speech-language services rationale, the student's speech-language pathologist at the Aaron School indicated that the student presented with "marked deficits within the following areas: comprehension of language that [was] abstract, inferential, complex, and/or ambiguous; language organization; syntax structures; problem-solving; and generating and interpreting novel ideas related to stories/creative writing" (Dist. Ex. 24 at p. 1). In addition, she noted that the student's speech was "characterized by a variety of sound substitutions and sound distortions," and further, that due to the "severity and nature of [the student's] challenges with language skills he require[d] intensive and consistent therapy in order to make progress toward his goals" (id.). The speech-language pathologist also noted in the 12-month services rationale that due to the student's "notable regression of his skills" after school breaks, she "strongly recommended" that the student receive 12-month speech-language therapy services and indicated that the 12-month services were "essential" for the student to "make meaningful progress toward his goals as well as to maintain and generalize the language, academic, and social skills that he had learned" (id.).

In addition, the speech-language pathologist testified at the impartial hearing about the student's noted regression in skills after not receiving 12-month speech-language therapy services during summer 2010 (Tr. pp. 426-28; see Parent Closing Br. at pp. 22-23). She testified, in particular, that the student exhibited regression in his ability to follow multistep directions, and explained that at the beginning of the 2010-11 school year, the student required "quite a bit of verbal and visual prompting" in order to follow two-step directions (Tr. p. 427). The speech-language pathologist also testified about the student's "significant" regression in the area of his pragmatic language, "including his ability to expand with conversation, his ability to maintain a topic within conversation, his ability to ask questions, in order to gain information," as well as his "ability to retain information and express, in a sequential, organized way" (Tr. pp. 427-28).

Next, the hearing record indicates that the student's occupational therapist at the Aaron School observed regression in the student's skills after the student did not receive OT services during summer 2010 and that she believed he would "benefit" from the provision of 12-month OT services (see Tr. pp. 470-71, 478-79, 501-03; see generally Parent Closing Br. at p. 23). In particular, the occupational therapist testified that at the beginning of the 2010-11 school year, she needed to readdress "some goals" with the student that he had achieved the previous year (Tr. pp. 479-80). The hearing record also indicates that according to the parents' testimony, the student had received 12-month services of speech-language therapy and OT services since 2005 (Tr. pp. 542-43). In addition, the student's fourth grade teacher at the Aaron School testified that she agreed that the student required speech-language therapy and OT services during the summer (Tr. pp. 239, 258-60, 272). In her testimony, the student's fourth grade teacher identified his "most significant"

issues or "primary" issues as his speech and language impairment, and in particular, noted his difficulties with pragmatic, receptive and expressive areas, and further, that his speech and language difficulties affected him socially (Tr. pp. 242-44).

Thus, based upon testimony by the student's own related services providers at the Aaron School, his parents, and the student's fourth grade teacher at the Aaron School, the student required the provision of 12-month services in order to make progress, which supports a finding that the parents have not sustained their burden to establish that the Aaron School was appropriate to meet the student's unique needs because as a 10-month school, the student's unilateral placement at the Aaron School was not reasonably calculated to enable the student to receive educational benefits.

Related Services

As an additional matter, the hearing record indicates that the Aaron School limits the provision of pull-out sessions for related services according to a student's grade level and that fifth grade students were allowed no more than three 30-minute pull-out sessions per week (Tr. pp. 354-55, 451-52, 481). Therefore, during the 2010-11 school year in fifth grade, the student's related services were distributed as follows: two 30-minute sessions per week of speech-language therapy with a peer and one 30-minute session per week of OT with a peer (Parent Ex. E at pp. 8, 10).¹⁰ However, the hearing record indicates that during fourth grade, the student received the same amount and frequency of related services: two 30-minute sessions per week of speech-language therapy, once per week with a peer in the therapy room and once per week in the student's classroom; and one 30-minute session per week of OT services (Dist. Ex. 10 at p. 1). According to the hearing record, neither of the student's related service providers at the Aaron School relied upon objective tests or objective measures to assess the student's progress (Tr. pp. 461, 467-68, 505). The speech-language pathologist testified that although she documented the student's progress in "session notes"—which were not submitted into evidence—she did not write annual "goals as measurable goals" (Tr. pp. 456-58). The speech-language pathologist also admitted in testimony that although she documented the student's progress in session notes, the therapists did not "have a consistent set way that we all do it" (Tr. pp. 460-61).

Conclusion

Upon due consideration of the hearing record, I find that the district failed to offer the student a FAPE for the 2010-11 school year, and further, that the impartial hearing officer erred in concluding that the parents sustained their burden to establish the appropriateness of the student's unilateral placement at the Aaron School for the 2010-11 school year. Having determined that the parents failed to sustain their burden to warrant an award of reimbursement for the costs of the student's tuition at the Aaron School for the 2010-11 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the equities support an award of tuition reimbursement at the Aaron School, or as the district asserts, whether the parents are entitled to an

¹⁰ Given the student's identified needs, the March CSE and June CSE recommended that the student receive the following related services: two 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of small group speech-language therapy; one 30-minute session per week of individual OT; and one 30-minute session per week of small group OT (Dist. Exs. 5 at pp. 1, 16; 18 at pp. 1, 16).

award of tuition reimbursement as a remedy for the district's failure to provide summer 2010 services (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision, dated May 11, 2011, that determined that the parents sustained their burden to establish the appropriateness of the student's unilateral placement at the Aaron School for the 2010-11 school year is annulled; and,

IT IS FURTHER ORDERED that the portion of the impartial hearing officer's decision, dated May 11, 2011, that ordered the district to reimburse the parents for the costs of the student's tuition at the Aaron School for the 2010-11 school year is annulled.

Dated: **Albany, New York**
 August 4, 2011

STEPHANIE DEYOE
STATE REVIEW OFFICER