



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-063

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

### **Appearances:**

Law Offices of Neal Howard Rosenberg, attorneys for petitioners, Neal H. Rosenberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Tracy Siligmuller, Esq., of counsel

### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request that respondent (the district) reimburse them for their son's tuition costs at the Aaron School for the 2010-11 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending a 12:1+2 kindergarten class at the Aaron School, where he was receiving academic instruction as well as speech-language therapy and occupational therapy (OT) (Tr. pp. 186, 229-30, 237, 240, 256-57). The Aaron School is a nonpublic school that has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student demonstrates difficulties with cognition, sensory regulation, adaptive behavior, frustration tolerance, attention, social skills, communication, and language processing, as well as with fine and gross motor skills (Tr. pp. 218, 220-21, 318-19; Dist. Exs. 14; 20). 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])

## Background

For the 2009-10 school year, the student attended a general education preschool and received special education itinerant teacher (SEIT) services, as well as speech-language therapy and OT (Dist. Exs. 15 at p. 1; 18 at p. 1; 20 at p. 1). On August 25, 2009, a district school psychologist completed a psychological evaluation of the student as part of a Committee on Preschool Special Education (CPSE) evaluation (Dist. Ex. 20 at p. 1). Administration of the Stanford-Binet Intelligence Scales-Fifth Edition (SB-V) yielded a full scale IQ (percentile rank) of 54 (0.1), a verbal IQ of 52 (0.1), and a nonverbal IQ of 60 (0.4) (*id.* at p. 3). The school psychologist determined that the student demonstrated significant delays in his overall cognitive functioning, but demonstrated a relative strength in his overall visual-spatial processing (*id.*). According to the evaluation report, the student maintained attention to a task for up to 35 minutes during the evaluation and his limited communication skills negatively affected his ability to answer the testing questions (*id.* at p. 2). The school psychologist noted that the results of the evaluation should be interpreted with caution as they may be an underestimate of the student's abilities due to his significant delays in social skills as well as in receptive and expressive language (*id.* at p. 3).

The school psychologist also examined the student's adaptive behavior, utilizing the student's mother's responses on the Adaptive Behavior Assessment System-Second Edition (ABAS-II) (Dist. Ex. 20 at pp. 5-6). The school psychologist reported that the student's standard score of 61 in conceptual skills fell within the extremely low range, his standard score of 71 in social skills fell within the borderline range, his standard score of 86 in practical skills fell within the below average range, his motor skills standard score fell with the extremely low range, and his standard score of 61 in general adaptive behavior fell with the extremely low range (*id.* at p. 5).

In an undated "Parent Survey," the parents reported that the student followed the school routine with assistance, but at times experienced difficulty with transitions (Dist. Ex. 18 at p. 1). According to the parents, the student exhibited difficulties in the areas of speech-language skills, social skills, and fine motor ability (*id.* at pp. 1-3).

In August 2009, a preschool student evaluation summary report described the student's functioning in the areas of cognition, social/emotional behavior, physical development, language processing, communication, and adaptive behavior (Dist. Ex. 19). The report indicated that the student's cognitive abilities were significantly delayed when compared to his same age peers (*id.* at p. 1). The report also indicated that the student's deficits in receptive and expressive language negatively affected his ability to engage with his peers (*id.* at pp. 1-2). The report noted also that the student's adaptive behaviors, including motor skills, were delayed when compared to same age peers (*id.* at p. 2).

In a January 4, 2010 related service progress report, the student's occupational therapist provided a description of his then-current functioning and related annual goals and short-term objectives (Dist. Ex. 11). The report indicated that the student received two 45-minute sessions of OT per week in a sensory integration gym (*id.* at p. 1). The student's OT sessions addressed upper body/trunk strength, fine motor coordination/skills, visual-motor skills, sequencing, body awareness/motor planning, safety awareness, sensory processing, self-help skills, initiation, and attention (*id.*). The occupational therapist reported that the student demonstrated some progress in the targeted areas, but continued to demonstrate delays (*id.*). The student demonstrated

decreased spatial/body awareness and increased impulsivity, which negatively affected his ability to remain safe (*id.*). The occupational therapist indicated that the student exhibited decreased strength in his trunk, shoulder girdle, and upper extremities (*id.*). The student maintained attention to a task for up to seven minutes without a movement break during table top activities (*id.* at p. 2). The occupational therapist recommended that the student receive OT for a 12-month school year in a sensory integration gym for 60-minute sessions twice per week (*id.* at p. 3). She further indicated that the student would continue to work on his annual goals/short-term objectives in the areas of fine motor, gross motor, self-regulation, safety, and attention (*id.* at pp. 2-3).

On January 6, 2010, the student's SEIT prepared a progress report regarding the student's functioning for the 2009-10 school year (Dist. Ex. 14). The SEIT noted that the student attended a general education preschool for three hours per day and received 15 hours of 1:1 SEIT services at school, as well as speech-language therapy and OT (*id.* at p. 1). According to the progress report, the student required SEIT services to assist him with social skills, communication, and sensory regulation (*id.*).

In the January 2010 progress report, the SEIT evaluated the student's cognition, social/emotional functioning, language skills, motor ability, and self-help skills utilizing the Developmental Assessment of Young Children (DAYC) (Dist. Ex. 14 at p. 1). The SEIT reported that the student's cognitive skills fell within the low range, his communication skills fell within the very low range, his social/emotional functioning fell within the delayed range, his physical development fell within the low range, and his adaptive behavior skills fell within the very low range (*id.* at p. 2). According to the report, the student demonstrated age appropriate pre-academic skills (*id.*). The SEIT noted that the student demonstrated a "short attention span" and exhibited challenging behaviors when he did not want to participate in or experienced difficulty with an activity (*id.*). The SEIT also reported that the student demonstrated difficulty with remembering and following a routine, transitioned from one activity to another activity with preparation such as a two-minute warning, and produced one to seven word sentences but at times it was difficult to understand his speech (*id.* at pp. 2-3). The report noted that the student required varying degrees of support when interacting with his peers (*id.*). According to the SEIT, the student's fine motor development was emerging in that he required verbal reminders to use an appropriate grasp while writing and with respect to gross motor skills, the student ran, jumped, and walked backwards (*id.* at p. 4).

The January 2010 progress report also indicated that the SEIT implemented various strategies to address the student's delays including modeling, incidental learning, visual cues, gestures, verbal reminders, encouragement, and positive reinforcement (Dist. Ex. 14 at p. 2). The SEIT recommended that the student attend a small, structured kindergarten classroom environment (*id.* at p. 5). The SEIT also recommended a classroom with a "high teacher to student ratio" with an emphasis on language in the curriculum (*id.*). Lastly, the SEIT recommended that counseling services for the student should be considered due to his delays in social/emotional functioning (*id.*).

On January 8, 2010, the student's speech-language therapist prepared a progress report (Dist. Ex. 13). The report indicated that the student received three 45-minute sessions per week of speech-language therapy (*id.* at p. 1). The report also reflected that the student's mode of communication had progressed over time from one of mainly gestures with a few words to using

words most of the time (id.). The student spoke using at least three words to comment, request, and reject (id.). The report indicated that the student needed "maximum support" to engage in age appropriate board games and to take turns (id.). The speech-language pathologist reported that the student benefited from visual and verbal cues (id. at p. 2). According to the speech-language pathologist, the student responded better when learning concrete concepts but as the concepts became more abstract and less visual, he experienced increased difficulty learning and retaining them (id.). The student often required redirection to a task and directions repeated (id.). The student's annual goals included improvement in the areas of articulation, receptive language, and expressive language (id.). It was recommended that the student continue to receive three 45-minute sessions of individual speech-language therapy to address receptive and expressive language, as well as to address generalization of acquired skills (id. at p. 3).

On January 15, 2010, a district occupational therapist conducted an OT evaluation of the student as part of his transition from the CPSE to the Committee on Special Education (CSE) (Dist. Ex. 12). The OT evaluation of the student included a parent interview, teacher interview, SEIT interview, classroom observation, and administration of the Sensory Profile School Companion (id. at p. 2). The report indicated that the student required 1:1 SEIT assistance for all structured activities, but during snack and gym/play time his level of independence was commensurate with his peers (id.). The student demonstrated delays in the areas of attention, self-regulation, social skills, communication, organization, learning, postural control, tone/strength, fine motor skills, sensory regulation, and adaptive behavior (id.). The report indicated that the student displayed difficulty with transitions and demonstrated a low frustration tolerance (id. at p. 4). The student followed one-step directions and classroom routines (id.). The occupational therapist recommended that the student receive two 30-minute sessions of individual OT and one 30-minute session of OT in a group of two (id. at p. 5). Recommendations also included the use of assisted seating, visual cues, and exercise breaks, as well as limiting visual distractions and excess auditory distractions (id.).

On January 29, 2010, an updated social history was completed by the school psychologist with the student's mother serving as informant (Dist. Ex. 9). According to the student's mother, the student demonstrated delays in speech, fine motor skills, and social skills (id.). The student was progressing in the area of academics including learning early decoding skills (id.). The student's mother reported that the student required a very structured program that provided support and redirection throughout the school day (id.).

The parents obtained a private psychoeducational evaluation of the student, which included administration of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III), the Vineland Adaptive Behavior Scales-Second Edition (Vineland-II), the Conner's Early Childhood Rating Scales (Conner's EC), as well as a classroom observation and teacher/staff interviews (Dist. Ex. 15 at p. 4). In an evaluation report dated January 31, 2010, the psychologist noted that the student exhibited most interest in subtests with a visual component and quickly lost interest in any subtest without a visual cue/prompt (id.). The psychologist also noted that the student demonstrated similar behavior during the classroom observation (id.). During the classroom observation, the student refused to participate in nonpreferred activities, but responded to redirection to participate in the activity at a later time (id.). Also during the classroom observation, the student's use of language declined and his physical behavior increased when frustrated but he responded to prompts and redirection (id.).

Administration of the WPPSI-III yielded a full scale IQ (percentile rank) of 73 (4), a verbal IQ of 75 (5), a performance IQ of 75 (5), and a standard score of 94 (34) in general language (Dist. Ex. 15 at p. 5). The psychologist noted that due to the student's delays in speech/language, the assessment results should be interpreted with caution as the results were likely to be an underestimate of his true intellectual functioning (id.). Administration of the Conner's EC-Parent Rating Scale yielded scores within the very elevated range in the areas of social functioning, adaptive skills, communication, motor skills, play skills, and pre-academic/cognitive skills (id. at pp. 6-7). Completion of the Conner's EC-Teacher Rating by the student's general education preschool teachers and SEIT revealed scores in the very elevated range in the areas of atypical behaviors, restlessness/impulsive, emotional lability, communication, motor skills, and play skills (id. at p. 8). According to the psychologist, the results of the Conner's EC indicated that the student was more likely to experience difficulty with expressive and receptive language, nonverbal forms of communication, and fine and gross motor activities at home than while at school (id.). However, the student was more likely to exhibit impulsivity and lack of attention within the school environment (id.).

Administration of the Vineland-II yielded a standard score (percentile rank) of 67 (1) in communication skills, 69 (2) in daily living skills, 70 (2) in socialization skills, 64 (1) in motor skills, and 64 (1) in adaptive behavior (Dist. Ex. 15 at pp. 9-10). As a result of the evaluation, the student received a diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS) (id. at p. 12). The psychologist recommended a small, supportive classroom with a "low student to teacher ratio" (id.). Recommendations also included that instructions and expectations be clear, explicit, and consistent (id.). The psychologist further recommended frequent sensory breaks, visual materials, facilitation of social interactions with peers, and positive reinforcement (id.).

On February 3, 2010, a school psychologist conducted a classroom observation of the student during his 12:1+3 preschool class (Dist. Ex. 10). The school psychologist indicated that the student required much individual support from his SEIT to play with his peers, sit at circle time, and respond to his peers and teachers (id.). The student demonstrated several skills including naming letters/sounds, counting to 10, and naming colors (id.). The classroom observation report indicated that the student was easily distracted during activities and that he often did not respond on the first request for a response (id.).

On March 12, 2010, the CSE convened to develop the student's individualized education program (IEP) for the 2010-11 school year (Dist. Ex. 6 at pp. 1-2). Meeting attendees included a school psychologist (who also acted as district representative), the parents, a district special education teacher, a regular education teacher, the student's SEIT, and an occupational therapist (id. at p. 2). The March 2010 CSE developed a statement of the student's present levels of performance in the areas of academic and functional performance, social/emotional performance, and health and physical development (id. at pp. 3-6). The March 2010 CSE determined that the student was eligible for special education services as a student with a speech or language impairment and recommended placement in a 12:1+1 special class in a community school (id. at p. 1). The recommended related services included one 30-minute session of OT per week in a group of two (separate location); one 30-minute session of OT in a group of two (general education setting); two 30-minute sessions per week of individual OT (separate location); one 30-minute session of speech-language in a group of three (separate location); two 30-minute sessions of

speech-language in a group of three (general education setting); and two 30-minute sessions of individual speech-language therapy (separate location) (id. at p. 13). According to the resultant IEP, the student's academic management needs included visual cues, small group instruction, redirection, teacher/peer modeling, a picture schedule, positive reinforcement, frequent movement breaks, chunking, graphic organizers/planners, review/reinforcement of new/learned concepts, and a multisensory approach with a focus on physical movement (id. at p. 3). The student's social/emotional management needs included opportunities to play in small groups with peers, prompts to initiate and engage with peers, and opportunities to express his feelings (id. at p. 4). The March 2010 IEP contained 14 annual goals in the areas of math, following directions, reading, social/emotional functioning, fine motor skills, organization, and speech-language skills (id. at pp. 6-10).

By final notice of recommendation (FNR) dated June 15, 2010, the district summarized the recommendations made by the March 2010 CSE and notified the parents of the school to which the district assigned the student (Dist. Ex. 7).

In a June 2010 letter, the parents informed the district that they had visited the assigned school on June 23, 2010 (Parent Ex. J).<sup>1</sup> The parents expressed concerns regarding the assigned school, including the large size of the school and classroom as well as the location of the gym, auditorium, and lunch room (id. at p. 1). The parents stated that they believed the student would have difficulty remaining "calm and focused" in those large areas because there would be too much stimulation and noise for the student (id.).

The district sent a second FNR to the parents dated June 29, 2010, wherein it again summarized the recommendations made by the March 2010 CSE and notified the parents of a second assigned school that was different than the school which the district had previously assigned the student in its June 15, 2010 FNR (compare Parent Ex. I, with Dist. Ex. 7).

In an August 4, 2010 letter to the CSE chairperson, the student's mother expressed the parents' concern regarding the large school setting and the functional grouping for the student at the second assigned school that was identified in the district's June 29, 2010 FNR (Parent Ex. A at p. 2). The student's mother stated that she had attempted to obtain information about the specific assigned class and she reiterated her request for a class profile (id.). She also stated that "pending additional information" regarding the second assigned school, the student would be placed at the Aaron School, which she believed would be "more appropriate" for him (id.). Lastly, the student's mother noted that she was willing to visit the second assigned school when it reopened in fall 2010; however, if she found that school to be inappropriate for the student, he would remain at the Aaron School and the parents would seek tuition reimbursement (id.).

In a September 16, 2010 letter to the CSE chairperson, the student's mother informed the district that she had recently visited the second assigned school (Parent Ex. B at p. 2). The student's mother stated that she was rejecting the assigned school because the student required "a small full time special education school" (id.). According to the student's mother, the assigned school was inappropriate due to the large school setting and the distance from the student's residence (id.).

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<sup>1</sup> The parents' June 2010 letter is undated and unsigned, but includes a certified return receipt dated June 24, 2010 and the student's mother testified that she sent it on June 24 or 25, 2010 (Tr. p. 328; Parent Ex. J at pp. 1, 2).

She also contended that the specific 12:1+1 special class to which the student was assigned was inappropriate because there were only 3 students in the class (*id.*). Moreover, the student's mother stated that she disagreed with the "process by which [the] IEP was developed" (*id.*). The letter requested advice from the district on "how to proceed" and stated that if district did not respond, the student would remain at the Aaron School for the 2010-11 school year (*id.*).

The student began attending the Aaron School in September 2010 (Tr. pp. 320, 334). In November 2010, the Aaron School prepared a fall report that described the student's program and academic and social goals for the 2010-11 school year (Parent Ex. G). The report indicated that the student's homeroom consisted of 12 students but that he received literacy and math instruction in a group of four students (*id.* at p. 1). The report also indicated that the student was learning letter-sound associations, segmenting and blending sounds, and reading for meaning (*id.*). In the area of math, the student was learning size relationships, strengthening his visual memory, building/finishing patterns, and developing number sense with the use of manipulatives (*id.* at p. 2). With respect to handwriting, instruction addressed the formation of letters using multisensory instruction (*id.*). The report indicated that the student was an active member of his class and eager to participate in all activities (*id.* at p. 3). The report also indicated that the student benefited from verbal and visual prompts to follow one and two-step directions and from teacher facilitation when interacting and communicating with his peers (*id.*). The report included goals in the areas of reading, math, writing, language arts, social studies, science, art, computer, music, physical education, and library (*id.* at pp. 5-7).

### **Due Process Complaint Notice**

In a due process complaint notice dated January 20, 2011, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year and requested an impartial hearing (Dist. Ex. 1). The parents asserted, without further specificity, that the March 2010 CSE was invalidly constituted and "failed to appropriately consider the evaluative documentation" (*id.*). The parents also asserted that the March 2010 IEP failed to appropriately describe the student's academic performance and needs and did not contain adequate goals and objectives (*id.*). According to the parents, the district first assigned the student to an inappropriate school that was too large, noisy, and stimulating for the student given his sensory needs and distractibility (*id.*). The parents contended that the second assigned school was too large and located too far from the student's residence, that the district never provided the parents a class profile of the assigned class, and that the assigned class contained only three students which would not provide appropriate peer role models, functional grouping, or social interactions for the student (*id.*). The parents stated that the student required a small class in a small school environment (*id.*). As relief, the parents requested tuition reimbursement for the Aaron School, as well as the provision of transportation and related services (*id.*).

On January 26, 2011, the district responded to the parents' due process complaint notice arguing, among other things, that it had offered the student a FAPE, that both of the assigned schools were reasonably calculated to enable the student to obtain meaningful educational benefits, that the March 2010 CSE was properly constituted, and that the student's IEP contained appropriate goals and objectives (Dist. Ex. 2).

## **Impartial Hearing Officer Decision**

An impartial hearing convened on April 5, 2011, and concluded after a second hearing date on April 7, 2011 (Tr. pp. 1, 177).<sup>2</sup> On May 16, 2011, the impartial hearing officer issued a decision in which he determined that the district offered the student a FAPE and denied the parents' request for tuition reimbursement for the Aaron School for the 2010-11 school year (IHO Decision at p. 13). In his decision, the impartial hearing officer noted that at the impartial hearing, the district defended the appropriateness of the first school that it had assigned the student and did not present any evidence regarding the appropriateness of the second assigned school (id. at pp. 9, 11). The impartial hearing officer noted that the parents rejected the first assigned school, and that the district offered a second assigned school, which the parents also rejected (id. at p. 11). The impartial hearing officer stated that the district opted to defend its first assigned school and determined that the district "should not be penalized for offering the parent an additional option with regard to the location of the recommended program" (id.).

The impartial hearing officer further determined that none of the procedural concerns alleged in the parents' due process complaint notice were demonstrated to have impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding provision of a FAPE, or caused a deprivation of educational benefits (IHO Decision at p. 12). He found that the student's mother acknowledged that she had the opportunity to participate in the development of the March 2010 IEP (id. at pp. 9, 12). Substantively, the impartial hearing officer determined that the district's proposed program was based upon a "comprehensive IEP" designed to confer meaningful educational benefits (id. at p. 9). Regarding the parents' contention that the recommended 12:1+1 class at the first assigned school was inappropriate because the student required a second certified teacher in the class, the impartial hearing officer determined that this conclusion was not supported by the hearing record because the recommended program included "a multitude" of related services and the assigned class was smaller than the student's Aaron School class (id. at p. 10). Regarding the parents' contention that the first assigned school was too large, noisy and distracting for the student given his sensory needs, the impartial hearing officer found that the parents' concerns were in part speculative because the parents did not accept the recommendations of the CSE or the program offered by the district (id. at p. 9). Further, the impartial hearing officer found that these contentions were not supported by the preponderance of the evidence (id. at pp. 9-11).

## **Appeal for State-Level Review**

This appeal by the parents ensued. The parents argue that the impartial hearing officer erred in finding that the district offered the student a FAPE for the 2010-11 school year and request that the impartial hearing officer's decision be annulled. The parents argue that: (1) the goals and short-term objectives were not discussed at the March 2010 CSE meeting, thereby denying the parents the opportunity to meaningfully participate in the formulation of the student's IEP; (2) the proposed 12:1+1 placement would not have provided the student with sufficient individualized support to address his needs and was inappropriate because the student required a second certified

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<sup>2</sup> I commend the impartial hearing officer and the parties for adhering to State regulations which provide that each party shall have up to one day to present its case and that additional hearing dates, if required, be scheduled on consecutive days (8 NYCRR 200.5[j][3][xiii]).

teacher in the classroom; (3) the district's program failed to address the student's social/emotional needs; (4) the first assigned school was inappropriate because it was too large and would create too much stimuli and distraction for the student; (5) the assigned class would not have had a special education teacher for two periods of the day; and (6) the impartial hearing officer's stated grounds for his decision were "irrelevant" because he failed to address the appropriateness of the second assigned school, which the parents relied upon as the final placement offer for the 2010-11 school year. The parents also contend that their unilateral placement of the student at the Aaron School was appropriate because it provided the student with a highly structured, individualized full-time special education program where he had demonstrated progress. Lastly, the parents contend that equitable considerations support their request for tuition reimbursement.

In its answer, the district initially contends that tuition reimbursement is barred in this case because the Aaron School is operated as a for-profit business. Next, the district contends that many of the issues raised by the parents on appeal were not raised in their due process complaint notice and are therefore not properly before a State Review Officer. The district further contends that the impartial hearing officer correctly determined that the district offered the student a FAPE because: (1) the parents fully participated in the March 2010 CSE meeting and the CSE discussed the goals and objectives drafted for the student's IEP; (2) the student's March 2010 IEP contained appropriate goals and objectives and offered a program designed to confer educational benefits; (3) the recommended 12:1+1 placement would have provided the student with adequate support and individualized attention; (4) the recommended program was in a special education setting—a shift from the general education preschool setting the student had been in previously—and was in a small, structured classroom as had been recommended by the student's SEIT; (5) the paraprofessional in the assigned class at the first assigned school would have provided sufficient support to the student and he would have received frequent 1:1 instruction; (6) the lack of a special education teacher during the student's lunch and elective classes would not have caused a denial of a FAPE; and (7) the first assigned school was not too large and noisy for the student. The district also contends that the parents' unilateral placement of the student at the Aaron School was not appropriate because it did not provide sufficient opportunities for mainstreaming with typically developing peers, did not provide the student with the necessary related services, and did not provide instruction designed to meet the student's unique educational needs. Lastly, the district contends that equitable considerations do not support the parents' claims because the parents did not intend to send the student to a public school.

### **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]).

## **Discussion**

### **Scope of Review**

Before addressing the merits of this case, I must address a procedural matter. The district contends that the only claim raised on appeal that the parents previously asserted was that the first assigned school was too large. The district requests dismissal of the other claims in the parents' petition, asserting that the parents alleged for the first time on appeal that they were denied meaningful participation because the goals and short-term objectives were not discussed at the March 2010 CSE meeting, that a 12:1+1 placement was inappropriate to meet the student's needs, and that the first assigned school was inappropriate because a special education teacher would not be with the class for two periods of the day.

The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see M.P.G., 2010 WL 3398256, at \*8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at \*6-\*7 [D. Hawaii April 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Here, the parents' due process complaint notice cannot be reasonably read to raise the allegation that the parents were denied meaningful participation because the goals and short-term objectives were not discussed at the March 2010 CSE meeting or that the first assigned school was inappropriate because a special education teacher would not have been with the class for two periods of the day (see Dist. Ex. 1). The hearing record

indicates that the parents did not amend their due process complaint notice and that the district objected generally to the expansion of the impartial hearing to include issues that had not been identified in the parents' due process complaint notice (Tr. pp. 61, 68, 101). Accordingly, I will not address the parents' claims listed above. However, contrary to the district's contention, I find that the other issue regarding the appropriateness of the 12:1+1 placement is properly before me as the due process complaint notice alleged that the IEP did not sufficiently describe the student's needs and I find that this issue was discussed at the impartial hearing without objection and addressed in the impartial hearing officer's decision (Tr. pp. 88-90, 101-03; Dist. Ex. 1; see IHO Decision at pp. 9-10; Parent Ex. K at pp. 2-5).

### **March 2010 IEP and Recommended Placement**

The parents assert that the impartial hearing officer erred in finding that the district offered the student a FAPE for the 2010-11 school year. Specifically, the parents assert that the student's needs would not have been addressed in a 12:1+1 placement. The parents assert that in the assigned class there would have been only one special education teacher present and the student required a second teacher, rather than a paraprofessional, to provide him with verbal prompts and individualized instruction, to keep him focused, and to provide him with enough support to prevent distractions and frustrations that may lead to problem behaviors (Tr. p. 219). The parents further assert that the student had a history of tantrums, would refuse to do his work, and would leave class when he became dysregulated, and that a paraprofessional would not have been able to adequately address those behaviors (Tr. pp. 220-23, 319).

As set forth in detail below, I find that the March 2010 IEP adequately identified the student's needs and the program recommended in the IEP offered the student a FAPE for the 2010-11 school year.

The hearing record indicates that the CSE reviewed an August 2009 preschool student evaluation, an undated parent survey, an August 2009 psychological evaluation, a January 2010 OT progress report, a January 2010 educational progress report, a January 2010 speech-language therapy progress report, a January 2010 district OT school function evaluation, the student's physical examination, an updated social history, and a School Version Rating Form (Tr. pp. 26-33; Dist. Exs. 8-14; 16; 18-20).<sup>3</sup> The district's special education teacher who participated in the March 2010 CSE meeting testified that the parents participated in the meeting and that the CSE members, including the parents, considered information provided by the parents regarding the student's needs, discussed which related services would be appropriate for the student, and determined which classification would be most appropriate for the student given his deficits (Tr. pp. 38, 52-53). The student's mother testified that she had the opportunity to participate at the meeting (Tr. pp. 323, 334-35).

The hearing record reflects that the information provided at the CSE meeting by the participants and the evaluative documents reviewed by the CSE supported its recommendation for a 12:1+1 special class in a community school for the student's 2010-11 school year (Dist. Exs. 8-14; 16; 18-20). The August 2009 preschool student evaluation summary report provided

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<sup>3</sup> The district's special education teacher who participated in the March 2010 CSE meeting was unsure whether the CSE had reviewed the January 2010 psychoeducational assessment (Tr. pp. 29-30; Dist. Ex. 15).

information regarding the student's delays in the areas of cognition, social/emotional functioning, receptive and expressive language, and motor skills (Dist. Ex. 19 at pp. 1-2). In addition, the preschool student summary report indicated that the student's deficits in communication negatively affected his social interaction with peers (id.).

In the January 2010 updated social history and an undated parent survey, the parents provided information regarding the student's functioning in the areas of academic achievement, speech-language abilities, fine motor skills, and social skills (Dist. Exs. 9; 18 at pp. 1-3). The parents reported that the student followed the school routine with assistance, but at times demonstrated difficulty with transitions (Dist. Ex. 18 at p. 1).

The August 2009 district psychological evaluation and the January 2010 educational progress report prepared by the student's preschool SEIT provided detailed information regarding the student's needs in the areas of communication, sensory regulation, cognition, social/emotional functioning, language processing, motor skills, self-help skills, and social skills (Dist. Exs. 14 at pp. 1-6; 20 at pp. 1-8). The school psychologist indicated that the student maintained attention to a task for up to 35 minutes during the psychological evaluation (Dist. Ex. 20 at p. 2). The student's SEIT reported that he was "independent" with respect to self-help skills at school (Dist. Ex. 14 at p. 5). The SEIT also reported that the student followed one-step directions within small and large groups (id. at p. 3). The SEIT indicated that the student understood stories when the stories were read to him independently or in a small group (id.). According to the student's SEIT, he demonstrated age appropriate preacademic skills (id. at p. 2). The SEIT also reported that the student required language cues to engage with peers and that cues were helpful to assist the student maintain attention to a task (id. at p. 3).

The January 2010 OT progress report reflected the student's demonstrated delays in upper body/trunk strength, fine motor coordination/skills, visual-motor skills, sequencing, body awareness/motor planning, safety awareness, sensory processing, self-help skills, initiation, and attention (Dist. Ex. 11 at pp. 1-3). According to the report, the student maintained attention to a task for up to seven minutes during table top activities without a movement break (id. at p. 2). The January 2010 speech-language therapy progress report provided information regarding the student's development in the areas of articulation, receptive language, and expressive language (Dist. Ex. 13 at pp. 1-3). The student's speech-language therapist indicated that the student needed frequent models and visual/verbal cues to learn a new game or activity but once he had internalized the rules and routine phrases, cues and models could be faded (id. at p. 1).

The March 2010 IEP reflected the student's academic and social/emotional needs as indicated in the evaluative reports (Dist. Ex. 6 at pp. 1-17). The student's IEP indicated that the student demonstrated solid preacademic abilities (id. at p. 3). The IEP further indicated that the student exhibited a "limited attention span," and learned best when in a small group with "much redirection and opportunities to move around" (id.). The IEP also indicated that the student required "much individual and direct prompting" when he interacted with peers (id. at p. 4). According to the March 2010 IEP, the student demonstrated delays in fine and gross motor skills including sensory processing deficits that negatively affected his participation in school activities (id. at p. 5).

The March 2010 CSE discussed the student's needs in the areas of attention, distractibility, language, vocabulary, social/emotional functioning, and sensory regulation (Tr. pp. 40-41, 93). Accordingly, the CSE included academic and social/emotional management needs as follows: visual cues; small group instruction; redirection; teacher/peer modeling; picture schedule; positive reinforcement; frequent movement breaks; chunking; graphic organizers/planners; review/reinforcement of new/learned concepts; multisensory approach with a focus on physical movement opportunities; play in small groups with peers; prompts to initiate and engage with peers; and opportunities to express his feelings (Dist. Ex. 6 at pp. 3-4). The March 2010 CSE considered the student's extensive needs requiring OT and speech-language therapy in light of his needs for social opportunities with his peers (Tr. pp. 35-36, 38-39, 52-53, 73). Therefore, the CSE recommended a combination of individual and group sessions as well as the provision of related services within the classroom and in a separate location (Tr. pp. 36-37, 76-77, 95-97; Dist. Ex. 6 at p. 13).

The March 2010 CSE recommended that the student attend a 12:1+1 special class in a community school for the 2010-11 school year (Dist. Ex. 6 at p. 1). The district's special education teacher testified that in her opinion, the 12:1+1 special class and the CSE's recommendations regarding speech-language therapy and OT were appropriate for the student (Tr. pp. 39, 51). The special education teacher testified that no one at the March 2010 CSE meeting disagreed with the IEP's related services recommendation, including the frequency of the related services (Tr. p. 39). According to the special education teacher, the CSE's recommendation for a 12:1+1 special class and related services was based in part on the report of the student's SEIT, which recommended a small, structured class (Tr. pp. 39-40; Dist. Ex. 14 at p. 5). The special education teacher also stated that the student required a small, structured class to assist him in the development of his academic skills (Tr. pp. 39-40). In addition, the special education teacher indicated that the provision of speech-language therapy and OT to the student would allow him to effectively participate in the 12:1+1 special class (*id.*). According to the special education teacher, the CSE considered the student's strengths and weaknesses in the development of the IEP and that the student's annual goals were developed based on academic benchmarks and standards and the student's functioning level (Tr. pp. 40-42, 46-47).

The March 2010 CSE considered alternate programs and services and determined that the higher student-to-teacher ratio within a collaborative team teaching program would not have met the student's needs, and that within a smaller 12:1+1 class, the student would have received more individual attention (Tr. pp. 50-51; Dist. Ex. 6 at p. 12). The CSE also considered a 12:1 special class but rejected it because the CSE believed that the addition of a classroom paraprofessional would be valuable in helping refocus the student's attention and ensure that he was on task (Dist. Ex. 6 at p. 12; *see* Tr. p. 51). The CSE also believed that a special class in a special school was too restrictive for the student regarding access to the general education curriculum and peer models (Tr. pp. 51-52; Dist. Ex. 6 at p. 12).

The special education teacher of the assigned class testified that she could have provided the student with the special education program and services in accordance with his March 2010 IEP (Tr. pp. 123-26, 128, 132-33, 135). The special education teacher further testified that the students within her 12:1+1 special class received individual and small group differentiated instruction as well as opportunities to interact with nondisabled peers (Tr. pp. 121-22, 130, 136). The special education teacher reviewed the student's March 2010 IEP, testified that the student's

annual goals were measurable and described how she tracks and monitors student progress (Tr. p. 130). The special education teacher also testified that she consults with the related service providers on a regular basis to address student goals and to reinforce skills (Tr. p. 132).

Based on the foregoing, I find that the evaluative documents reviewed by the CSE showed that the recommendation of a 12:1+1 special class was appropriate for the student because of his significant needs in the area of communication, language processing, self-regulation, attention, social/emotional functioning as well as fine and gross motor functioning. In addition, the hearing record shows that within a 12:1+1 special class, a classroom paraprofessional could have provided cues, models, and behavioral support to the student to assist him in engaging with peers and maintaining attention to tasks. Based upon careful review of the evidence contained in the hearing record, I conclude that the March 2010 IEP was reasonably calculated to enable the student to receive educational benefits and that the student was offered a FAPE for the 2010-11 school year.

### **Assigned School**

The parents further assert that the impartial hearing officer erred in finding that their claims regarding the first assigned school were speculative and not supported by a preponderance of evidence. The parents assert that the assigned school would have been too stimulating, noisy, and distracting for the student based on the number of students in the building; the size of the school building; and the size of the gym, auditorium and lunch room. I concur with the impartial hearing officer that this issue is in part speculative insofar as the parents did not accept the recommendations of the CSE or the programs offered by the district and, furthermore, I note that the hearing record in its entirety does not support the conclusion that had the student attended the first 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]).<sup>4</sup> Additionally, the parents concerns are not adequately supported by the evidence in the hearing record.

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 placement of

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<sup>4</sup> Insofar as the parents also raised concerns in their due process complaint notice regarding the second assigned school, and contend on appeal that the impartial hearing officer erred in addressing only the appropriateness of first assigned school in his decision, I note that the parents rejected both the district's assigned schools and that the parents' specific concerns regarding the second assigned school raised in their due process complaint notice are also speculative (Dist. Ex. 1; see IHO Decision at pp. 9-11; Parent Exs. A at p. 2; B at p. 2; J at p. 1; see also Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-010; Application of the Dep't of Educ., Appeal No. 11-016; Application of the Dep't of Educ., Appeal No. 11-025; Application of a Student with a Disability, Appeal No. 11-032; Application of the Dep't of Educ., Appeal No. 11-040; Application of a Student with a Disability, Appeal No. 11-042; Application of the Dep't of Educ., Appeal No. 11-050).

the student in a 12:1+1 special class at the first assigned school would not have deprived him of a FAPE.

The assigned school consists of approximately 570 students in grades prekindergarten through fifth grade (Tr. p. 142). The assigned school shares a building with a school for gifted and talented students, but the two schools have separate entrances and the students remain in their own classrooms (Tr. pp. 118-19, 142-43). The gym, cafeteria, and auditorium are shared areas but the students from the two schools do not utilize these areas at the same time (Tr. pp. 118-20). The students at the assigned school attend lunch in the cafeteria with approximately 100 other students and several supervising classroom paraprofessionals (Tr. pp. 144, 162-63). If a student becomes dysregulated during lunch in the cafeteria, the student can have lunch separately with the special education teacher or an administrator (Tr. p. 163). When the students attend related services sessions, lunch, and classes outside of the 12:1+1 classroom, they are escorted by an adult such as a teacher, paraprofessional, or related service provider (Tr. p. 158). In view of the foregoing, I find the parents' concerns regarding the size of the building are not supported by the evidence contained in the hearing record.

## **Conclusion**

Based on the foregoing, I find that the CSE's recommendation of a 12:1+1 special class in a community school with related services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The hearing record demonstrates that the March 2010 IEP identified the student's multiple needs, developed annual goals and short-term objectives to address those needs, and recommended a program in the LRE (see 20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]). Furthermore, I note that the hearing record, in its entirety, does not support the conclusion that had the student attended a 12:1+1 special class at a district 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., 2010 WL 1049297; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn, 502 F.3d 811; Houston Independent School District, 200 F.3d at 349; see also Catalan, 478 F. Supp. 2d 73 [D.D.C. 2007]).

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 supported the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

**THE APPEAL IS DISMISSED.**

**Dated:**            **Albany, New York**  
                      **August 15, 2011**

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**STEPHANIE DEYOE**  
**STATE REVIEW OFFICER**