The University of the State of New York

The State Education Department
State Review Officer
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No. 11-080

**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, Tracy Siligmueller, Esq., of counsel

Law Offices of Regina Skyer and Associates, attorneys for respondents, Lara Damashek, Esq., of counsel

## DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Aaron School for the 2010-11 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending the Aaron School (Tr. pp. 300-03, 407, 432, 490-94; Dist. Ex. 1; Parent Exs. G; H; I),[1] which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The hearing record describes the student as "enthusiastic," "kind," "curious," "caring," "sensitive to his surroundings," and displaying no aggressive behaviors (Tr. pp. 67, 304, 313, 347; Dist. Ex. 5 at p. 3). However, the student also exhibits deficits related to attention, self-regulation/arousal, receptive and expressive language, social pragmatic language, articulation, language processing and comprehension, visual-perceptual motor skills, postural control, and age-appropriate "life skills" (Tr. pp. 44, 47, 304-07,

[1] The hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and Parent exhibits were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

475, 529; Dist. Exs. 5 at pp. 3-5; 14-17). The hearing record also reveals that the student experiences some weakness on the left side of his body (Tr. pp. 464, 528-29; Dist. Ex. 5 at p. 5). Academically, the hearing record reflects that at the time of his annual review meeting for the 2010-11 school year, the student was performing at a mid-first grade level in both reading and math (Tr. pp. 40, 46; Dist. Ex. 5 at p. 3). Additionally, the student's history noted a peanut allergy, requiring the use of an EpiPen as needed (Tr. pp. 473, 503; Dist. Ex. 5 at pp. 1, 5; Parent Ex. E at p. 4). The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11).

**Background**

The hearing record reflects that the student exhibited developmental delays at the age of seven months, at which time he began receiving early intervention (EI) services consisting of occupational therapy (OT), physical therapy (PT), speech-language therapy, and the services of a "special educator" (Tr. pp. 465-66). For the 2009-10 school year (first grade), the Committee on Special Education (CSE) recommended a 12:1+1 special class, which was ultimately rejected by the parents who instead enrolled their son at the Aaron School for first grade (Tr. pp. 471-73; Dist. Exs. 11; 12).

The hearing record reflects that during the 2009-10 school year, the student was enrolled at the Aaron School in a 10:1+1 special class, and was receiving OT and speech-language therapy, both twice per week (Dist. Exs. 11 at pp. 1, 7; 12 at p. 1). On January 12, 2010, a district social worker conducted a 45-minute classroom observation of the student during his social studies class at the Aaron School (Tr. pp. 28-29, 82-84; Dist. Ex. 10). On February 1, 2010, the parents executed a reenrollment contract with the Aaron School, advancing a nonrefundable deposit and reserving the student's place in the school for the 2010-11 school year (Tr. pp. 485-86; Parent Ex. F).

On April 28, 2010, the CSE convened for the student's annual review to develop his individualized education program (IEP) for the 2010-11 school year (Dist. Exs. 4; 5). On June 24, 2010, the district summarized the recommendations made by the April 2010 CSE and notified the parents of the school to which the district assigned the student (Dist. Ex. 2). By letter to the district dated July 23, 2010, the parent indicated that she had toured the assigned school on July 19, 2010 and found it to be inappropriate for her son based upon concerns that the building was shared by two different schools and the student could potentially become "lost and wander;" the school did not have a teacher for the assigned class yet; all of the other students in the class required paraprofessionals and her son did not have one and would become dependent upon a paraprofessional if he was assigned one; and the assigned school's lunch room was not a peanut-free environment (Parent Ex. E at pp. 3-4). Consequently, the parent advised the district that she was rejecting the district's offer (id. at p. 3).

On August 24, 2010, the parents reiterated their rejection of the public school program and informed the district of their intention to reenroll the student at the Aaron School for the 2010-11 school year and seek reimbursement at public expense (Dist. Ex. 1 at p. 1). The parents also rejected the April 2010 IEP, alleging failure on the part of the CSE to reference objective testing in the IEP and failure to include an additional parent member as part of the CSE (id. at pp. 1-2).

The parents further stated that a "detailed hearing request" would follow under separate cover (id. at p. 2).

The student was subsequently reenrolled at the Aaron School for the 2010-11 school year, during which he was placed in a 12:1+1 special class and received related services consisting of OT twice per week for 30 minutes per session, once in a 1:1 setting and once with a peer; and speech-language therapy twice per week for 30 minutes per session, once in a 1:1 setting and once with a peer (Tr. pp. 317, 348; Parent Exs. G at pp. 1, 5-6; H at p. 1; I at p. 1).

**Due Process Complaint Notice**

By due process complaint notice dated November 4, 2010, the parents alleged that: (1) the April 2010 CSE was improperly composed, in that it lacked an additional parent member; (2) the April 2010 CSE did not rely on evaluations to properly identify the student's present skill levels, relying instead solely on teacher estimates to discern the student's functional levels in reading, writing, and math; (3) the annual goals and short-term objectives contained in the April 2010 IEP were deficient; (4) the 12:1+1 special class program recommended by the April 2010 CSE was inappropriate for the student; (5) the Aaron school was an appropriate placement for the student for the 2010-11 school year; and (6) there were no equitable considerations barring reimbursement to the parents (Parent Ex. B at pp. 2-4).

**Impartial Hearing Officer Decision**

On February 8, 2011, the parties proceeded to an impartial hearing, which concluded on April 7, 2011, after four days of proceedings.[2] On June 1, 2011, the impartial hearing officer issued a decision, finding that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year, that the parents met their burden of proving that the Aaron School was an appropriate placement for the student for the 2010-11 school year, and that equitable considerations supported the parents' reimbursement claim (IHO Decision at pp. 35-40). Specifically, the impartial hearing officer concluded that the hearing record established that the student was "prone to imitating" observed behaviors, and as such, the disruptive behaviors of the other students in the assigned class would have negatively impacted the student's social/emotional functioning and exacerbated his distractibility issues, ultimately interfering with his ability to learn and function appropriately in the classroom and negatively impacting all aspects of the student's education (id. at pp. 35-36). Next, the impartial hearing officer found that the Aaron School was an appropriate placement for the student for the 2010-11 school year because the hearing record indicated that the student's educational needs were met at the school and that he made progress in his language skills, behavior, and "physical condition" during the course of the school year (id. at pp. 36-38). Lastly, the impartial hearing officer found that equitable considerations supported the parents' reimbursement claim because the parents visited the assigned

[2] I note that the impartial hearing officer did not address the particular claims raised by the parents in their due process complaint notice regarding the content of the student's IEP, which is the central planning document for the proposed program in dispute. I remind the impartial hearing officer that State regulations set forth provisions for conducting a prehearing conference to simplify or clarify the issues that will be addressed in an impartial hearing (8 NYCRR 200.5[j][3][xi][a]) in order to determine which issues need to be addressed in the impartial hearing officer's decision.

school before rejecting it, properly notified the district of their rejection of the assigned school, and the parent testified that he would have accepted a public school placement had an appropriate one been offered (id. at pp. 38-40). Based on the above, the impartial hearing officer awarded tuition reimbursement to the parents for the student's 2010-11 school year at the Aaron School (id. at pp. 40, 44-46).

**Appeal for State-Level Review**

The district appeals from the impartial hearing officer's decision, arguing, among other things, that the parents' reimbursement claim should be denied because the April 2010 CSE was properly constituted, it offered the student a FAPE during the 2010-11 school year, the parents' unilateral placement of the student at Aaron was not appropriate for the 2010-11 school year, and equitable considerations precluded an award of reimbursement. Additionally, the district contends that the parents' claims must fail because of the Aaron School's status as a for-profit institution.

The parents answer, countering, among other things, that the lack of an additional parent member on the April 2010 CSE impeded their ability to meaningfully participate in the review process, that the district failed to offer the student a FAPE during the 2010-11 school year, that the Aaron School was an appropriate placement for the student during the 2010-11 school year, and that equitable considerations supported a reimbursement award. With regard to the Aaron School, the parents further contend that the district failed to raise its for-profit argument below, or alternatively, that the argument is without merit.

**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 105 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**

As noted above, the impartial hearing officer did not address many of the parents' claims raised in their due process complaint notice. Additionally, the district is not aggrieved by the impartial hearing officer's decision not to reach the claims related to CSE procedures and the April 2010 IEP. A review of the parents' answer indicates that they did not cross-appeal from the impartial hearing officer's decision. Raising additional issues in a respondent's answer without cross-appeal is not authorized by State Regulations and, in effect, deprives the petitioner of the opportunity to file responsive papers on the merits because State Regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6; Application of the Bd. of Educ., Appeal No. 11-050). In essence, a party who fails to obtain a favorable ruling with respect to an issue submitted to an impartial hearing officer is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal.[3] Consequently, I will not disturb the unappealed aspects of the impartial hearing officer's decision not to address the parents' claims, although I have briefly discussed the elements of the student's IEP since so much of the hearing record is devoted to its development.

**Assigned School**

I will now turn to review of the evidence in this case regarding the district's proposed program and the impartial hearing officer's conclusion that the proposed program was deficient and that the student was denied a FAPE because the particular disability classifications and behaviors of other students in the classroom to which the district assigned the student would have interfered with the student's ability to learn and negatively impacted his education (IHO Decision at pp. 35-36). The impartial hearing officer determined that "half of the students were classified as having an emotional disturbance and described as having behavioral issues severe enough to require individual crisis paraprofessionals" (id. at p. 35; see Parent Ex. J). The impartial hearing officer did not reach a conclusion that the content of the student's April 2010 IEP was inappropriate and, as noted previously, the parents have not appealed this determination. The parent did not accept the recommendations of the CSE or the programs offered by the district and the student therefore did not attend the public school classroom and the district was not required to implement the student's IEP. The IDEA and State regulations provide parents with the opportunity to offer

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

input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]). Furthermore, I note that the hearing record in its entirety does not support the conclusion that had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent Sch. Dist. 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]).

Even assuming for the sake of argument that the student had attended the public school program, the evidence hearing record—to the extent relevant to such a claim— does not support the impartial hearing officer's determination that assigning the student to the identified classroom would have denied the student a FAPE due to a failure to implement the April 2010 IEP. The hearing record reflects that the assigned school consisted of 14 classrooms, 3 of which were special education classes, and included among its staff speech-language pathologists, occupational therapists, physical therapists, and other related services personnel (Tr. pp. 133-34, 160, 172). The parent coordinator explained that the assigned school shared a building with a larger school, occupying the entire back half of the building, but advised that each school had its own floor, that their classrooms were "completely divided," and that the schools interacted only during student arrival and dismissal (Tr. pp. 133, 172). She commented that although the lunchroom, auditorium, dance room, science lab, and library were shared areas, the students from each school did not utilize these areas contemporaneously, and that students at the assigned school attended lunch in the cafeteria with approximately 100 other students and several supervising paraprofessionals, school aides, and parent volunteers (Tr. pp. 121, 133, 183-84). She further advised that students attending related services sessions, lunch, and classes outside of the 12:1+1 classroom were typically escorted by one or more adult teacher, paraprofessional, or related service provider (Tr. pp. 151-52, 177, 223).

The parent coordinator further testified that school staff were notified of students who had allergies and required an EpiPen, and that students with allergies wore color-coded badges to alert lunchroom and other school staff; teachers of these students were also provided an informational visual presentation by the school nurse and trained how to administer an EpiPen and how to recognize symptoms (Tr. pp. 147, 149). She added that parents of students with food allergies received advance copies of the school's lunch menu (Tr. p. 148). Students with allergies who were unwilling or unable to eat in the lunchroom were permitted to eat in other school areas, including a conference area near the principal's office, the parent coordinator's office, or in the main office of the school (Tr. pp. 148-49, 192-93). Additionally, the assigned school cooperated with a community-based hospital health unit located across the street from the school to provide medical

assistance in the event the school nurse was unavailable to assist a student with a medical condition (Tr. p. 146).

With regard to the particular classroom discussed in the hearing record, the special education teacher of the assigned class reported that that the class was comprised of ten special education students, including three classified as students with a speech or language impairment, one classified as other health-impaired, five classified as students having an emotional disturbance, and one classified as learning disabled, all of whom received related services; the class also had one classroom paraprofessional and four 1:1 crisis paraprofessionals (Tr. pp. 198-99, 244-45; Parent Ex. J).[4] The students in the assigned class ranged in age from seven to eight years old, their reading and writing levels ranged from kindergarten to second grade, and their math levels from kindergarten to third grade (Tr. pp. 201, 203, 222, 252-53, 274-75).[5]

The special education teacher of the assigned class advised that she taught the class through mini lessons at the front of the classroom, in small groups of two to five students based upon skill level, and through conferencing with each student during independent work time, and that all of the crisis paraprofessionals assisted all students, regardless of whom they were assigned to, if their 1:1 assigned student did not require support at the time (Tr. pp. 206-08). Reading, writing, and math instruction occurred daily for 50 minutes per subject area (Tr. pp. 208-09). She added that she collaborated and worked "closely" with the students' related service providers (Tr. pp. 210-11, 239).

With regard to behavior management in the classroom, the special education teacher of the assigned class noted that she and the paraprofessionals employed a variety of strategies, including removal of disruptive students from the classroom, calling the guidance counselor or security for assistance, and relocating other students to the back of the classroom to continue working while paraprofessionals addressed an incident, and she opined that behavioral incidents in the class would not have interfered with the student's ability to learn (Tr. pp. 216, 269-71, 279-80). She further explained that she used a "check system" to moderate classroom behavior in which rewards were distributed to students "when we feel like [they] are doing a good job and they're following directions and everything;" a "red light green light system" in which parents would receive a telephone call at home after a student "did something that was inappropriate;" and daily "behavior sheets," which rated each student's behavior for the day, were sent home with each student at the end of each day, required parental signature, and were required to be returned to the teacher the next school day (Tr. pp. 221-22). She also testified that based on her review of the student's April 2010 IEP, his present levels of performance, annual goals, classroom management needs, and

[4] The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194); however, it is permissible to demonstrate age ranges or similarity of abilities and needs through the use of a class profile or by the testimony of a witness who is familiar with the children in the classroom in question (see Application of the Bd. of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068). The profile for the assigned class contained in the hearing record in this case indicated that there were 11 students in the class as of November 12, 2010; however, during the impartial hearing, the special education teacher clarified that one of the students was moved to a different school prior to the convening of the impartial hearing (Tr. pp. 243-44; Parent Ex. J).

[5] The hearing record reflects that the student functioning at the third grade level for math attended a mainstream math class (Tr. p. 203).

recommended strategies were similar to those of the other students in the assigned 12:1+1 class; she further explained her procedure for tracking student progress toward annual goals, and opined that the academic support and multisensory teaching method provided inside the classroom, together with the extra academic support offered by the assigned school in conjunction with the student's related services, would have enabled him to progress toward his annual goals (Tr. pp. 225-32, 235-37, 240-41, 253-54, 258-59, 277-78).

In view of the foregoing evidence, I disagree with the impartial hearing officer's reliance upon the number of students classified as having an emotional disturbance or the fact that other students in the classroom required different levels of paraprofessional support as a basis for concluding that the district was incapable of implementing the student's IEP to the degree that the student would not have received educational benefits. Accordingly the district's appeal must be sustained. Even assuming, for the sake of argument that the parents had properly cross-appealed the impartial hearing officer's decision and argued that the April 2010 IEP failed to adequately address the student's needs, as further described below, such claims would also fail.

**April 2010 IEP and Recommended Program and Placement**

Although unaddressed by the impartial hearing officer, unappealed by the parent, and unnecessary to reach a decision in this case, I have nevertheless briefly discussed in the alternative whether the student's April 2010 IEP appropriately addressed the student's needs and recommended an appropriate placement.

The April 2010 CSE continued the student's classification as a student with a speech or language impairment, and recommended a 10-month special education program consisting of a 12:1+1 special class in a community school; pull-out related services consisting of OT twice per week for 30 minutes per session in a 1:1 setting, PT twice per week for 30 minutes per session in a 1:1 setting, and speech-language therapy twice per week for 30 minutes per session in a 1:1 setting and twice per week for 30 minutes per session with a peer; program modifications consisting of a multisensory approach, explicit directions and repetition of information, teacher modeling/prompts, redirection/verbal and visual prompts, positive reinforcement, visual agendas/checklists, adaptive seating, reminders/sensory breaks, and whole body listening cues (Dist. Ex. 5 at pp. 1, 3-4, 14, 16; see Dist. Ex. 4). The April 2010 IEP also included annual goals in reading, math, OT, PT, and speech-language (Dist. Ex. 5 at pp. 6-13).

**Evaluative Data and Present Levels of Performance**

Regarding the development of the written statement of present levels of performance in the April 2010 IEP, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student must be sufficiently comprehensive to identify all of the

student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 11-066; Application of the Dep't of Educ., Appeal No. 07-018). Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2]).

The hearing record reflects that in making the program and services recommendations for the student's annual review, the April 2010 CSE considered updated information, including the student's OT plan from October 2009, fall report from November 2009, and mid-year report from February 2010, all from the Aaron School, and the district social worker's January 12, 2010 classroom observation report (Tr. pp. 26, 29-31; Dist. Exs. 10-13).[6]

The October 2009 OT plan confirmed that the student received OT twice per week for 30 minutes per session, once in a 1:1 setting and once with a peer, and enumerated multiple goals and short-term objectives addressing his fine motor and graphomotor skills, his use of sensory information, his physical endurance, muscle stamina, and functional control in his arms, shoulders, and hands, his motor planning, and his independent self-care skills (Dist. Ex. 13). The November 2009 fall report from the Aaron School noted that the student's classroom was equipped with a classroom-wide FM amplification system designed to "enhance auditory processing and attention" of the students; described the content of the student's curriculum in reading, math, handwriting/writing, language arts, social studies, science, art, computer, music, physical education, and library; and enumerated reading, math, and global curriculum goals for 2009-10 at the first grade level, documenting the student's progress relative to each throughout the fall marking period (Dist. Ex. 12).

The February 2010 mid-year report from the Aaron School advised that the student was enrolled in a 10:1+1 class and receiving OT and speech-language therapy, each two times per week for 30-minutes per session, once in a 1:1 setting and once with a peer (Dist. Ex. 11 at pp. 1, 7). The mid-year report noted that due to his struggles with attention, self-regulation, receptive and expressive language, and articulation, the student required a variety of individualized supports and strategies to ensure continued academic and social/emotional progress (id. at p. 1). Overall, the report observed that the student enjoyed interacting with classmates but had difficulty initiating and maintaining conversations with them (id. at p. 7). To address this, his teacher modeled phrases

[6] During the impartial hearing, the district's social worker testified that the April 2010 CSE also possessed the student's Aaron School speech-language therapy plan, which was purportedly included in his 2009-10 fall report received by the district from the parents prior to the annual review meeting (Tr. p. 30). However, the fall report contained in the hearing record does not contain the speech-language therapy plan (see Dist. Ex. 12).

and strategies for him and facilitated his conversations with classmates by helping him maintain eye contact through prompts and cues; with teacher support, the student was described as being able to express proper follow-up questions and responses (id.). The student's teacher also modeled words to assist him with his articulation difficulties, provided verbal prompts to encourage him to speak slowly and maintain a still body when conversing, and provided him with word choices to expand his conversational vocabulary (id.). The Aaron School mid-year report also described the student as being distracted by internal and external stimuli, which hindered his ability to attend, grasp information, and follow directions (id.). His teacher employed repetition of information, redirection of behavior, "whole body listening" cues, positive reinforcement, "sensory tools," and "sensory breaks" to address the student's needs with regard to focusing (id.).

According to the January 12, 2010 classroom observation report, the district's social worker observed the student for 45 minutes during his social studies class at the Aaron School (Dist. Ex. 10 at p. 1). She commented that the student participated in the class lesson, but tended to leave the instructional area within the classroom and engage in distracted behaviors when the teacher attended to another student (id.). She further reported that the student needed reminders to sit in his chair and return to the class, as well as redirection to correctly follow instructions (id.). In summary, the classroom observation report indicated that during the observation, the student required frequent teacher redirection and support to return him back to the topic or activity (id. at p. 2).

In the instant appeal, there was no reevaluation of the student using formal testing in preparation for the April 2010 annual review meeting and the parents did not request that the district conduct any evaluations of their son (Tr. pp. 78-79, 476, 509; see Dist. Ex. 5 at pp. 3-5).[7] The district's social worker testified that she agreed with the CSE's decision not to conduct any formal district evaluations of the student prior to the April 2010 CSE meeting (Tr. pp. 78-79). She also testified that prior to the April 2010 meeting, the CSE reviewed the January 12, 2010 classroom observation report, as well as the student's 2009-10 school year fall and mid-year reports and October 2009 OT plan from the Aaron School (Tr. pp. 26, 29-31; see Dist. Exs. 10-13).[8] As detailed above, these reports described the student's progress academically, socially, and behaviorally; identified the strategies and supports recommended to enable the student to be successful in the classroom; and reflected the student's current academic and OT goals and his progress toward them (Tr. pp. 28-30; Dist. Exs. 10-13).[9]

[7] The hearing record contains a PT progress report dated January 28, 2009 (Dist. Ex. 18), a teacher assessment report dated April 30, 2009 (Dist. Ex. 17), a classroom observation report dated June 16, 2009 (Dist. Ex. 16), and a speech-language progress report dated June 18, 2009 (Dist. Ex. 15). There is no indication in the hearing record that the April 2010 CSE considered these reports in developing the student's educational program for the 2010-11 school year.

[8] The social worker also advised that during the annual review meeting, the CSE inquired if the student's related service "providers [at the Aaron School] were on the phone. They [didn't] become available" (Tr. p. 48).

[9] Because the hearing record does not contain the speech-language plan, which was purportedly included in his 2009-10 fall report from the Aaron School, it is unclear whether the April 2010 CSE had access to the student's speech-language goals for the 2009-10 school year.

In view of the evidence in the hearing record, the April 2010 CSE adequately developed a description of the student's present levels of academic and social/emotional performance, health and physical development, as well as his strengths, deficits, needs, and related services (Tr. pp. 39-45; Dist. Ex. 5 at pp. 3-5). Although the parents alleged in their due process complaint notice that the CSE improperly considered the student's instructional levels as described by his teacher at the Aaron School,[10] neither the IDEA nor State regulations preclude a district from relying upon instructional levels as described by a student's teacher while formulating the present levels of performance from a variety of sources. The district's social worker testified that during the CSE meeting, the district's special education teacher and the student's teacher from the Aaron School discussed the teacher's estimates of the student's academic performance and his academic management needs in order to determine if any modifications to the IEP were appropriate (Tr. pp. 40-41). The hearing record reflects active participation by the student's special education teacher from the Aaron School during the CSE meeting and shows that she was afforded opportunities to describe the student's weaknesses, deficits, and strengths, and to meaningfully contribute to the discussion of the student's academic functioning, abilities, and progress toward his educational goals (Tr. pp. 39-47, 56; Dist. Ex. 5 at p. 2). Moreover, the student's father agreed with the description of his son's present levels of performance contained in the IEP (Tr. pp. 509-12). In consideration of the foregoing, I find that the evidence does not support a claim that the April 2010 IEP was inappropriate due to an inadequate statement of the student's present levels of performance.

**Annual Goals**

With respect to the student's annual goals, an IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

The hearing record reflects that the April 2010 CSE reviewed the student's academic goals from Aaron School contained in the February 2010 mid-year report, updated them, and incorporated them into the IEP (compare Dist. Ex. 5 at pp. 6-7, with Dist. Ex. 11 at pp. 8-9; see Tr. pp. 52-53; Dist. Ex. 4). Review of the April 2010 IEP demonstrates that the annual goals were specific and measurable, and reflective of the student's then-current educational needs as identified in the evaluative data available to the CSE at the time of the annual review meeting with input from the student's special education teacher from the Aaron School (Tr. pp. 52-53, 58-61; Dist. Exs. 5 at pp. 6-12; 10-13). The district's social worker testified that the April 2010 IEP lacked an academic goal specifically addressing the student's distractibility, but explained how the IEP addressed this deficit through academic and social/emotional management strategies, including

[10] The parents did not assert that the student's teacher at the Aaron School inaccurately described the student's instructional levels.

recommendations for a multisensory teaching approach, explicit directions/repetition of information, verbal and visual prompts and cues, positive reinforcement, visual agendas/checklists, adaptive seating, reminders, sensory breaks, sensory tools, teacher modeling/prompts, and whole body listening cues; as well as by the OT recommended by the CSE which addressed among other things, the student's ability to use sensory information to change or sustain optimum levels of arousal and sustain attention up to ten minutes (Tr. pp. 61-62, 68-69, 92; Dist. Ex. 5 at pp. 3-5, 8).

Moreover, I find the parents' argument that the April 2010 IEP failed to set forth the procedures to be used in measuring the student's progress toward meeting each annual goal to be unpersuasive (Parent Ex. B at pp. 2-3). The special education teacher of the assigned class explained that she would track the student's progress toward his annual goals through teacher observations in class, work samples, homework, and by "giving tests at the end of the unit that I make up myself" (Tr. pp. 235-36). She also advised that she kept records detailing student progress toward annual goals in the form of "narratives," which were used in lieu of a report card, and a data binder, which included students' writing samples, results on math tests, and their "running records," which she defined as their results on tests for reading level advancement (Tr. pp. 236-37). Furthermore, the April 2010 IEP indicated that progress reports would be written three times per year (Dist. Ex. 5 at pp. 6-13). Under these circumstances, I conclude that the hearing record establishes that the proposed placement had evaluative mechanisms in place to assess the student, to measure the student's progress made on his goals, and to alter those goals and objectives if reevaluation indicated such a course were warranted.

In consideration of the foregoing, I find the evidence contained in the hearing record adequate to support a conclusion that the annual goals contained in the April 2010 IEP were consistent with the student's identified educational needs as described in the October 2009 OT plan, November 2009 fall report, and February 2010 mid-year report from the Aaron School, and the district social worker's January 12, 2010 classroom observation report (Dist. Exs. 10-13), and that the IEP goals were sufficiently linked to the student's educational needs as described in the present levels of academic performance contained in the IEP (Dist. Ex. 5 at pp. 3-5).

**12:1+1 Special Class Placement**

Next I turn to the parties' dispute regarding the appropriateness of the recommended 12:1+1 placement. According to the hearing record, the April 2010 CSE considered alternative programs and services and ultimately determined that the higher student-to-teacher ratio found within a CTT class and a 12:1 special class would not have addressed the student's educational needs (Tr. p. 57; Dist. Ex. 5 at p. 15). The district's social worker testified that she was aware that the student had a negative experience in a previous CTT class,[11] and she opined that a special class placement in a specialized school would have been too restrictive for the student given his "average academic potential" and level of functioning (Tr. pp. 75-77, 80). Furthermore, the social worker explained that the CSE concluded that a 12:1+1 class would appropriately address the student's academic and attention needs because it offered the addition of a classroom paraprofessional who could

[11] Other points in the hearing record further clarify that for the 2008-09 school year, the student was placed by the district's CSE in a CTT class of 25 students (see Tr. pp. 468-70, 531-32; Dist. Exs. 16-17).

provide the student with redirection and extra support in addressing his distractibility (Tr. pp. 66, 85). The hearing record also establishes that the parents did not request a more restrictive program than a 12:1+1 special class placement with related services offered by the district during the April 2010 CSE meeting, and that the student had not attended a district 12:1+1 class previously (Tr. pp. 95, 514-15, 520).

The hearing record also reflects that placement in a 12:1+1 special class was designed to present opportunities for the student to interact with nondisabled students. Both the parent coordinator and the special education teacher from the assigned school testified that students have daily opportunities to mainstream with typically developing peers during breakfast, lunch, auditorium assemblies, outdoor play, celebrations, gym class, and the "extended day" program in the mornings, during which teachers provided more concentrated help to students in particular subjects (Tr. pp. 152, 184-85, 214-15, 268-69).

Based on the foregoing, I find that the hearing record supports a finding that, given his significant needs in the areas of communication, language processing, self-regulation, attention, social/emotional functioning, and fine and gross motor functioning, the April 2010 CSE's recommendation of a 12:1+1 special class in a community school with related services was appropriate for the student and was reasonably calculated to enable the student to receive educational benefits in the LRE.

**Conclusion**

In summary, I find that the district's appeal of the impartial hearing officer's determination that the district failed to offer the student a FAPE must be sustained. Additionally, the hearing record contains evidence showing that April 2010 CSE's recommendation of a 12:1+1 special class 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 April 2010 IEP identified the student's multiple areas of need, 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]).

Having reached this determination, it is not necessary to address the appropriateness of the student's unilateral placement at the Aaron School, and I need not consider whether equitable considerations support the parents' reimbursement request; thus, the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-094; Application of a Student with 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 address them in light of my determinations.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the portion of the impartial hearing officer's decision dated June 1, 2011 which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to provide tuition reimbursement for the student's attendance at the Aaron School is hereby annulled.

**Dated:** **Albany, New York**
**August 31, 2011**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**