



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-113

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Vida Alvy, Esq., of counsel

Law Offices of Regina Skyer and Associates, LLP., attorneys for respondents, Jaime Chlupsa, 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. 197-98, 308; Parent Ex. C at p. 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 student demonstrates average cognitive and academic skills, but exhibits difficulties with receptive, expressive, and pragmatic language; articulation; sensory processing; and fine motor skills (Dist. Exs. 7-9; 11; 13 at pp. 1-2; 17 at pp. 1-5; 20 at pp. 1-4). 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 received Early Intervention (EI) services at two years of age after his parents expressed concern regarding his language delays, and that he received special education instruction and services including speech-language therapy, applied behavior

analysis (ABA),¹ occupational therapy (OT), and sensory gym (Tr. pp. 287-88; Dist. Exs. 10 at p. 1; 20 at p. 1). In 2008, the student was determined eligible for special education and related services as a preschool student with a disability by the Committee on Preschool Special Education (CPSE), which placed him in a 12:1+2 special class with speech-language therapy, OT, and physical therapy (PT) inside and outside of school, and special education itinerant teacher (SEIT) services (Tr. p. 288; Dist. Ex. 10 at p. 1).

On February 28, 2008, at the age of 2.8 years, the student received a psychological evaluation determine his cognitive abilities (Dist. Ex. 20). Behaviorally, the evaluating psychologist described the student as "agreeable, cooperative, and motivated to complete tasks," noting that although the student displayed limited attention he was easily redirected to a task (id. at p. 1). She observed that the student was unable to answer many questions without visual support, and that he followed directions when provided with much repetition and cueing; leading her to conclude that some of the student's difficulties appeared to be related to "sequential processing and execution of both verbal and motor material" (id.).

Administration of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) yielded a verbal IQ of 93 (32nd percentile), a performance IQ of 90 (25th percentile), a full scale IQ of 91 (27th percentile), and a general language composite of 100 (50th percentile) (Dist. Ex. 20 at pp. 2-3). Overall, the student's skills related to understanding verbal information and verbal reasoning by selecting a correct response from pictures were assessed to fall within the average range, as were his skills related to nonverbal problems, working in a quick and efficient manner with visual information, and his listening and speaking skills (id. at p. 3).

Administration of the Vineland Adaptive Behavior Scales-Second Edition (VABS), with the student's mother acting as informant, yielded standard scores of 84 (14th percentile) in communication skills, 89 (23rd percentile) in daily living skills, 84 (14th percentile) in socialization skills, 74 (4th percentile) in motor skills, and an adaptive behavior composite score of 79 (8th percentile) (Dist. Ex. 20 at pp. 3-4). The evaluating psychologist indicated that the student's difficulties with sensory processing and motor skills negatively affected his abilities related to feeding, dressing, and hygiene; that his limited attention negatively affected his play skills, including his development of "scaffolded play;" and that his "underdeveloped" fine and gross motor skills and difficulties with attention appeared to negatively affect his daily functions (id. at p. 4). With respect to the student's social/emotional functioning, the evaluating psychologist noted that he enjoyed physical play as a way to relate to peers, but that his play skills were limited to parallel play and could deteriorate into hitting/pinching, and that his difficulties with language detracted from his ability to communicate with peers and adults (id.).

Also on February 28, 2008, in order to ascertain the student's level of communicative functioning, the student received a private speech-language evaluation (Dist. Ex. 19).² The evaluating speech-language pathologist described the student as "variably and at times superficially related," observing that the student interacted with the evaluator by smiling, vocalizing, and attempting to touch the evaluator's face (id. at pp. 1-2). Administration of the Goldman-Fristoe Test of Articulation (GFTA), in order to assess intelligibility of the student's

¹ The hearing record reflects that the student's ABA services were terminated after an unspecified time period and replaced by "special instruction," services which were not described in the hearing record (Dist. Ex. 10 at p. 1).

² The hearing record does not clearly indicate whether the evaluation was privately or publicly funded.

single word productions revealed poor overall intelligibility, despite his being provided with slow and clear models (*id.* at p. 2). The evaluating speech-language pathologist also noted that the student was unable to produce/repeat bisyllabic productions, although he appeared fluent and his voice was within normal limits (*id.*). During administration of the Receptive One-Word Picture Vocabulary Test-2000 Edition (ROWPVT), the evaluating speech-language pathologist noted that the student "appeared to randomly point and label pictures that he attempted to name" (*id.*). During administration of the Preschool Language Scale-Fourth Edition (PLS-4), the student identified six of eight pictures and two of six pictures related to nouns and verbs respectively, but demonstrated difficulties with identification of objects by function, part/whole relationships, and descriptive terms, and he did not receive consistent credit above the 18-month old level on the expressive communication subscale (*id.* at pp. 2-3). Additionally, the student was unable to correctly identify any of the pictures on the Expressive One-Word Picture Vocabulary Test-2000 Edition (EOWPVT) (*id.* at p. 3).

On an informal basis, the speech-language pathologist noted that the student "localized" to his name, but did not provide his name or age when asked, and he responded to concrete and remote questions by approximating the last two or three words of the evaluator's prompts in an echolalic manner (Dist. Ex. 19 at p. 3). In addition, the evaluating speech-language pathologist characterized the student's language skills as "markedly restricted" in the areas of form, content, and use of language; observing that the student displayed communicative intent by pointing or reaching, "with these gestures often accompanied by short, unintelligible utterances or an occasional true word determined only by context" (*id.* at pp. 3-4). In summary, the speech-language pathologist concluded that the student exhibited a severe phonological disorder reducing his speech intelligibility and a severe expressive/receptive language delay, and recommended speech-language therapy and parental counseling regarding methods of stimulating the student's speech and language behaviors at home (*id.* at pp. 2, 4).

On March 5, 2008, the student received a private OT evaluation (Dist. Ex. 17). During the evaluation, he presented "with limited attention span with periods of ... 30 seconds to 2-4 minutes with consistent prompting," he displayed "fleeting eye contact" and "moved quickly from one activity to another with limited ability to regulate and focus," and participated in the majority of the motor activities with firm limitations and prompting (*id.* at p. 2). During the assessment, the student followed visual cueing and basic verbal commands, and attempted to interact through vocalizations, gestures, and echolalic speech (*id.*). The student's mother reported that he frequently had tantrums, including screaming, pinching, and hitting, when he was challenged; that he did not appear to understand verbal communication within the home setting on a consistent basis; that he exhibited auditory sensitivity and was distracted by external noise/stimuli; and that he had previously received a diagnosis of a sensory processing delay (*id.* at pp. 1-3). Results from the Sensory Profile Questionnaire indicated that the student was at risk in all areas, including tactile processing, vestibular processing, proprioceptive processing, and auditory processing (*id.* at p. 3). The OT evaluation also indicated that the student craved deep pressure/textures, and exhibited impulsivity, distractibility, resistance to firm boundaries and structure, a preference for independence, a limited attention span, a need for 1:1 adult attention, difficulty filtering extraneous noise/stimuli, poor abilities to self soothe and to transition, and sensory seeking behavior (*id.*).

With respect to self-help skills, the evaluating occupational therapist reported that the student drank from a sippy/regular cup and sipped from a straw without assistance; however, he required assistance to eat with utensils due to frequent spillage (Dist. Ex. 17 at p. 3). The evaluator

further reported that the student was able to remove simple clothing items but needed assistance with most dressing activities (id.). In regard to fine motor skills, the student transferred objects from left to right, crossed body midline independently, and utilized a palmer grasp due to limited grip strength and dexterity skills (id. at pp. 3-4). Results from the Peabody Developmental Motor Scales-Second Edition (PDMS-2) indicated that the student demonstrated below average skills in the areas of visual motor integration and grasping, but with respect to gross motor skills, he presented normal ranges of motion in all extremities (id. at p. 4). In summary, the evaluating occupational therapist concluded that the student manifested significant delays in fine motor, self-help, and sensory processing skills; assessing his fine motor skills at the level of a 15 to 24 month-old and noting that they were negatively affected by the student's impulsivity, sensory processing delays, limited attention, and delayed dexterity skills (id. at p. 5). The evaluating occupational therapist recommended that the student may benefit from OT services addressing sensory integration, following directions, upper extremity/grip strengthening, attention, dexterity training, mature grasping patterns, adaptability, and organization (id.).

Also on March 5, 2008, the student received a PT evaluation, which included background information, behavioral observations, and assessment of the student's functioning levels in gross motor skills (Dist. Ex. 18 at pp. 1-8). On the Peabody Scale of Motor Development-Second Edition (PSMD-2), the student achieved a an overall quotient of 72 (3rd percentile), and exhibited gross motor and sensory processing delays which negatively affected his development with respect to his gait, posture, strength, balance, motor planning, safety awareness, and body awareness (id. at p. 8). The evaluating physical therapist recommended 1:1 PT for the student (id.).

A November 2009 progress report generated by the student's SEIT service provider noted that the student had been receiving home-based SEIT service for the preceding ten months, during which he exhibited tantrums; however, this behavior had decreased as his vocabulary and speech improved so as to allow the student to communicate his wants and needs (Dist. Ex. 15).³ The SEIT further reported that the student continued to manifest difficulties with attention, as well as self direction, which resulted in problems following directions (id.).

In a November 30, 2009 CPSE related service progress report, the student's occupational therapist indicated that OT sessions focused on the student's sensory processing, motor planning, visual perceptual, visual motor, and fine motor skills (Dist. Ex. 13 at p. 1). The progress report indicated that the student was developing an ability to choose and play a wider variety of games with the assistance of modeling, and was increasing adaptability, but that he required assistance with his daily living skills including manipulating buttons and closing snaps (id.). According to the occupational therapist, the student did not "seek out excessive amounts of movement or deep pressure/heavy work," but such activities appeared to assist the student to self-regulate with respect to fine motor tasks and peer interactions (id.). The progress report also noted that the student was beginning to demonstrate an interest in playing with peers and engaging in pretend play with some adult direction (id.). Administration of the PDMS-2 yielded results suggesting that the student exhibited a 25 percent delay in visual motor skills and a greater than 50 percent delay in grasping skills, while the occupational therapist commented that the student's lower scores may have been

³ I note that this report is incorrectly identified as a "Physical Therapy Student Progress Report," and is ascribed a date of "1/26/09" in the exhibit list attached to the impartial hearing officer's decision; however, the report contained in the hearing record indicates that it was prepared by the student's preschool SEIT service provider on an unspecified date in November 2009 and that services began on January 26, 2009 (compare Dist. Ex. 15, with IHO Decision at p. 14).

partly due to his difficulty understanding the tasks (id.). The student's therapy goals contained in the progress report targeted his sensory processing skills to improve social interaction, his fine motor and visual motor skills, his bilateral coordination to assist with daily living skills, and his use of age appropriate grasp during writing and coloring activities (id. at pp. 1-2). The occupational therapist recommended that the student continue to receive OT services (id. at p. 2).

On December 17, 2009, as the student prepared to transition from the CPSE to the Committee on Special Education (CSE), he received an OT evaluation (Parent Ex. J). The evaluating occupational therapist noted that the student was receiving OT once per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a group of four, and although citing the student's progress, indicated that the student presented with delays in fine motor, visual-perceptual, and self-help skills (id. at pp. 1-2). Continued OT services were recommended (id. at p. 2).

On December 28, 2009, the student's preschool classroom teacher completed a "CSE Educational Progress Report" of the student (Dist. Ex. 12). His classroom teacher advised that the student demonstrated difficulties with expressive articulation speech and receptive language (id. at p. 1). She further reported that the student expressed his wants and needs, but his articulation was often poor (id.). With regard to classroom behavior, the teacher noted that the student responded well to a visual schedule, followed one-step directions and the classroom routine with verbal/visual cues and responded "extremely well" to verbal praise (id.). She reported that the student also enjoyed the classroom experience; developed friendships with peers; demonstrated a solid knowledge of the alphabet and numbers; and although he exhibited a limited attention span, was "easily directed in activities" (id.). With respect to fine motor skills, she reported that the student exhibited a loose tripod grasp when coloring, but acknowledged that his attention to task had improved to the point where he required fewer prompts to follow through with an activity (id. at p. 2). With respect to language skills including articulation, the teacher advised that the student benefited from repetition, visual cues, verbal cues, and modeling (id.). In the area of gross motor skills, she noted that the student exhibited gross motor delays, but continued to improve his balance, coordination, ball play, and sports skills (id.). She also reported that the student demonstrated social/emotional delays, including a lack of frustration tolerance, but reiterated that he interacted well with peers and had recently initiated play with his classmates (id.). The student's classroom teacher recommended that the student "would continue to benefit from a small classroom with very structured activities and a supportive and caring teaching staff" as well as "strong language and behavior models found in other children his age as well as older children" (id. at p. 3).

In a December 2009 related service progress report, the student's speech-language pathologist reported that results from the Preschool Language Scale-Fourth Edition (PLS-4) and behavioral observations indicated that the student's receptive language skills were at a 37 month age level (29 percent delay) and his expressive language skills were "quite scattered" up to approximately a 36 month age level (31 percent delay), indicative of a moderate to severe delay (Dist. Ex. 16 at p. 1).⁴ The progress report also indicated that the student's performance on the Westby Developmental Play scale identified moderate to severe delay in his play skills (id.). The

⁴ In the hearing record, the first page of this report is incorrectly dated "December 2010" (compare Dist. Ex. 16 at p. 1, with Dist. Ex. 16 at p. 3), and the report is also incorrectly identified in the exhibit list attached to the impartial hearing officer's decision as a "December 2010" report (IHO Decision at p. 14).

progress report also noted that the student exhibited a "few misarticulations and phonological delays that mildly impact[ed] his speech intelligibility" (id.). The therapy goals set forth in the progress report targeted improvement in the student's play skills, pragmatic language skills, receptive and expressive language skills, and speech intelligibility (id.). According to his speech-language pathologist, the student's receptive language delays included difficulties with comprehension of possessive pronouns, comparative concepts, complex spatial concepts, and descriptive concepts; but she acknowledged his "notable gains" in language skills and play skills, and noted that he exhibited knowledge of learned concepts with decreasing cues (id. at pp. 1-2). The speech-language pathologist recommended continued speech-language therapy three times per week for 45-minute sessions to improve the student's receptive language, expressive language, phonological skills, and play skills (id. at p. 3).

In a January 5, 2010 progress report the student's speech-language pathologist advised that the student identified objects and pictures across categories, understood object use and part/whole relationships, identified categories of objects in pictures, and understood negatives in sentences (Dist. Ex. 11 at p. 1). The report further indicated that the student was able to make inferences in response to pictorial stimuli and comprehend simple descriptive statements, understood "simple what and where questions regarding objects and actions in his immediate environment and pictures," as well as simple yes/no questions regarding preference and simple "wh-" questions (id.). However, the student's speech-language pathologist also noted that he exhibited difficulties comprehending complex or abstract "wh-" questions and understanding expanded sentences, and required repetition, rewording, and a range of prompts to assist him in understanding verbal requests (id. at pp. 1-2).

The speech-language pathologist acknowledged that the student had recently demonstrated "great improvement" in the area of expressive language, noting that although the student had been observed communicating in three to four word sentences, he tended to speak using one or two word utterances and used spontaneous language to greet, request, call, notice, and protest (Dist. Ex. 11 at p. 2). The progress report indicated that although he labeled some actions and objects within his immediate environment and in pictures, the student demonstrated difficulties with vocabulary and word retrieval (id.).

With respect to pragmatic language skills, the progress report indicated that the student greeted adults and peers, and noted improvement with respect to his initiation of communication (Dist. Ex. 11 at p. 2). The report noted that the student's eye contact as "variable," requiring verbal and tactile prompts to establish and maintain eye contact during social interactions (id.). The speech-language pathologist commented that the student was easily distracted, benefited from prompts and redirection to task, and engaged in turn-taking activities with adult encouragement and support (id.). In the areas of articulation and oral motor skills, the progress report identified the student's exhibited "deficits in the motor planning of his articulators for speech production," while also noting his "great improvement in this area" (id.). The report further indicated that the student was "stimulable for many accurate sound productions" and benefited from modeling and tactile cues to improve intelligibility (id.). The speech-language pathologist recommended goals targeting the student's receptive language, auditory processing skills, ability to follow directions, and vocabulary, as well as understanding pronouns, "wh-" questions, descriptive/temporal sequencing, and spatial concepts (id. at p. 3). She also recommended that the student improve his expressive language skills, eye contact, attention, initiation of communication, engagement in conversations, articulation and intelligibility of speech, and his abilities to share, take turns, and

negotiate with peers (id.). She further recommended that he increase the mean length of his utterances, and that he expand his word retrieval skills and play skills (id.).

In a January 2010 progress report, the student's physical therapist indicated that the student demonstrated minimally decreased muscle strength, normal range of motion, and normal tone through his trunk and extremities, and she recommended continued PT to address his strength, coordination, and age appropriate ball play (Dist. Ex. 14).

On January 7, 2010, a district social worker completed a social history update of the student in preparation for his transition from the CPSE to the CSE (Dist. Ex. 5). The report summarized the student's education background, family and developmental histories, and health (id.). The student's mother, who served as the informant for the report, indicated that the student appeared to be "doing well" in the 12:1+2 preschool special class, but that he may continue to require special education services (id. at p. 2).

On January 29, 2010, the CPSE convened for the student's annual review to develop his individualized education program (IEP) with effective dates of January 29, 2010 to August 31, 2010, prior to his transition to the CSE (Parent Ex. L). The January 2010 CPSE recommended a 12-month special education program consisting of a 12:1+2 special class; related services consisting of individual OT twice per week for 30 minutes per session and twice per week for 45 minutes per session; individual PT twice per week for 30 minutes per session; and individual speech-language therapy twice per week for 30 minutes per session and twice per week for 45 minutes per session (id. at p. 24). The CPSE also recommended program modifications consisting of partnership with a positive role model, seating close to the instructor, allowance for adequate time for the student to process comments, questions, and instructions before repetition, small group play activities, verbal modeling, and visual/pictorial cueing; as well as extended school year (ESY) services consisting of a 12:1+2 special class, SEIT services, and continued OT, PT, and speech-language services (id. at pp. 1-2, 5-6, 22-24). The hearing record reflects that the student was subsequently placed in this program for the 2009-10 school year and for summer 2010 at the same preschool he had been attending since 2008 (see Tr. p. 288; Dist. Ex. 10 at p. 1; Parent Ex. L at pp. 1-2).

In an undated parent survey, the student's mother described her son's overall functioning, citing his progress in language processing and noting that he was relating well with peers and that as his language abilities improved, his relationship with his older sibling, whom he used as a model, had "become more and more functional" (Dist. Ex. 6).

In an undated preschool teacher observation checklist, the student's preschool teacher inventoried the student's abilities advising, among other things, that he was able to identify colors, body parts, and shapes; followed one-step directions and understood comparative concepts (such as big/little and first/last); recognized his written name; recited the alphabet and recognized at least five letters; demonstrated 1:1 correspondence; counted up to five objects; and recognized numbers one through ten (Dist. Ex. 8 at p. 1). She indicated that the student exhibited an average ability to maintain attention, engaged in cooperative play, spoke in sentences, and expressed his wants and needs (id. at p. 2). She further indicated that the student's grasp was awkward, he climbed steps with alternating feet, drank from a cup, and fed himself using a fork while eating (id.).

On February 2, 2010, the district social worker conducted a classroom observation of the student in his preschool 12:1+1 special class (Dist. Ex. 7). The classroom observation report

indicated that student transitioned without difficulty and followed adult direction (id. at p. 1). The district social worker observed that during classroom instruction, the student followed along with the lesson, maintaining his attention and following teacher directives; during "free choice time," the student played with peers; during snack time, the student's verbal interaction with peers was limited, but he verbally responded to adults; and during playground time, the student interacted well with both peers and adults (id.). The observation report further indicated that while engaged in an activity with the teaching assistant, the student employed an "awkward" grasp of a marker and painting brush and "tended to write very big" (id.).

In conjunction with the classroom observation, the district social worker interviewed the student's preschool teacher, who characterized the student as a "friendly well-behaved youngster with articulation and expressive language difficulties" (Dist. Ex. 7 at p. 2). Overall, she identified the student as easily engaged, cooperative with peers and teachers, not easily distracted, demonstrating an average ability to maintain attention, and understanding verbal directions but sometimes needing visual cues (id. at p. 3). The student's preschool teacher further commented that the student spoke in fragments and demonstrated difficulties in the areas of articulation and expressive language; however, she reported that he "may be ready to be enrolled in a general education program but his difficulties with speech may actually place him at risk if placed in a large classroom with no extra supports available" (id. at pp. 2-3).

In an undated post-observation teacher interview, the student's preschool teacher reported that his behavior during the classroom observation was "typical," that the student was "happy" and rarely exhibited behavior difficulties (Dist. Ex. 9). The teacher further reported that although the student demonstrated significant speech and language delays, he had become more verbal over the past year, and that he interacted well with peers and had recently begun to initiate play with them (id.). The preschool teacher suggested that a collaborative team teaching (CTT) kindergarten class would be the "best fit" for the student (id.; see Tr. pp. 40-41, 111).

The student's preschool teacher also served as informant for a February 8, 2010 Preschool Evaluation Scale (PES) report, which summarized the student's then-current functioning across multiple domains (Dist. Ex. 10). The PES yielded standard scores of 9 (average) in large muscle skills, 8 (below average) in small muscle skills, 8 (below average) in cognition, 4 (significantly below average) in expressive language skills, 8 (below average) in social/emotional skills, and 5 (borderline) in self-help skills (id. at p. 2).

On March 25, 2010, the CSE convened to develop the student's educational program for the student's 2010-11 (kindergarten) school year (Parent Ex. D; see Tr. pp. 20-21).⁵ In attendance were the school psychologist (who also served as the district representative), a district regular education teacher, a school social worker, and the parents; a special education teacher and a regular education teacher from the student's preschool participated in the meeting telephonically (Parent Ex. D at p. 2; see Tr. pp. 22-24). The March 2010 CSE determined that the student was eligible for special education and related services as a student with a speech or language impairment and

⁵ The hearing record contains two copies of the student's March 25, 2010 IEP, which is the subject of this appeal (Dist. Ex. 4; Parent Ex. D). Both exhibits are substantially similar, except for a difference in the sequence of the pages and the presence of underlining and an additional page of annual goals and short-term objectives contained in Parent Ex. D (compare, Dist. Ex. 4 at pp. 3, 10-15, with Parent Ex. D. at pp. 3, 10-16). Neither party addresses this on appeal. For convenience, I will refer only to Parent Ex. D in this decision when referencing the student's March 2010 IEP.

recommended a 10-month special education program consisting of a 12:1 CTT class,⁶ with related services consisting of OT twice per week for 30 minutes per session in a group (2:1), and speech-language therapy twice per week for 30 minutes per session in a group (2:1) and once per week for 30 minutes per session in a 1:1 setting (Parent Ex. D at p. 16). The CSE also recommended program modifications consisting of use of a visual schedule, direction, redirection, and repetition; allowing an adequate amount of time to enable the student to process comments, questions, and instructions before repetition; small group play activities; verbal modeling of language needed for peer engagement; and visual/pictorial cueing as needed (*id.* at pp. 1-4, 14, 16).

On April 9, 2010, the parents signed an enrollment contract with the Aaron School and paid a nonrefundable deposit for the 2010-11 school year (Tr. pp. 312-13; Parent Ex. M).

In a notice dated May 24, 2010, the district summarized the recommendations made by the March 2010 CSE and informed the parents of the particular school to which the district assigned the student (Parent Ex. E). In an undated written response to the district, the student's mother rejected the district's offer, stating that she had visited the assigned school on June 8, 2010, and believed that the school and class sizes were "entirely too big" and that her son "would not be able to function in such a setting" because of potential overstimulation, overcrowding, and distraction to the student (Tr. p. 307; Parent Ex. F; *see* Tr. pp. 296-306). In her letter, she further stated her belief that the student required a "smaller class size with more support" and requested that the district "let [her] know what happens next" (Parent Ex. F; *see* Tr. p. 307). In July 2010, the student's mother reported that she received a second letter from the district assigning the student to the same school (Tr. pp. 307-08; *see* Parent Ex. G).⁷ She then sent a second undated "letter of disagreement" to the district reiterating her concerns with the assigned school and requesting further guidance from the district (Tr. p. 308; Parent Ex. G).

On August 18, 2010, the district sent a third letter to the parents recommending the same educational program and assigned school as in its May and July 2010 letters (*compare*, Dist. Ex. 3, *with* Parent Ex. E). By letter to the district dated August 24, 2010, the parents sent a letter rejecting the March 2010 IEP and assigned school, alleging that they were denied the opportunity to meaningfully participate in the development of the IEP, that their son would be inappropriately grouped in the assigned 12:1 CTT class, and that the sizes of the assigned school and assigned 12:1 CTT class were inappropriate for the student (Parent Ex. C at pp. 1-2). The parents also

⁶ State regulations incorporate "collaborative team teaching [CTT]" services within its "Continuum of services" as "integrated co-teaching services," which is defined as the following: "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]; *see* Tr. pp. 124, 134-35). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an "integrated co-teaching class shall minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). In April 2008, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued a guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities" (*see* <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>). The hearing record and the impartial hearing officer primarily refer to the student's recommended program for the 2010-11 school year as a "collaborative team teaching" or "CTT" class (*see, e.g.*, Tr. p. 124, 134-35; Parent Ex. D at pp. 1-2; IHO Decision at p. 10). For consistency within this decision, I use the term "CTT" class when referring to the district's recommended placement for the 2010-11 school year.

⁷ A copy of the letter referred to at the impartial hearing by the student's mother is not contained in the hearing record.

informed the district of their intention to enroll the student at the Aaron School for the 2010-11 school year, and to seek reimbursement at public expense (*id.* at p. 1). The parents further stated that "details describing the nature of the problem(s) with the [March 2010] IEP and/or placement will follow in a hearing request under separate cover" and requested that the CSE arrange for the provision of transportation services for the 2010-11 school year (*id.* at pp. 1, 2).

On September 7, 2010, the student began the 2010-11 school year at Aaron School, where he was enrolled in a 11:2 special class and received weekly speech-language therapy and OT, each twice per week for thirty minutes per session, once in a 1:1 setting and once in a 2:1 setting (Tr. pp. 231-32; Parent Exs. P at p. 1; Q at p. 1; R at p. 1; S at p. 1; see Parent Exs. N; O).

Due Process Complaint Notice

By due process complaint notice dated October 22, 2010, the parents alleged, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year because the March 2010 CSE failed to conduct a classroom observation of the student; was deficiently constituted, lacking an additional parent member; and failed to rely upon necessary evaluations in developing the student's present levels of performance contained in the March 2010 IEP –instead relying on "teacher estimates" (Dist. Ex. 1 at pp. 1-3).⁸ The parents further alleged that the IEP was inadequate because the annual goals and short term objectives were inappropriate in that they were not sufficiently tailored to the student, lacked baselines from which to measure student progress, and failed to indicate the method of measurement (*id.* at pp. 2-3). The parents also alleged that the district's recommended CTT placement did not provide the student with an appropriate student-to-teacher ratio or adequate individualized support to address his educational needs (*id.* at p. 3). The parents also contended that the assigned school was too large for him given his educational needs, that the district failed to suitably group the student within the assigned class with students having similar individual needs, and that the district failed provide them with a profile of the assigned class (*id.*). With regard to their unilateral placement, the parents claimed that the Aaron School was an appropriate placement for the student for the 2010-11 school year and further, that equitable considerations supported their claims (*id.* at pp. 3-4). For relief, the parents sought reimbursement of tuition expenses incurred for the student's 2010-11 school year at the Aaron School (*id.* at pp. 1, 4).⁹

On October 28, 2010, the district responded the parents' due process complaint notice (Dist. Ex. 2).

Impartial Hearing Officer Decision

On March 15, 2011, the parties proceeded to an impartial hearing, which concluded on July 7, 2011 after four days of proceedings. On August 8, 2011, the impartial hearing officer issued a decision, finding, among other things, that the lack of an additional parent member at the March

⁸ 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]).

⁹ The hearing record reflects that the parents had fully paid the student's tuition for the 2010-11 school year at the Aaron School by December 16, 2010 (Parent Ex. N).

2010 CSE meeting did not "rise[] to the level of a denial of a FAPE" because it did not impede the student's right to a FAPE, "significantly impede the parents' opportunity to fully participate in the decision-making process" regarding their son's IEP, or cause a deprivation of educational benefits (IHO Decision at pp. 9-10, 12). The impartial hearing officer also concluded that the March 2010 CSE relied upon appropriate evaluations, which provided sufficient information to develop the IEP and that it was not necessary for the district to conduct more recent evaluations because the evaluations in evidence had been conducted "within three years" of the student's March 2010 IEP (id. at p. 10).

However, the impartial hearing officer found that the CTT program recommended by the CSE was inappropriate to meet the student's needs and failed to offer him a FAPE for the 2010-11 school year (IHO Decision at pp. 10-11). Specifically, the impartial hearing officer found that the student's teacher and mother, as well as the social worker who observed him, agreed that the student needed a "small structured classroom" (id. at p. 10). The impartial hearing officer further noted that at the time of the CSE meeting, the student was in a class of 12 students and that "a class double that size – with 24 students" would "overwhelm" the student (id.). She also found that the annual goals and short-term objectives contained in the March 2010 IEP were inadequate in that they lacked a "benchmark" from which to measure the student's progress (id.). She further concluded that the class to which the student was assigned lacked sufficient individual adult support to address the student's distractibility and needs for redirection and rephrasing of questions (id.).

With regard to the parents' unilateral placement, the impartial hearing officer found that the Aaron School was an appropriate placement for the student for the 2010-11 school year (IHO Decision at p. 11). Specifically, the impartial hearing officer concluded that at the Aaron School, the student was appropriately grouped with students of similar ages, demonstrating similar educational abilities; and that the school provided educational instruction that was specially designed to meet the student's speech-language and sensory needs, as well as his anxiety and social/emotional needs (id.). Additionally, the impartial hearing officer found that the student had progressed at the Aaron School, and that the related services he received there enabled him to obtain educational benefits (id.). Lastly, the impartial hearing officer found that equitable considerations supported the parents' claim for tuition reimbursement because they cooperated with the district during the review process, visited the assigned school before rejecting it, and timely notified the district of their rejection of the assigned school and placement of him at the Aaron School (id.). Accordingly, the impartial hearing officer ordered the district to reimburse the parents for tuition expenses incurred in connection with their son's 2010-11 school year at the Aaron School (id. at pp. 11-12).

Appeal for State-Level Review

The district appeals from the impartial hearing officer's decision, arguing, among other things, that the March 2010 CSE offered the student a FAPE for the 2010-11 school year. Specifically, the district maintains that the March 2010 IEP contained appropriate annual goals and short-term objectives because the present levels of performance in the IEP contained detailed narratives of the student's needs and abilities which served as "benchmarks" from which to measure the student's progress, and because further evaluative criteria could have been established through

testing and assessments as referenced in the hearing record.¹⁰ The district also asserts that the 12:1 CTT class recommended in the March 2010 IEP was appropriate for the student because it would have provided the student with the support he needed, was consistent with the recommendation of the student's preschool teacher, and was the least restrictive environment (LRE) for the student. Specifically, the district alleges that the hearing record does not reflect that the student needed a small structured classroom; rather, the classroom observation concluded that the student might be ready for a general education program.

The district also alleges that the impartial hearing officer erred because the parents' unilateral placement of the student at the Aaron School for the 2010-11 school year was inappropriate for the student as it was overly restrictive and did not provide the amount of related services mandated in the student's IEP. Lastly, the district alleges that equitable considerations did not support the parents' request because they did not intend to place the student in a public school. The district requests that the impartial hearing officer's decision should be vacated.

The parents answer, countering, among other things, that the impartial hearing officer correctly found that the district failed to offer the student a FAPE for the 2010-11 school year. Specifically, the parents contend that the IEP goals were not discussed during the CSE meeting, were ambiguous, were not measurable, and lacked baselines from which to measure the student's progress. The parents also argue that the recommended 12:1 CTT class was not appropriate for the student, contending that he would not have benefited from exposure to general education students and that the class lacked the 1:1 support that the student required, and that the assigned school and class were too large for the student. The parents also maintain that the student's placement at the Aaron School for the 2010-11 school year was appropriate, and that equitable considerations support their tuition reimbursement claim. The parents contend that the impartial hearing officer's decision should be upheld.

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]).

¹⁰ The impartial hearing officer and the parties to this appeal refer to the terms "benchmark" and "baseline" interchangeably when referencing evaluative criteria used to measure student progress toward annual goals. State regulations require an IEP for a student taking a New York State alternate assessment to include short-term instructional objectives and/or "benchmarks" that constitute "the measurable intermediate steps between the student's present level of performance and the measurable annual goal" (8 NYCRR 200.4[d][2][iv]). State regulations require a functional behavioral assessment (FBA) to include a "baseline" from which to measure a student's problem behaviors (8 NYCRR 200.22[a][3]).

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 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

I note that the parents do not cross-appeal the impartial hearing officer's findings that the lack of an additional parent member at the March 2010 CSE meeting did not deny the student a FAPE, that the March 2010 CSE relied upon appropriate evaluations in developing the student's IEP, and that it was not necessary for the CSE to conduct more recent evaluations (IHO Decision at pp. 9-10). Additionally, the parents do not appeal the impartial hearing officer's decision insofar as it did not address their allegations raised in the due process complaint notice that the district failed to conduct a classroom observation of the student and failed to provide the parents with a class profile of the assigned class. 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]). Accordingly, I will not address these matters in this decision.

March 2010 IEP

Annual Goals and Short-Term Objectives

On appeal, the district argues that the annual goals and short-term objectives contained in the March 2010 IEP were appropriate because evaluative criteria were provided by detailed narratives of the student's needs and abilities contained within the IEP, and that further baselines could have been established through standardized testing and assessments. Furthermore, the district maintains that the student's speech-language and OT goals were supplemented by detailed, measurable short-term objectives with specific baselines from which to measure student progress.

The parents counter that the district failed to indicate on the IEP methods of measurement to be used to measure student progress.¹¹

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 March 2010 CSE developed the student's annual goals based on the evaluative reports before it and input from the student's then-current instructors, including his preschool teachers and related service providers (Tr. pp. 41-44, 52-54, 95-97; see Parent Ex. D at p. 2). The March 2010 CSE considered the following documents: January 2010 social history update; undated parent survey; February 2010 preschool narrative analysis observation; undated preschool teacher observation checklist; undated post observation teacher interview; February 2010 PES report; January 2010 CSE speech and language progress report; December 2009 CSE educational progress report; November 2009 OT progress report; January 2010 CSE PT report; March 2008 OT evaluation; March 2008 PT evaluation; February 2008 speech and language evaluation; and the February 2008 psychological evaluation (Tr. pp. 24-27, 34-37, 41-44; Dist. Exs. 5-15; 17-20). The March 2010 IEP contained 16 annual goals and 23 short-term objectives addressing the areas of reading, math, speech-language, writing, social skills, fine motor skills, bilateral coordination, self-help skills, and sensory processing (Parent Ex. D at pp. 8-13). A review of these goals reveals that none of them, read in isolation outside of the context of the IEP as a whole, identified the method used to measure student progress (*id.*). However, as further discussed below, the lack of measurability in the annual goals, in this instance, did not deprive the student of a FAPE in this case because many of the goals contained short-term objectives from which the student's progress could be measured. Additionally, with respect to six of the annual goals related to speech-language skills, the present levels of performance contained information from which the student's progress could be measured.

Regarding the student's math and reading goals, the two goals contained in the March 2010 IEP to address these areas lacked evaluative criteria from which to measure his progress and are clearly not measurable (Parent Ex. D at p. 8). However, in this case, the consequence of having unmeasurable math and reading goals was slight or completely absent insofar as the student demonstrated age appropriate skills related to math and reading, which rendered the continuation of reading and math goals from the CPSE IEP unnecessary (Dist. Exs. 8; 9; 10; 12). More specifically, as stated above, an undated preschool teacher observation checklist indicated that the student identified colors, body parts, shapes; followed one-step directions; recognized his written

¹¹ The parents also assert in their answer that the procedures used in conducting the CSE meeting were inadequate with regard to discussion the goals. However, this assertion was not raised in their due process complaint notice or at the impartial hearing below and was not addressed by the impartial hearing officer (see IHO Decision; Parent. Ex. A; see also *C.F. v. Dep't of Educ.*, 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; *C.D. v. Bedford Cent. Sch. Dist.*, 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; *R.B. v. Dep't of Educ.*, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]). Therefore, I will not address this allegation.

name; recited the alphabet; and recognized at least five letters (Dist. Ex. 8 at p. 1). In addition, the student demonstrated 1:1 correspondence, counted up to five objects, and recognized numbers one through ten (*id.*). The student also exhibited an average ability to maintain attention and engage in cooperative play, and he spoke in sentences, expressed his wants/needs, climbed steps with alternating feet, drank from a cup, and fed himself including using a fork while eating (*id.* at p. 2). Additionally, a December 28, 2009 CSE educational progress report indicated that the student enjoyed both the classroom experience and interacting with peers (Dist. Ex. 12 at p. 1). According to the report, the student demonstrated a solid knowledge of the alphabet and numbers 1 through 15 (*id.*).

The district's school psychologist testified that a student's deficits in language skills would "typically" negatively affect a student's reading skills due to a lack of ability to process, understand, and organize information (Tr. p. 115). However, hearing record does not show this to be the case for this student (*see id.*). In addition, the school psychologist testified that the student's annual goals related to speech and language skills were designed to address the student's reading skills (*id.*).

I find, therefore, that the student demonstrated age appropriate academic skills including reading and math skills based on the information contained in the undated preschool teacher observation checklist and the December 2009 CSE educational progress report, both of which were reviewed by the March 2010 CSE. The student's IEP also included an annual goal related to writing that lacked evaluative criteria and procedures from which to measure student progress (Parent Ex. D at p. 9). However, the hearing record does not indicate that the student demonstrated a specific need in the area of written expression.

Turning to the speech-language and OT goals contained in the March 2010 IEP, a review of the January 2010 speech-language progress report demonstrates that the student exhibited deficits in the areas of receptive, expressive, and pragmatic language (Dist. Ex. 11 at p. 3; *see* Tr. p. 235). While six of the speech-language goals lacked short-term objectives (Parent Ex. D at pp. 8-9),¹² I find that the student's present levels of academic performance as identified in the March 2010 IEP contained sufficient information describing the student's receptive, expressive, and pragmatic language skills and his articulation ability to enable measurement of his progress toward the stated goals (*see id.* at pp. 3-4; *see also D.G. v. Cooperstown Cent. Sch. Dist.*, 746 F. Supp. 2d 435, 447 [N.D.N.Y. Oct. 29, 2010]), and while it may have been best to ensure that all of the annual goals and short term objectives were measurable when read in isolation, federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (34 C.F.R. § 300.320[d][2]).

The March 2010 IEP contained four other annual speech-language goals and 14 related short-term objectives which addressed the student's receptive and expressive language needs by targeting his articulation, speech intelligibility, ability to follow complex directions, ability to describe objects, use of pronouns and possessives, auditory processing, morpho-syntactic markers, "wh-" questions, auditory processing, comprehension, vocabulary, mean length of utterances, phonological processing, word retrieval, description of objects, temporal sequencing, and spatial

¹² Because the hearing record reflects that the student did not participate in New York State alternate assessment, the district was not required to include short-term objectives in the March 2010 IEP (8 NYCRR 200.4[d][2][iv]); Parent Ex. D at p. 16).

concepts (Parent Ex. D at pp. 8-11). The IEP goals also addressed the student's pragmatic language skills, play skills, and social skills by targeting the student's eye contact, attention, initiation of communication, engagement in conversational discourse, initiation of play/verbal interactions with peers, and expansion of play themes/interactions (*id.*). The March 2010 IEP also contained three annual OT goals and nine related short-term objectives addressing the student's needs related to self-regulation, social skills, fine motor skills, bilateral coordination, self-help skills, and sensory processing needs as indicated in the November 2009 related service student progress report reviewed by the March 2010 CSE (Parent Ex. D at pp. 12-13; *see* Dist. Ex. 13 at pp. 1-2). These annual goals and short-term objectives targeted the student's motor planning, utilization of sensory processing strategies, visual motor skills, writing grasp, drawing/copying skills, interaction with people and objects, cutting skills, and buttoning skills related to clothing fasteners (*id.*). Although these goals neither contained evaluative criteria or schedules, I find that the related short-term objectives "contained sufficiently detailed information regarding 'the conditions under which each objective was to be performed and the frequency, duration, and percentage of accuracy required for measurement of progress'" and remedied any deficiencies in the annual goals (Tarlowe, 2008 WL 2736027, at *9; *see* M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096). I also note that the March 2010 IEP indicated that progress toward meeting the goals would be measured by written reports three times during the school year (Parent Ex. D at pp. 8-12).

With respect to the parents' assertion that the March 2010 IEP must be invalidated because the measurement method box for each goal was left blank (*see* Dist. Ex. 1 at p. 2; Parent Ex. D at pp. 10-12), I decline to find that such a procedural violation resulted in a denial of a FAPE, particularly here, where I have otherwise determined that the annual goals and short-term objectives were appropriate for the student (*see* Tarlowe, 2008 WL 2736027, at *9).

In summary, based upon the hearing record, I find that the student's speech-language and OT annual goals and short-term objectives contained in the March 2010 IEP adequately addressed the student's areas of need in receptive, expressive and pragmatic language, articulation, fine motor skills, visual motor skills, self-help skills, and sensory processing as identified in the evaluative data considered by March 2010 CSE, and did not deny the student a FAPE for the 2010-11 school year (*see* Dist. Exs. 11; 13; Parent Ex. D at pp. 8-13). I also find that because the student demonstrated age appropriate academic skills in reading and math based on the information contained in the hearing record, the district's inclusion of reading and math goals in the March 2010 IEP that lacked evaluative criteria did not result in a denial of FAPE (*see* T.Y. v. New York City Dept. of Educ., 584 F.3d 412, 419 [2d Cir. 2009] [holding that the inadequacies present in the student's IEP did not render it substantively deficient as a whole and could be corrected]; Karl v. Bd. of Educ. of the Geneseo Cent. Sch. Dist., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; *see also* Bell v. Bd. of Educ. of Albuquerque Pub. Schs., 2008 WL 5991062, at *34 [D.N.M. Nov. 28, 2008] [explaining that an IEP must be analyzed as whole in determining whether it is substantively valid]; Lessard v. Wilton-Lyndeborough Co-op. Sch. Dist., 2008 WL 3843913, at *6-*7 [D.N.H. Aug. 14, 2008] [noting that the adequacy of an IEP is evaluated as a whole while taking into account the child's needs]; W.S.,

454 F. Supp. 2d at 146-47 [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]).¹³

Placement—Collaborative Team Teaching Class

Next I turn to the parties' dispute regarding the appropriateness of the recommended 12:1 CTT placement. The parents contend that the district's recommended 12:1 CTT placement was not appropriate. Upon review of the hearing record, I find that in consideration of the of the supports and related services recommended in the student's IEP, the March 2010 CSE's recommendation of a 12:1 CTT class was appropriate for the student and was reasonably calculated to enable the student to receive educational benefits in the LRE.

As discussed above, the March 2010 CSE recommended that the student be placed in a 12:1 CTT class and receive related services (Parent Ex. D at pp. 1-2, 14, 16).

According to the testimony of the school psychologist who participated in the CSE meeting, the February 2010 PES report provided specific information to the March 2010 CSE regarding the student's development in the areas of language skills, cognition, social/emotional functioning, and motor skills (Tr. p. 27). The school psychologist also testified that based on the information in the PES report and additional evaluation information including observations and parent and teacher reports, the CSE developed recommendations based on the student's needs (Tr. pp. 27-29, 41). According to the testimony of the school psychologist, the student's expressive language skills with respect to PES results were significantly below average due to student's difficulties with expressing his thoughts and organizing his ideas (Tr. p. 34). In addition, the school psychologist stated that the CSE reviewed information from the parents and the student's then-current service providers to provide a thorough understanding of the student regarding his needs, deficits, and abilities (Tr. pp. 38-39). According to the testimony of the school psychologist, the student's preschool teacher indicated that the student demonstrated academic progress as well as social/emotional progress (Tr. p. 40). Moreover, the student demonstrated progress in all areas including social interaction with peers, play skills, and following the classroom routine (*id.*). According to the evaluative data, the student's speech-language abilities were a significant area of need (*id.*). The social history update provided information from the parents regarding the student's development in the areas of language, social/emotional functioning, and motor skills to assist the CSE in the development of the program recommendations (Tr. p. 41; Dist. Ex. 5 at pp. 1-3).

Review of the March 2010 IEP demonstrates that it accurately reflected the student's areas of need as identified in the evaluative data available to the CSE (Parent Ex. D at pp. 3-7; *see* Dist. Exs. 5-20). The school psychologist testified that the CSE recommended a 12:1 CTT class based in part upon the student's preschool teachers' reports and input, related service provider reports, and social worker's classroom observation (Tr. pp. 44-49). The school psychologist maintained that all CSE members were in agreement regarding the student's present levels of academic and functional performance, that the CSE members, including the student's mother, discussed the student's present levels of social/emotional performance and determined that he did not demonstrate social/emotional management needs, and that the student's occupational therapist discussed the student's present levels of health and physical development with the CSE members

¹³ While there was little if any harm to the student's overall program by including the unnecessary goals in this particular instance, I caution the district to be more thorough in the preparation of the student's IEP in the future.

(Tr. pp. 46, 48-49, 52, 105). The hearing record further reflects that the CSE's program recommendation was consistent with the recommendations of two of the student's preschool teachers, one of whom suggested that a 12:1 CTT kindergarten class was the "best fit" for the student, and stated that with the student could be ready for a general education learning environment, provided the requisite individual supports were in place (Dist. Exs. 7 at p. 2; 9; see Tr. pp. 40-41, 105, 111).

The school psychologist further testified that within a 12:1 CTT class placement, students received individualized instruction from both the general education and special education teachers (Tr. p. 57). In addition, the recommended 12:1 CTT class was designed to provide individualized support to help address the student's specific areas of need from the general education students in the class, who, in addition to serving as role models, were used by the teachers "to assist or to help the students with special needs" (Tr. p. 58). The school psychologist added that the CSE recommended speech-language therapy and OT to address the student's needs in language processing, articulation, fine motor skills, and self-regulation as identified in the evaluative information before the CSE (Tr. p. 59; Dist. Exs. 11-13).

The February 2010 classroom observation report indicated that student did not demonstrate difficulty with transitions and followed adult direction (Dist. Ex. 7 at p. 1). The report reflected that the student followed along with the teacher directed lessons including maintaining his attention and that he interacted well with both peers and adults within the classroom and playground setting (id.). The social worker noted that the student was easily engaged, cooperative with peers and teachers, and demonstrated an average ability to maintain his attention (id. at p. 3). The preschool teacher observation checklist indicated that the student demonstrated age appropriate academic skills including the ability to identify colors, body parts, shapes, his written name, as well as the ability to recite the alphabet and recognize at least five letters (Dist. Ex. 8 at p. 1). It further showed that the student demonstrated 1:1 correspondence, counted up to five objects and recognized numbers one through ten (id.). Although the student exhibited significant language processing delays, he spoke in sentences and expressed his wants/needs (id. at p. 2). The December 2009 educational progress report indicated that the student followed the classroom routine with verbal/visual cues and responded "extremely well" to verbal praise (Dist. Ex. 12 at p. 1). The report also showed that the student enjoyed the classroom experience and developed friendships with peers (id.).

Based on the foregoing, the March 2010 CSE's recommendation of a CTT class and related services of speech-language therapy and OT was based on the student's needs as indicated in the evaluative reports and input from CSE members, including the parents. As reflected in the hearing record, the student exhibited significant language delays and demonstrated difficulties with attention and fine motor skills (Dist. Ex. 7; 8; 12; 20). The student also demonstrated age appropriate cognitive and academic skills and related well with peers and adults (Dist. Exs. 7; 8; 12). I find that the information provided in the hearing record supports the recommendation of the CSE for a CTT placement for the student. The hearing record further shows that the parent had a meaningful opportunity to participate in the development of the student's IEP. Based upon the foregoing, I conclude that the evidence contained in the hearing record establishes that the district's recommended educational program was reasonably calculated to enable the student to receive educational benefits for the 2010-11 school year (see Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Assigned School

The parents argue that the district deprived the student of a FAPE for the 2010-11 school year because the assigned class would not have offered sufficient 1:1 support to address the student's needs, the student would not have been suitably grouped in the class, and because the size of the 12:1 CTT class to which the district assigned the student as well as the size of the assigned school were too large for the student.

The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct, through veto, a district's efforts to implement each student's IEP (see T.Y., 584 F.3d at 420). 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]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]). 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; 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 D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

In this case, a meaningful analysis of the parents' claims with regard to implementation of the recommended 12:1 CTT class at the assigned school would require me to determine what might have happened had the district been required to implement the student's March 2010 IEP, which is in part speculative because in August 2010 it became clear that the parents would not accept the placement recommended by the district in the March 2010 IEP and that they intended to enroll the student at the Aaron School. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the recommended 12:1 CTT class at the assigned school was designed to provide the student with a FAPE.

Functional Grouping

State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child

with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

Assuming for the sake of argument that the district had been required to implement the student's IEP in accordance with State regulations regarding grouping, the parents' contention that the student was denied a FAPE is not supported by the evidence available in the hearing record. The special education teacher of the assigned 12:1 CTT class testified that at the start of the 2010-11 school year, students in the assigned classroom ranged in age from four to five years (Tr. p. 128). Five of the students in the class received special education and related services, and were classified as students with a speech or language impairment (Tr. pp. 127-28, 136, 161).¹⁴ With respect to the reading levels of the students in the assigned class, the special education teacher testified the students' reading levels ranged from students with only reading readiness skills through students who demonstrated the ability to read (Tr. p. 128). She further testified that within the CTT class, the students receive reading instruction including "sighted reading" and "strategy reading groups" based on a student's individual needs within small groups of four to six students (Tr. pp. 129-31). The special education teacher testified that on the first day of school during the 2010-11 school year, the students' math levels ranged from prekindergarten through kindergarten (Tr. p. 133). The special education teacher indicated that she provided small group math instruction including utilizing the Everyday Math curriculum, which is a spiraling curriculum that is designed to reinforce learned skills (Tr. pp. 133-34). She described how the "whole group instruction" that she employed in the assigned 12:1 CTT class benefited the special education students by "giv[ing] them the opportunity to work . . . alongside their peers," and how exposure to their general education peers provided the special education students with "classroom role models" and encouraged their learning (Tr. pp. 144-46, 176). With respect to the social/emotional functioning of students in the assigned 12:1 CTT class, she noted that although some of the students occasionally needed assistance with social skills, including turn taking and patience, none of the students in the assigned class presented behavioral problems, and none had behavior intervention plans (BIPs) (Tr. pp. 137-38, 162). She further testified that the students were

¹⁴ The hearing record reflects that there were two additional students added to the class between the start of the 2010-11 school year and the convening of the impartial hearing, both of whom were general education students (Tr. pp. 159-60).

provided assistance with social skills through modeling, verbal praise, group play, and dramatic play work (Tr. pp. 137, 143). The special education teacher of the assigned 12:1 CTT class also commented that based upon her review of the student's March 2010 IEP, she found that the student was similar to those students in her class on the first day of the 2010-11 school year, and that the assigned 12:1 CTT class would have been appropriate to address the student's needs (Tr. pp. 139-40, 154). In consideration of the foregoing, I find that the hearing record demonstrates that had the parents elected to place the student in the assigned 12:1 CTT class, the student would have been appropriately grouped with students of similar needs and abilities.

Size of the Assigned School and Classroom

The parents further maintain that the sizes of the assigned school and classroom to which the student was assigned were inappropriate, because the settings would have been "too distracting and overwhelming" for the student (Dist. Ex. 1 at p. 3). Although the parents may have preferred a school and classroom setting for the student that was more similar to the 12:1+2 special preschool class he attended previously, as discussed below, I find that the hearing record does not support that the student required a smaller setting to enable him to receive educational benefits.

The hearing record does not reflect the total number of students at the assigned school, but indicates that all five of the kindergarten classes at the school, each of which totaled between 21-25 students, were located in the same hallway on the first floor of the building (Tr. p. 157). According to the special education teacher of the assigned CTT class, at the start of the 2010-11 school year, there were 19 students in the assigned class, together with two teachers, an assistant, and a paraprofessional assigned to one of the special education students in the class; while at the time of the impartial hearing, there were 21 students in the assigned class (Tr. pp. 126-27, 159-60). She further advised that during lunch, the five kindergarten classes ate together in the school lunchroom, supervised by lunch aides, monitors, a cafeteria administrator, and an assistant from each of the five kindergarten classes who accompanied the students to lunch each day; the five kindergarten classes also attended recess together, supervised by an administrator and monitors (Tr. pp. 158-59). As previously discussed, the hearing record indicates that the student enjoyed the classroom environment, related well to other students and adults, followed classroom routines with verbal/visual cues, demonstrated age appropriate cognitive skills, did not appear to have difficulties with transitions, and, in the opinion of his preschool teacher, was ready for the general education environment given proper support (see Dist. Exs. 5; 7 at pp. 2-3; 8; 9; 12 at p. 1; 20). Additionally, the special education teacher of the assigned 12:1 CTT class explained that when students engaged in independent work, the general education and special education teachers conferenced with them individually basis to assist the student with comprehension of the lesson (Tr. p. 134). She also explained that depending on the subject, "...with two teachers and then an assistant we're really able to give everyone at a separate point of the day some individualized time," with the amount of 1:1 attention depending on the particular need of the student (Tr. pp. 167-68). In view of the foregoing, in the evidence in the hearing record does not support the conclusion that the district would upon implementation of the student's IEP, deviate from substantial or significant provisions of the IEP in a material way.

I find the impartial hearing officer's determination that the district's assigned 12:1 CTT class failed to address the student's needs is not supported by the hearing record (see D.B. v. New York City Dept. of Educ., 2011 WL 4916435 [S.D.N.Y. Oct. 12, 2011]).

Considering the totality of the evidence contained in the hearing record, I find the parents' concerns regarding size of the assigned school and assigned classroom, the student's functional grouping in the assigned class, and the level of individual support provided in the assigned class, had the district been required to implement the student's IEP, are not supported by the preponderance of the evidence contained in the hearing record (see generally, M.H. v. New York City Dep't of Educ., 2011 WL 609880 [S.D.N.Y. Feb. 16, 2011], citing Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). While it is understandable that the parents may desire that the student be assigned to a small class that could provide the student, or any student for that matter, with a superior education, it does not mean that district was required to guarantee such a class in this instance (see J.B. v. Board of Educ., 2001 WL 546963, at *7 [S.D.N.Y. May 22, 2001]).

Conclusion

In summary, I find that the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2010-11 school year must be reversed. Additionally, the hearing record contains evidence showing that the March 2010 IEP recommending a CTT 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 primary areas of need, developed appropriate annual goals and short-term objectives to address those needs, and recommended an appropriate placement 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 a Student with a Disability, Appeal No. 11-100; Application of the Dep't of Educ., Appeal No. 11-080; 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 reach them in light of my determination.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that those portions of the impartial hearing officer's decision dated August 8, 2011 which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to reimburse the parents for the cost of the student's tuition at the Aaron School for the 2010-11 school year are annulled.

Dated: Albany, New York
November 10, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER