The University of the State of New York

The State Education Department
State Review Officer
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No. 11-145

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

Appearances:
Thivierge & Rothberg, P.C., attorneys for petitioners, Randi M. Rothberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their requests to be reimbursed for their son's tuition costs at the Ha'or – the Beacon School (Beacon) for the 2010-11 school year, for tuition and expenses at the private summer program during summer 2010, and for the cost of one session per week of private counseling during the 2010-11 school year. The appeal must be dismissed.

Background

At the time of the impartial hearing, the student was attending a second grade class at Beacon (Tr. pp. 106, 235, 395). The Commissioner of Education has not approved Beacon as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

In February 2006, the student began attending a nonpublic school, which provided the student 1:1 applied behavioral analysis (ABA) instruction, occupational therapy (OT), and speech-language therapy (Tr. pp. 362-63). The student attended the school continuously until August 2009 (id.).

On September 10, 2009, the Committee on Special Education (CSE) convened for the student's annual review and to develop his individualized education program (IEP) for the 2009-10 school year (Parent Ex. C). Meeting participants included a district special education teacher who also acted as the district representative, the student's mother, an additional parent member, a district school psychologist, a district social worker, and a psychologist (id. at p. 2). The teacher and director at the student's nonpublic school as well as the principal at Beacon participated in the meeting by telephone (id.). The CSE found the student eligible for special education programs and related services as a student with autism and recommended a 12-month placement in a 6:1+1 special class in a specialized school (id. at p. 1). The CSE further recommended five 30-minute sessions of individual speech-language therapy per week, five 30-minute sessions of individual OT per week, two 30-minute sessions of individual physical therapy (PT) per week, one 30-minute session of individual counseling per week, and one 30-minute session of counseling per week in a group of three (id. at p. 26).

In September 2009, the student began to attend a first grade 6:1+1 class at Beacon and received speech-language therapy, OT, and counseling as related services (Tr. pp. 189, 364; Parent Ex. M at p. 2).

In an undated progress report conducted while the student attended Beacon, a speech-language pathologist provided information regarding the student's speech-language abilities and related annual goals (Parent Ex. N). The report indicated that the student received five 30-minute individual speech-language therapy sessions per week (id. at p. 1). The report also indicated that the student exhibited severe deficits in receptive, expressive, and pragmatic language (id.). Additionally, the student exhibited "great anxiety" related to social interactions (id.). The student demonstrated progress with respect to articulation, but continued to require "significant therapy" in this area and also exhibited progress in following directions, self-advocacy skills, and following a classroom lesson (id.). The report also indicated that the student required prompts to use words for self-expression and to remain focused (id.). The student demonstrated difficulties with conversational speech with peers including initiating conversations, maintaining a topic, and transitioning (id.). The speech-language pathologist provided the student with eight annual goals related to comprehension of spatial objects, identification of objects, conversational speech, turn-taking, self-advocacy skills, and identification of feelings (id. at pp. 1-2). The speech-language pathologist recommended that the student receive three 30-minute individual speech-language sessions per week and one 30-minute speech-language therapy session per week in a group of three (id. at p. 1).

On March 17, 2010, the parents obtained a neurodevelopmental reevaluation of the student conducted by a private developmental pediatrician and physiatrist (Parent Ex. M).[1] The resulting report indicated that the private evaluator first evaluated the student in July 2006 (id. at p. 1). At that time, the student had received diagnoses of autistic spectrum disorder; global dyspraxia, including verbal apraxia; gross and fine motor "incoordination;" and attention deficit hyperactivity disorder (ADHD), hyperactive-impulsive type (id.). The report also indicated that the student "improved significantly" in comparison to his performance at an earlier May 2009 assessment session (id.). Specifically, the student demonstrated increased cooperation, attention, and eye

[1] It is unclear from the report, but the evaluation may have been conducted with the assistance of a speech-language pathologist whose name also appears on the report (Parent Ex. M at p. 5).

contact as well as being "more engaged and related" (id.). However, the evaluator noted that the student continued to present with a severe expressive and receptive language disorder as shown by his use of only rote phrases and simple sentences which were out of context (id.). In addition, the student's speech continued to be marked with omissions, substitutions, and a "'slushy' quality" which impaired his intelligibility (id.). The student also continued to exhibit difficulties that further negatively affected his ability to learn, including difficulties with following directions, distractibility, decreased truncal tone, behavior, sensory processing, play skills, social skills, as well as fine and gross motor skills (id.). Previous testing indicated that the student's nonverbal IQ was in the average range (id.).

The private evaluator assessed the student by use of clinical observations, parental report, and an administration of the Oral and Written Language Scales (OWLS) (Parent Ex. M at p. 2). Behaviorally, the student presented as cooperative, but required prompts to engage in conversations (id. at p. 4). The student's affect was noted as flat and he only briefly established eye contact (id.). Administration of the OWLS yielded standard scores (percentile rank) of 74 (4) in listening comprehension and 61 (.5) in oral expression (id. at p. 2). The private evaluator reported that the results on the OWLS indicated that the student exhibited moderate to severe receptive and expressive language delays with his expressive language skills being weaker than his language comprehension skills (id.). The student exhibited particular difficulties with comprehension of figurative language and preposition usage (id.). The student formulated sentences with respect to asking for information, although the student's communication with the examiner appeared to "somewhat rote" (id. at p. 3). The student demonstrated an increase in the use of adjectives and adverbs, but continued to exhibited difficulties with pronouns (id.). The student also exhibited difficulties with vocabulary and articulation, including decreased intelligibility regarding connected speech (id.).

The private evaluator administered the Draw a Person test to assess the student's visual-motor and cognitive skills (Parent Ex. M at p. 3). The student achieved an age equivalent of six years, which was approximately two years below his expected performance level (id.). The private evaluators also administered the Young Children's Achievement Test (YCAT) to assess the student's academic skills (id.). The student achieved standard scores of 70 in general information, 103 in reading, and 83 in mathematics (id. at p. 4). The private evaluator noted that the YCAT results needed to be interpreted with discretion because the student was 8 years, 3 months old when evaluated but normative data was only available for students up to age 7 years, 11 months old (id.). According to the report, the student exhibited difficulty with the general information subtests due to his language processing delays (id.). The student's decoding skills were "good," but the reading subtest did not measure reading comprehension skills (id.). The student also exhibited "good" skills related to counting and number concepts, but had difficulties with math word problems which may have been related to his language delays (id.).

The private evaluator opined that the student demonstrated improvement across all domains including behavior, language skills, and attention; however, the student continued to exhibit weak social skills and impulsive behavior (Parent Ex. M at p. 4). The student also continued to exhibit language comprehension and expression difficulties that negatively affected his socialization and academic performance (id. at p. 5). The private evaluator indicated that the student's mean length of utterance and use of complex grammar was reduced for his age (id. at p. 4). The report noted that the student "frequently use[d] over-learned, rote sentences, resulting in occasionally awkward language output" (id.). The student's speech clarity continued to be

compromised by "residual motor planning difficulties and oral-motor weaknesses, resulting in decreased precision and strength of articulatory contacts" (id. at p. 5). As a result of the current neurodevelopmental reevaluation, the student received the diagnoses of autism, childhood apraxia of speech (mild), receptive-expressive language delays, hypotonia, and ADHD hyperactive-impulsive type (id. at p. 4).

The private evaluator recommended the following for the student: (1) Beacon's 6:1+1 class from September 2010 through June 2011 where he could be provided with one-to-one attention to assist the student with completion of assignments, comprehension, attention, and communication; (2) visual and multisensory learning tools; (3) continuation of related services in the areas of OT, PT, counseling, and speech-language therapy; (4) outside speech-language therapy from a specialist trained in apraxia and Prompts for Restructuring Oral Muscular Phonetic Targets (PROMPT); (5) attendance at a summer camp; and (6) related services over the summer to prevent regression (Parent Ex. M at p. 5).

During the 2010-11 school year, the occupational therapist at Beacon who provided OT to the student provided a statement of the student's present level of performance and annual goals to be considered by the June 2010 CSE (Parent Ex. O; see Tr. p. 206). According to the statement, the student exhibited delays in sensory processing, bilateral coordination, visual perception, fine motor skills, and daily living skills (Parent Ex. O at p. 1). The student demonstrated difficulties with zipping/unzipping and buckling his belt for which he required assistance (id.). The student followed directions during OT sessions, but within the classroom he exhibited impulsivity and continued to exhibit poor eye contact (id.). The therapist further noted that the student's handwriting was improving (id.). The therapist recommended that the student receive two 30-minute OT sessions per week (id.).

In a Beacon end of the year report for the 2009-10 school year, the student's first grade teacher provided information regarding the student's progress in reading, math, handwriting, writing, spelling, social skills, behavior, science, and social studies (Parent Ex. L). With respect to reading, the student learned several key concepts, including digraphs, initial and final consonant blends, short vowel sounds, and two-syllable words (id. at p. 1). The student was developing skills related to reading comprehension (id.). The student's goals included increasing phonological awareness and retelling a sentence after reading (id.). With respect to math, the student learned number concepts and arithmetic, including application of math to real life scenarios (id.). The student exhibited the ability to add and subtract up to 20 while utilizing math strategies, but exhibited difficulties with learning new math concepts (id.). The student's math goals included identification of coins and continuing to learn addition and subtraction facts and double digit addition and subtraction (id.). In the area of handwriting, the student learned formation of all uppercase letters and numbers 1 through 10, but sometimes when writing the alphabet the letters lacked neatness and correct formation due to his impulsivity (id.). The student learned a correct grasp while writing with prompts (id.). With respect to writing/spelling, the student wrote simple sentences and multiple sentences about one idea (id. at p. 2). One of the student's goals was to differentiate between correct and incorrect sentences with prompts (id.). With respect to social/behavior, the student exhibited significant improvement with peer interactions, followed rules, participated in class, and followed class procedures (id.). The student's goals included responding to peer questions/comments, speaking slowly and clearly, and identifying facial expressions (id.). In the area of science, the student learned about the five senses (id. at p. 1). The student's goals were to increase his understanding of science and conduct experiments using the

scientific method (id.). In the area of social studies, the student learned about families and one of his goals was to learn about the community (id.).

By two letters sent to the district dated June 11, 2010, the parents requested an IEP meeting to review the student's progress and to develop a program for the student for the 2010-11 school year and enclosed a March 2010 neurodevelopmental reevaluation and the student's May 2010 Beacon end of the year report (Parent Exs. J; K).[2] The letters indicated that the district could have access to the student's Beacon school records and that the parents would consent to any needed evaluations of the student (id.). The letters also noted that the student would attend a private summer program if the district failed to recommend an appropriate program for the student for summer 2010 (id.). During summer 2010, the student attended a private summer program (Tr. pp. 248, 273). The private summer program was described as providing research based interventions in a natural setting to students with behavioral disorders including ADHD and oppositional defiant disorder (ODD) (Parent Ex. V at p. 1).

On June 21, 2010, the CSE convened for the student's annual review and to develop an IEP for the 2010-11 school year (second grade) (Parent Ex. D).[3] Meeting participants included a district special education teacher who also acted as the district representative, a district regular education teacher, the student's mother, an additional parent member, a district school psychologist, and a district social worker (id. at p. 2). The student's first grade teacher, a social worker, and principal from Beacon participated in the meeting by telephone (id.). The CSE continued the student's eligibility for special education programs and related services as a student with autism and recommended a 10-month placement in a 12:1+1 special class in a community school (id. at p. 1). The CSE further recommended five 30-minute sessions of individual speech-language therapy per week, five 30-minute sessions of individual OT, two 30-minute sessions of individual PT per week, one 30-minute session of individual counseling per week, and one 30-minute session of counseling per week in a group of three (id. at p. 26). The CSE also recommended a 1:1 behavioral management paraprofessional for 50 percent of the school day, and extended year related services of speech-language therapy, OT, PT, and counseling (id. at pp. 1, 17).

By notice dated August 10, 2010, the district summarized the recommendations made by the June 2010 CSE and notified the parents of the school to which the district assigned the student (Parent Ex. I).

In a letter to the district dated August 20, 2010, the parents described some difficulties they had in arranging a visit to the district's particular school, but indicated they would continue to attempt to contact the assigned school (Parent Ex. H). They further notified the district that subject to an appropriate placement recommendation made by the CSE, the student would attend Beacon and they would seek tuition reimbursement (id. at p. 1).

In two letters to the district dated September 15, 2010, the parents indicated that the student's mother visited the assigned school, spoke with the school's special education coordinator,

[2] The letters were sent to two different district CSE chairs, but are otherwise identical (Parent Exs. J; K).

[3] The IEP included informational sheets provided by Beacon that detailed the student's functioning and related annual goals (Dist. Ex. D at pp. 1-29).

and observed the assigned class (Parent Exs. F; G).[4] The parents further advised that the student's mother intended to revisit the assigned school in order to speak with the classroom teacher and that the student would remain at Beacon until the parents could evaluate the district's program (id.).

In a letter to the district dated September 28, 2010, the student's parents indicated that they had visited the assigned school a second time and had spoken with the teacher in the assigned class (Parent Ex. E at p. 1). The parents decided that the district's proposed program was not appropriate for the student and that they would place him at Beacon for the 2010-11 school year (id.). The parents expressed concerns regarding the availability of parent training, a lack of a transition plan, functional abilities of the other students in the assigned class, the ability of the assigned school to fulfill the related service mandates, and the size of the class (id.). The parents indicated that they were willing to consider other district placement recommendations, but that in the absence of an appropriate placement recommendation made by the CSE, the student would attend Beacon and the parents would seek tuition reimbursement (id. at p. 2).

Due Process Complaint Notice

By due process complaint notice dated December 22, 2010, the parents requested an impartial hearing, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year for a variety of procedural and substantive reasons (Parent Ex. A). Among other things, the parents asserted that the June 21, 2010 CSE was improperly composed because the regular education teacher did not attend the whole meeting, that the CSE improperly relied upon "teacher estimates" of the student's instructional levels and failed to properly consider the evaluative information it possessed, and that the CSE did not treat the parents or the Beacon school CSE members as full members of the committee and inappropriately predetermined its recommendations (id. at p. 3). The parents also asserted that the June 2010 IEP failed to offer the student sufficient supports and services in that it should have offered transition support services, transportation accommodations, individualized parent counseling and training, and specified that the student would receive "PROMPT" therapy (id. at pp. 3-4). The parents also contended that the student's IEP contained goals that could not be implemented in the CSE's recommended program, contained a recommendation for both 12:1+1 and 6:1+1 adaptive physical education (PE), and failed to note that the parents requested that the CSE consider placing the student at Beacon (id. at p. 3). The parents asserted that the CSE's recommendation that the student attend a 12:1+1 special class in a community school was inappropriate because that setting was too large for the student and the student should have been placed in a "more restrictive class" (id.).

Regarding the particular school and classroom to which the district assigned the student, the parents asserted that there were no parent training workshops, they would be discouraged from visiting the school, that the assigned school might not be able to provide all of the related services specified on the student's IEP, that the student's 1:1 paraprofessional would instead work with all of the students in the class, and that the assigned class did not include "appropriate peers" for the student because some of the other students were very low functioning or were not verbal while the student was "fully verbal" (id. at pp. 4-5).

[4] The letters were sent to two different district CSE chairs, but are otherwise identical (Parent Exs. F; G).

As relief, the parents requested implementation of the student's pendency placement, and an order directing the district to reimburse the parents for the costs of the student's tuition at Beacon for the 2010-11 school year, the private summer program, and one session per week of counseling outside of school (Parent Ex. A at p. 5).

Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on February 15, 2011, and after six nonconsecutive days of testimony, concluded on July 28, 2011 (IHO Decision at p. 1; Tr. pp. 1-429). During the impartial hearing, on February 17, 2011, an impartial hearing officer issued a decision regarding pendency, in which he concluded—upon agreement between the parties—that a prior, unappealed impartial hearing officer decision dated September 8, 2010 and "the accepted portions of the 2009 IEP" constituted the student's pendency placement (Interim IHO Decision at pp. 2-3).[5]

By decision dated October 3, 2011, the impartial hearing officer found that the June 2010 IEP was tailored to meet the unique needs of the student, was reasonably calculated to enable the student to receive educational benefits, and that the district offered the student a FAPE for the 2010-11 school year (IHO Decision at pp. 5-9). Specifically, the impartial hearing officer found that there was no evidence in the hearing record to suggest that the June 2010 CSE predetermined the student's recommended program, but rather showed that the CSE was familiar with the student and recommended the program in light of the student's progress (id. at p. 7). The impartial hearing officer reviewed the evaluative information in the hearing record, including information about the student from Beacon witnesses and reports, and determined that the information in the hearing record that was available to the June 2010 CSE supported the CSE's recommendations (id. at pp. 5-6). For example, the impartial hearing officer noted that the Beacon end of year report summarizing the student's progress during the 2009-10 school year indicated that the student had made academic, behavioral, and social progress such that Beacon recommended moving the student from the 6:1+1 class he attended during that year to a less restrictive 8:1+1 class (id. at p. 5). The impartial hearing officer also noted that a March 17, 2010 neurodevelopmental reevaluation indicated that the student read proficiently, had relatively good decoding skills, and that although some difficulties remained he had progressed "across all domains including his behavior, language skills and attention" (id. at p. 6). Based on the above and on testimony from Beacon staff, the impartial hearing officer found that the present levels of academic performance and learning characteristics reported on the June 2010 IEP were accurate and supported the CSE's recommendations (id.). Regarding the goals and objectives on the IEP, the impartial hearing officer found that the parents did not assert that the goals themselves were inappropriate and that the hearing record did not support the claim that the goals could not have been implemented in the district's recommended 12:1+1 placement (id. at pp. 6-7). With respect to the lack of a specific plan to transition the student from a 6:1+1 setting to a 12:1+1 setting, the impartial hearing officer

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[5] The interim decision regarding the student's pendency (stay put) was issued by an impartial hearing officer who conducted the first two hearing dates held on February 15 and March 23, 2011 (Tr. pp 3, 11). That impartial hearing officer later recused himself and the final four hearing dates were conducted by a second impartial hearing officer, who also rendered the final October 3, 2011 decision (Tr. pp. 106, 114, 185, 299; IHO Decision at p. 9). Subsequent references to "the impartial hearing officer" in the present decision refer to the impartial hearing officer who rendered the October 3, 2011 decision. Neither party appealed the interim decision; therefore, that decision is final and binding upon the parties (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

found that the student had previously transitioned from 1:1 instruction to group instruction "without issue" and that the IEP called for a part-time 1:1 paraprofessional who could have aided in transitioning the student should difficulties have arisen (id. at pp. 7-8). The impartial hearing officer also found that the paraprofessional would be useful in redirecting the student if needed (id. at p. 7).

Although he made no explicit finding that it would be appropriate, the impartial hearing officer noted that the hearing record showed that the assigned school could have provided adapted PE in a 12:1+1 setting (IHO Decision at p. 7). Regarding the assigned school, the impartial hearing officer found that the hearing record showed that there were students in the assigned class with similar academic abilities and behavioral issues as the student, that the teacher provided 1:1 and small group instruction that would benefit the student, and that a therapist trained in "PROMPT" therapy was on staff at the assigned school (id. at pp. 5-7). Although the impartial hearing officer determined that parent counseling and training should have been listed on the student's IEP in compliance with 8 NYCRR 200.13(d), he found that the failure to do so did not result in a denial of a FAPE because the parents had previously received and are continuing to receive training from the student's psychologist (id. at p. 8). Accordingly, the impartial hearing officer denied the parents' request for tuition reimbursement at Beacon for the 2010-11 school year (id. at p. 9).

The impartial hearing officer next denied the parents' request for reimbursement for private out-of-school counseling services because he found that nothing in the hearing record suggested that the level of counseling provided on the student's June 2010 IEP was inadequate. Lastly, the impartial hearing officer also denied the parents' request for reimbursement for the private summer program after finding that the CSE's recommendation of related services during the summer was appropriate and that the hearing record did not show that the student would regress any more that a typical student would (id. at pp. 8-9).

Appeal for State-Level Review

This appeal by the parents ensued. The parents allege that the impartial hearing officer's decision should be overturned because he erred in finding that the district offered the student a FAPE for the 2010-11 school year. Among other things, the parents assert that the impartial hearing officer failed to reference that the June 21, 2010 CSE was improperly composed because the regular education teacher did not attend the whole meeting. The parents contend that the CSE failed to evaluate the student after he began attending Beacon and failed to properly consider the evaluative information that it did have which resulted in an IEP that failed to fully describe the student's academic levels. The parents argue that the impartial hearing officer ignored or failed to reference the student's need for a small class size and difficulties with transitions. The parents also allege that the CSE did not treat the parents or the Beacon CSE members as full members of the CSE by, for example, failing to follow the recommendation to place the student in a smaller class made by Beacon's principal at the CSE meeting. The parents contend that the CSE inappropriately predetermined its recommendations in that the CSE refused to consider other placement options and that during a CSE meeting held for the student on September 21, 2009, a district special education teacher stated that the student would be "getting a [recommendation for] a 12:1:1 [class]." The parents also allege that the June 2010 IEP failed to offer the student sufficient supports and services in that it should have offered transition support services and individualized parent counseling and training.

The parents also contend that, the impartial hearing officer's finding is unsupported because, the IEP contained goals that could not be implemented in the CSE's recommended program, and the impartial hearing officer excused a conflicting recommendation for both 12:1+1 and 6:1+1 adaptive PE. Additionally, the parents contend that the CSE's recommendation that the student attend a 12:1+1 special class in a community school was inappropriate because that setting was too large for the student and the student should have been placed in a "more restrictive class." The parents contend that the impartial hearing officer correctly found that the student had progressed at Beacon, but that progression in the context of three years in a private 1:1 ABA setting and one year in Beacon's 6:1+1 setting did not mean that the student was ready for the district's proposed 12:1+1 program. Additionally, the parents contend that the impartial hearing officer erred in placing the burden on the parents to prove that the class size was inappropriate, rather than holding the district to its burden to show that it had offered an appropriate program.

The parents assert that the impartial hearing officer also erred in finding that the district offered a FAPE because the assigned school had no transition plan for the student, that the student's mother had observed the class and seen "very rudimentary' work being done in the class, and that the student's 1:1 paraprofessional would be too distracting and anxiety provoking for the student. The parents allege that the impartial hearing officer should have found that the district failed to appropriately group the student in the assigned classroom because some of the other students were very low functioning or were minimally verbal while the student was "fully verbal."

Next, the parents contend that the unilateral placement at Beacon was an "appropriate core school program" for the student because the student had made progress in social, reading, math and speech skills at the school and because the school provided an appropriate behavior plan and individualized parent training. The parents also contend that the private summer program and supplemental counseling obtained by the parents were appropriate and that equitable considerations favored the parents and were not a bar to reimbursement.

Lastly, the parents contend that the impartial hearing officer's decision should not be upheld because the decision was not well reasoned or supported by the record. According to the parents, the impartial hearing officer who rendered the final decision had not heard all of the testimony in person. Additionally, the parents argue that they were unduly prejudiced and that the district had an unfair advantage when it submitted its post-hearing brief one day late and that the impartial hearing officer failed to note the late submission.

In its answer, the district denies many of the substantive allegations of the parents and asserts that the impartial hearing officer properly determined that the district offered the student a FAPE during the 2010-11 school year. The district contends that the parents' petition should be dismissed because the June 2010 IEP and school assignment were appropriate for the student, that the parents unilateral placement at Beacon was not appropriate, that the parents are not entitled to

reimbursement for supplemental counseling or the private summer program and that the equities do not favor reimbursement.[6]

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

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[6] In its answer, the district also belabors the late closing brief issue by asserting that the parents had failed to provide any citation to the record regarding their claim that the district failed to submit its post-hearing brief to the impartial hearing officer on time. A closing brief is typically one of the last elements added to the administrative hearing record and the district's claim is disingenuous, especially when it makes no assertion that the brief was timely submitted. The parents filed a reply together with additional evidence (Reply ¶ 1; Reply Ex. A). Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the matter was already addressed in the petition and the parents' reply does not respond to any procedural defenses interposed by the district nor does it respond to additional evidence submitted by the district. Therefore, I will not consider the parents' reply or the proffered additional evidence. There is no indication that the impartial hearing officer referenced either brief in his decision or included them in the record and they were not submitted to the Office of State Review. Even assuming the brief was submitted one day late as set forth in the petition, and upon consideration of the evidence in the hearing record I find that any prejudice suffered by the parents was no so great that it requires reversal of the impartial hearing officer's decision.

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

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

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Impartial Hearing Officer Decision

Concerning the parents' contention that the decision of the impartial hearing officer should not be upheld due to the fact that he did not personally hear all of the testimony and claims that he ignored evidence and failed to reference or describe several matters to the parents' satisfaction, I note that, pursuant to 8 NYCRR 200.5(j)(5)(v), the decision of an impartial hearing officer must be based solely upon the record of the proceeding before the impartial hearing officer. In essence, the parents contentions appear to be that the impartial hearing officer deviated from acceptable norms of a fact-finding process. With regard to deference, a State Review Officer gives due deference to the credibility findings of the impartial hearing officer, unless the hearing record read in its entirety would compel a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F. 3d 520, 524 [3d Cir. 1995]; Application of a Student with a Disability, Appeal No. 11-074; Application of a Student with a Disability, Appeal No. 11-064; Application of a Student with a Disability, Appeal No. 10-018; Application of the Bd. of Educ., Appeal No. 09-087; Application of a Student with a Disability, Appeal No. 08-157; Application of the Dep't of Educ., Appeal No. 08-105; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Bd. of Educ., Appeal No. 08-074; Application of the Dep't of Educ., Appeal No. 08-037).

Here, some of the impartial hearing officer's findings were brief; however, I find that the impartial hearing officer did not deviate acceptable norms in the process of conducting the hearing or making his findings of fact. As one court has noted "while it would of course be preferable for hearing officers to explain their analysis in as much detail as possible, a hearing officer's failure to meet this aspirational standard does not provide a basis for concluding that the factual findings contained in a statutorily compliant written opinion were not regularly made (J.P. v. County School Bd. of Hanover County, Va., 516 F.3d 254, 262 [4th Cir. 2005]).[7] I also note that the impartial hearing officer did not make any credibility findings with respect to any particular witness. Moreover, I have conducted a thorough, independent review of the issues in this matter with due consideration to the hearing record before me and, as further described below, find no reason to disturb his conclusions (see e.g. Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-101).

June 2010 CSE Process

Composition of the CSE

I will next address the parents' contention that the CSE was inappropriately constituted because the regular education teacher was not present for the full length of the June 2010 CSE meeting. A district's CSE must include not less than one regular education teacher of the student if the student is, or may be, participating in the general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate," participate in the development of the IEP of

[7] The issue of deference is treated differently depending on whether there is a single tier or two-tiered administrative review (see e.g., Gagliardo, 489 F.3d at 114, n.2 [citing Karl v. Board of Educ., 736 F.2d 873, 877 [2d Cir.1984]]).

the student, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel (20 U.S.C. § 1414[d][3][C]; see 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]). Here, the student's mother testified that the regular education teacher was not present at the time the CSE meeting commenced and that he appeared to want to leave during the meeting (Tr. p. 376). Notably, the parents do not assert that the CSE conducted any business prior to the regular education teacher's attendance (see Tr. pp. 375-77). The student's mother also testified that the CSE chairperson explained to the regular education teacher that he must attend the CSE meeting until its conclusion (Tr. p. 376). Additionally, the district school psychologist testified that the regular education teacher was present for the full CSE meeting (Tr. pp. 62-63). Moreover, it is undisputed that a general education environment was not contemplated for the student for the 2010-11 school year (Pet. ¶¶ 25-30; Answer ¶¶ 30, 54; Parent Ex. D at p. 16). Accordingly, I find that the composition of the June 2010 CSE was appropriate

Predetermination and Parental Participation

Turning next to the parties' dispute regarding whether the January 2010 CSE engaged in impermissible predetermination when formulating the student's IEP and whether the district failed to treat the parents as "full members of the CSE," I find that the parents' claims are not supported by the hearing record. The consideration of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal 10-070). Courts have rejected predetermination claims where the parents have actively and meaningfully participated in the development of the IEP or where there was credible evidence that the school district maintained the requisite open mind during the CSE meeting (J.G. v. Kiryas Joel Union Free School District, 2011 WL 1346845, at *30-31 [S.D.N.Y. Mar. 31, 2011] [rejecting the parents' assertion that the offer of a "cookie-cutter" placement rose to the level of impermissible predetermination]).

Here, the hearing record reflects meaningful and active parental participation in the development of the student's June 2010 IEP and a willingness among the CSE members to consider different program options for the student. The student's mother attended the June 2010 CSE meeting in person and the student's first grade teacher, a social worker, and principal from Beacon attended by telephone (Parent Ex. D at p. 2). The hearing record does not reflect that the student's mother was denied an opportunity to ask questions or offer input regarding the student's proposed program during the June 2010 CSE meeting (Tr. pp. 377-83). Rather, the hearing record reveals that the parent and the Beacon representatives were able to communicate their concerns about the proposed program and that the CSE decided to add a behavioral paraprofessional in response to the concern that the recommended placement would be too large a setting for the student (id.). The hearing record also reflects that the CSE considered other placement options for the student including placement in a 6:1+1 special class in a special school, which was rejected as too restrictive for the student, and placement in a 12:1+1 special class in a community school without

a behavioral paraprofessional, which was rejected as insufficient to address the student's academic, social, and emotional needs (Parent Ex. D at p. 16).[8] Based on the foregoing, I find that the evidence in the hearing record does not support a finding that the district predetermined the student's program for the 2010-11 school year, but instead shows that the parent meaningfully participated and contributed to the development of the student's IEP during the June 2010 CSE meeting.

Evaluative Data and Present Levels of Performance

The parents assert that the CSE failed to consider sufficient evaluative data to support their recommendations insofar as the CSE failed to conduct a new evaluation and classroom observation or sufficiently consider the recommendations contained in the student's most recent neurodevelopmental reevaluation, and that the IEP did not accurately reflect the student's present levels of performance. 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. 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]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 C.F.R. § 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

[8] The student's mother testified that she also discussed placing the student in an 8:1+1 or an 8:1+2 setting at the June 2010 CSE meeting and was told that these settings "probably exist[], they exist, but not in your district" (Tr. p. 378). It appears that the student's mother may have misconstrued the discussion at the CSE as her testimony during cross-examination suggested that the district CSE member she was speaking with may have been referring to options that were available to the student in a specialized school district in which the student could have been placed, but not in the student's "home zone" (Tr. pp. 413-15).

In this case, the district school psychologist testified that the district last evaluated the student in 2008 (Tr. p. 66).[9] In addition, the school psychologist also testified that the June 2010 CSE reviewed the student's full record including the 2008 evaluations (Tr. p. 84). According to the testimony of the school psychologist and the student's mother, the neurodevelopmental reevaluation report was available to the CSE and the members reviewed the recommendations contained within the report (Tr. pp. 70, 377). The school psychologist testified that the CSE's recommendation of a 12:1+1 special class was based on the information contained within the neurodevelopmental reevaluation report which indicated that the student exhibited progress within his 6:1+1 class at Beacon, but that he continued to require a small class setting (Tr. pp. 70-71). Accordingly, I find that the hearing record does not support the parents' contention that the CSE failed to consider sufficient evaluative information. Additionally, I find that the district was not required to reevaluate the student prior to the June 2010 CSE meeting as the student's educational needs did not warrant a reevaluation and the parents did not request a reevaluation.

On the June 2010 IEP, the student's present levels of performance in the areas of academic and functional performance consisted of both teacher estimates of instructional levels and a narrative description of the student (Parent Ex. D at p. 3). The student's first grade teacher at Beacon, who participated in the June 2010 CSE meeting, provided the teacher estimates of the student's abilities in reading, math, writing, and listening comprehension (Tr. pp. 65-66). The student demonstrated upper first grade level skills in reading comprehension, decoding, listening comprehension, and writing (Parent Ex. D at p. 3). The student also demonstrated mid-first grade level skills in math computation and math problem solving (id.).

The student's present levels of performance in the areas of academic and functional performance in the June 2010 IEP indicated that the student demonstrated deficits in the areas of receptive, expressive, and pragmatic language which negatively affected his communication with others (Parent Ex. D at p. 3). The student followed classroom rules and was willing to attempt all tasks but exhibited difficulties with peer interactions (id.). The IEP indicated that the student spoke quickly with poor and inconsistent articulation resulting in difficulty in understanding the student's speech (id.). The student exhibited difficulties with understanding classroom lessons and short stories requiring additional assistance (id.).

The social/emotional present levels of performance in the June 2010 IEP indicated that the student exhibited delays in social/emotional functioning and behavior (Parent Ex. D at p. 4). The present levels of performance in the area of health and physical development in the June 2010 IEP indicated that the student demonstrated delays in bilateral coordination, fine motor skills, balance, visual/depth perception, and activities of daily living (id. at pp. 6-7). The student exhibited difficulties with walking on stairs and maneuvering beyond obstacles in his path (id. at p. 6). The principal at Beacon testified that she believed the present levels of performance on the June 2010 IEP were accurate (Tr. pp. 195-97).

Based on the foregoing, I find that the June 2010 CSE reviewed sufficient evaluative data including the neurodevelopmental reevaluation report and that the IEP accurately described the

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[9] The school psychologist stated that the student was most likely also observed while at Beacon in 2009, but that she was not entirely sure that an observation was conducted (Tr. pp. 80-81).

student's needs in the areas of academics, speech-language, social/emotional functioning as well as fine and gross motor skills.

June 2010 IEP

12:1+1 Special Class in a Community School Placement

Next, I will address the parents' contention that the impartial hearing officer erred in finding that the proposed 12:1+1 special class placement was reasonably calculated to address the student's special education needs because that placement would not have provided sufficient support to meet the student's needs due to its large class size. As set forth herein, I find that the hearing record does not substantiate their claim. Rather, a careful review of the hearing record reveals that the 12:1+1 special class was designed to offer a FAPE to the student, because the proposed placement would provide an appropriate level of support for him in the areas of language processing, academics, and social skills and that the recommended special class combined with the provision of a 1:1 behavior management paraprofessional and related services of speech-language therapy, counseling, OT, and PT were reasonably calculated to address the student's academic, language, and social/emotional needs.

According to the school psychologist, the CSE members—including the student's mother—agreed that a 12:1+1 special class was an appropriate placement for the student (Tr. pp. 70-71, 93-94).[10] However, the student's mother testified that she had requested that the June 2010 CSE consider Beacon for the student's placement and also asked the CSE to consider other placements on the continuum (Tr. p. 377-78). The IEP indicated that a 6:1+1 special class would be too restrictive for the student (Parent Ex. D at p. 16). According to the testimony of the school psychologist, the CSE developed a program for the student in part by considering the private neurodevelopmental reevaluation of the student (Tr. pp. 71-72). The school psychologist further testified that the CSE recommended a 12:1+1 special class placement for the student based on his progress at Beacon (Tr. p. 71). According to the school psychologist, the CSE recommended 12-months of related services in the areas of speech-language therapy, OT, PT, and counseling to prevent the student from regressing in these areas and because it was important to maintain consistency with related services over time and was "clinically appropriate" for the student (Tr. pp. 74-75).

Consistent with the testimony of the district school psychologist, the hearing record confirms that during the 2009-10 school year, the student demonstrated progress in the areas of academics, language processing, articulation, social/emotional functioning, and fine motor skills (Tr. pp. 217-220, 224; Parent Exs. L; M; N; O). The private developmental pediatrician and physiatrist who conducted the March 17, 2010 neurodevelopmental reevaluation of the student found, upon retesting the student, that the student demonstrated increased cooperation, attention, and eye contact (Parent Ex. M at p. 1). The student also exhibited progress in following directions, self-advocacy skills, participating in class, and following a classroom lesson (Parent Exs. L at p. 2; N at p. 1). The student continued to present with severe delays in expressive, receptive, and pragmatic language (Parent Ex. M at p. 1; N at p. 1). The student demonstrated progress with

[10] The principal at Beacon testified that during the June 2010 CSE meeting she disagreed with the recommendation of a 12:1+1 special class for the student (Tr. pp. 194, 201).

respect to articulation, but continued to require "significant therapy" in this area (Parent Ex. N at p. 1). The hearing record also indicated that the student exhibited significant improvement with peer interactions and exhibited progress in reading, math, writing, and handwriting (Parent Ex. L at pp. 1-2). The student was developing skills related to reading comprehension (id. at p. 1). However, the student continued to exhibit difficulties with social skills, reading, math as well as fine and gross motor skills including balance and coordination (Parent Ex. D at pp. 3-7). Overall, the principal at Beacon testified that during the 2009-10 school year, the student exhibited "nice progress" (Tr. pp. 189-90).

The CSE recommended five 30-minute sessions of individual speech-language therapy per week, five 30-minute sessions of individual OT per week, two 30-minute sessions of individual PT per week, one 30-minute session of individual counseling per week, and one 30-minute session of counseling per week in a group of three (Parent Ex. D at p. 17). The student was recommended to receive extended year related services of speech-language therapy, OT, PT, and counseling (id. at p. 1). The CSE recommended these related services to address the student's identified and continued needs in the areas of fine motor, gross motor, social/emotional functioning, and articulation as well as receptive, expressive and pragmatic language (id. at pp. 3-7, 17).

The CSE also recommended a 1:1 behavioral management paraprofessional for 50 percent of the school day (Parent Ex. D at p. 17). The behavioral management paraprofessional would assist the student based on his needs (Tr. p. 31). The behavioral management paraprofessional would provide the student support with academic instruction, maintaining his attention, and facilitating the teacher directed instruction (Tr. pp. 31-32, 133-34).

In light of the above, I find that the CSE's recommendation of a 12:1+1 special class in conjunction with a 1:1 behavior management paraprofessional and the recommended related services, including summer related services, would have provided the student with sufficient support such that he was offered a FAPE.

In regard to the parents' claim that the annual goals on the June 2010 IEP could not be implemented within the recommended 12:1+1 special class, I note that the hearing record indicted that the student's annual goals were written by Beacon staff and adopted by the district in the June 2010 IEP (Tr. p. 200). The parents do not assert that the student's annual goals were inappropriate, rather that the annual goals could not be successfully implemented within a 12:1+1 special class because the student required the support and comfort level that could only be provided in a smaller class setting (see Tr. p. 200). The June 2010 IEP contained annual goals that were targeted to the student's areas of need in communication, social/emotional functioning, articulation, academics as well as receptive, expressive, and pragmatic language (Parent Ex. D at pp. 8-14). The student's IEP contained annual goals related to language processing and academics to address the student's needs in the areas of receptive, expressive, and pragmatic language as well as reading, writing, and math (id. at pp. 12-14). The student's occupational and physical therapist could have addressed the student's annual goals related to fine and gross motor skills (id. at pp. 8-9; Tr. pp. 29, 38). The student's annual goals related to social/emotional functioning could have been addressed during the student's counseling sessions as well as in the 12:1+1 special class (Parent Ex. D at pp. 10-11; Tr. p. 29). For example, the student's annual goal related to effectively interacting with adults and peers could have been addressed through teacher interventions and well as intervention techniques utilized within a counseling session (id). Accordingly, and in conjunction with the above finding that the June 2010 IEP provided the student with appropriate support, related services, and

accommodations, I find that the annual goals were appropriate and could have been implemented within the recommended 12:1+1 special class and related service sessions.

Adapted Physical Education

Regarding the parents' contention that the conflicting recommended student/teacher ratios for adapted PE within the June 2010 IEP contributed to a denial of FAPE, I note that it was not an ideal practice for the CSE to enter all of the descriptions and recommendations regarding the student's health and physical development available to it directly into the IEP, rather than synthesizing the recommendations into a single coherent entry (Parent Ex. D at pp. 5-7).[11] However, this obvious error in recording the information on the IEP would likely have been easily corrected with a question to district personnel from the student's adapted PE provider and it does not rise to the level of a denial of FAPE.

Parent Counseling and Training

Next, I turn to the parents' assertion that the omission of parent counseling and training in the June 2010 IEP contributed to a denial of a FAPE to the student. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). Under State regulations, the definition of "related services" includes parent counseling and training (8 NYCRR 200.1[qq]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 C.F.R. § 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y. Oct. 28, 2011]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. March 25, 2010]), or where the district was not unwilling to provide such services at a later date (see M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]; but c.f., P.K. v. New York City Dep't of Educ., 2011 WL 3625088, at *9 [E.D.N.Y. Mar. 2011]; adopted at 2011 WL 3625317 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *21 [E.D.N.Y. Jan. 21, 2011] adopted at 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]).[12]

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[11] The student's IEP indicated that the student received adapted physical education in a 6:1+1 class and a 12:1+1 class (Parent Ex. D at pp. 5-7). The district's school psychologist testified that the notation of the 6:1+1 adapted physical education class was likely an oversight (Tr. pp. 68-69). The hearing record reflected that the assigned school offered adapted physical education and the assistant principal at the assigned school testified that the student would be placed in an adapted physical education class based on his needs and functioning levels as determined by the adapted physical education teacher (Tr. pp. 23, 38-39).

[12] To the extent that P.K. or R.K. may be read to hold that the failure to adhere to the procedure of listing parent counseling and training on an IEP constitutes a per se, automatic denial of a FAPE, I note that Second Circuit authority does not appear to support application of such a broad rule (see A.C., 553 F.3d. at 172 citing Grim, 346 F.3d at 381 [noting that it does not follow that every procedural error renders an IEP inadequate]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, *16 [E.D.N.Y., Oct. 30, 2008]).

Although the provision of parent counseling and training is not listed on the June 2010 IEP, the hearing record reflects that parent counseling and training would have been available at the assigned school (Tr. pp. 24-26, 124-25). The assistant principal at the assigned school testified that the assigned school employed a parent coordinator (Tr. p. 24). The parent coordinator conducted monthly workshops and provided information to parents through a website (Tr. pp. 24-25). The parent coordinator also addressed parents' questions and concerns (Tr. p. 24). The social worker at the assigned school conducted "message classes" for parents regarding autism (Tr. p. 26). The district assistant principal also testified that parents could meet with the school psychologist, the school's social worker and related service providers by appointment (Tr. pp. 25-27). The special education teacher at the assigned school testified that parent training was offered both on an individual basis by appointment with the psychologist and social worker and on a group basis in the form of workshops (Tr. pp. 124-25). The parent workshops covered a variety of topics and were based on the parents' needs (Tr. p. 125). The student's mother testified that during the June 2010 CSE, the district indicated that most of its schools offered workshops for parents, but that the district could not indicate parent training on the IEP (Tr. pp. 379-80). During fall 2010, the private psychologist began providing the parents with 45-minute weekly parent training sessions with respect to student's social skills, behavior, and generalization of skills (Tr. pp. 313-16, 419).

Under the circumstances presented herein, I concur with the impartial hearing officer's finding (IHO Decision at p. 8; see Tr. pp. 313-16, 419) that the district should have complied with the State regulations by identifying parent counseling and training on the June 2010 IEP; however, given that parent counseling and training was available at the assigned school, the district's failure to incorporate it into the challenged IEP did not result in any substantive harm, nor did it, in this case, rise to the level of a denial of a FAPE to the student (see C.F., 2011 WL 5130101, at *10; M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509).

Transition Support Services

With regard to the parents' contention that the district failed to develop a transition plan for the student, the IDEA does not specifically set forth the provisions requiring a school district to formulate a "transition plan" as part of a student's IEP when a student moves from one school to another.[13] However, under separate State regulations, "transition support services" are to be provided to a regular or special education teacher to aid in the provision of services to a student with a disability who is transferring to a regular program or to a program or service in a less restrictive environment (8 NYCRR 200.1[ddd]; 200.4[fff]). I find that for the reasons discussed

[13] Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 C.F.R. § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 C.F.R. § 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.).

below, any perceived lack of transition support by the student's teacher did not rise to the level of a denial of a FAPE to the student.[14]

In this case, the evidence in the hearing record does not show that the student demonstrated particular difficulty with transitions. The hearing record showed that the student transitioned from a 1:1 ABA instruction program to the "more academic and social setting" at Beacon where "he has done exceptionally well" (Parent Ex. P). According to the developmental pediatrician and psychiatrist who conducted the March 2010 neurodevelopmental reevaluation, the student had not displayed any oppositional behaviors during the evaluation and had made improvements in behavior, cooperation, and attention (Parent Ex. M at p. 1). The evaluator noted that although the student had made gains in behavior, "some impulsive behaviors and weak social skills persist" and that he continued to require "one-on-one attention" (id. at pp. 1, 4-5). This evidence is sufficiently in harmony with the description of the student in the IEP, as well as the provision of a part-time 1:1 behavioral paraprofessional (Parent Ex. D at pp. 4, 17). Transition support services were not required for the student.

Even though transition support services were not required, the district assistant principal at the assigned school testified that the student assessment team at the assigned school assisted students with transitions (Tr. p. 50). The psychologist and social worker at the assigned school meet with parents to develop goals that target student transition needs (id.). A transition plan would be developed with the teacher and parents serving as informants based on the transition needs of the student (Tr. pp. 33-34). If needed, the student assessment team would also develop a behavior intervention plan for the student based on his needs (Tr. pp. 52-53). The paraprofessional would assist the student during transition times on an as needed basis (Tr. p. 31). Accordingly, the hearing record reflects that the district was capable of providing transition support services in order to facilitate the student's placement in the assigned school in the event that it was later determined that the student required such services (see A.L. v. New York City Dep't of Educ., 2011 WL 4001074, at *12 [S.D.N.Y. Aug. 19, 2011]). Under the circumstances of this case, I find that the lack of specified services on the June 2010 IEP to assist the student in transitioning from Beacon to the public school program did not impede the student's right to a FAPE, significantly impede the parents' meaningful participation in the CSE process, or cause 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]).

Assigned School

Functional Grouping

I will next address the parents' contention that the student would not have been grouped appropriately in the assigned class. 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

[14] The Office of Special Education recently issued a guidance document updated in April 2011 entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents" which describes transition support services for teachers and how they relate to a student's IEP (see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

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).

In this case, a meaningful analysis of the parents' claim with regard to functional grouping would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]). 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]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from

substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parents rejected the IEP and enrolled the student at Beacon prior to the time that the district became obligated to implement the student's IEP. Thus, the district was not required to establish that the student had been grouped appropriately upon the implementation of his IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 12:1+1 special class at the assigned district school provided the student with suitable grouping for instructional purposes and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. 2011 WL 4001074, at *9.

According to the hearing record, in September 2010, the assigned class consisted of nine students, including seven students who were verbal and two students who were verbal with prompts (Tr. pp. 127-28). The students in the assigned class have received educational classifications of orthopedic impairment, mental retardation,[15] speech or language impairment, and learning disability (Tr. p. 156). Testimony by the special education teacher of the assigned class showed that the students' instructional reading levels fell at the prekindergarten through first grade and their math levels were at the kindergarten through second grade level (Tr. pp. 123-24, 146, 154, 160-61). The student's instructional levels were upper first grade in reading and mid-first grade in math (Parent Ex. D at p. 3). The assigned school provided mainstreaming opportunities for the students within the assigned class if appropriate based on student needs (Tr. p. 129). The special education teacher provided whole group and differentiated instruction within the assigned class (Tr. p. 123). The students were also instructionally grouped according to their academic levels (Tr. pp. 160-61). According to the testimony of the special education teacher, the student exhibited similar social/behavioral concerns compared to the students within the assigned class (Tr. p. 139). The special education teacher at the assigned school testified that the student would have been in an appropriate functional grouping within the 12:1+1 special class (Tr. p. 123). Given these facts and circumstances, I decline to find a denial of a FAPE on the ground that the student would not be appropriately grouped for instructional purposes with other students in the assigned class, particularly in the case here where the student never attended the assigned school.

Conclusion

Based on the foregoing, I find that the June 21, 2010 IEP, and the recommended 12:1+1 placement with a part-time behavior management paraprofessional was designed to address the student's needs, that the recommended special education programs and related services were 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). Although it is clear from the hearing record that the parents have real concern for the well-being of their child, the student in this case, and I am encouraged that the student is making admirable progress in overcoming his disabilities in the educational setting provided by his

[15] Mental retardation is currently referred to as an intellectual disability (8 NYCRR 200.1[zz][7]).

parents, I find that the IEP developed by the CSE offered the student a FAPE. Having determined that the district offered the student a FAPE, it is not necessary for me to consider the appropriateness of the program that the parents obtained for the student, or whether the equities support their claim for tuition reimbursement (see MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). I have also considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 13, 2012

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JUSTYN P. BATES
STATE REVIEW OFFICER