



The University of the State of New York

The State Education Department
State Review Officer
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No. 11-147

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

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Law Offices of Lauren A. Baum, P.C., attorneys for respondents, Lauren A. Baum, 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 Kulanu Academy (Kulanu) for the 2010-11 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending Kulanu, where he was placed in a special class which focused primarily on life skills, functional academics, and vocational training, and received 1:1 crisis management paraprofessional services to moderate his behavior and refocus his attention, and additional related services consisting of counseling, once per week for 45 minutes per session in a 1:1 setting and once per week for 45 minutes per session in a 3:1 setting, occupational therapy (OT), twice per week for 45 minutes per session in a 1:1 setting, physical therapy (PT), twice per week for 45 minutes per session in a 1:1 setting, and speech-language therapy, twice per week for 45 minutes per session in a 1:1 setting and once per week for 45 minutes per session in a 3:1 setting (see Tr. pp. 749-50, 797-99, 839-42, 887; Parent Exs. A at p. 4; J; U at p. 1; Z; KK). The student's special class at Kulanu totaled 12 students, a special education teacher, a teacher assistant, and, in addition to the student's 1:1 crisis management paraprofessional, five other 1:1 paraprofessionals assigned to individual students in the class (Tr. pp. 955-59, 963) Kulanu, which is described in the hearing record as a small ungraded special education school for students aged 11 to 21 serving students with speech/language impairments, emotional disabilities, intellectual challenges, multiple disabilities, and students on the autism

spectrum (Tr. p. 1235), 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).

According to the hearing record, the student received diagnoses of a pervasive developmental disorder (PDD) and a "social communication disorder," and exhibited anxiety, which was managed pharmacologically (Dist. Exs. 6 at p. 1; 9 at p. 5). In a November 2010 administration of the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III), the student received a full scale IQ of 62, placing him in the extremely low range of cognitive ability (Parent Ex. P at pp. 1-3). He was described in the hearing record as exhibiting significant deficits in all academic areas, with estimated instructional levels in reading and math ranging from mid fourth grade to sixth grade level, although his academic performance was characterized as "inconsistent" due to his behaviors (Tr. pp. 1010-15; Dist. Ex. 9 at p. 3). The student's executive functioning skills were described as "weak," and he demonstrated impulsivity, fluctuating attention, distractibility, self-regulatory deficits that significantly compromised his academic performance and his social interactions with peers, perseverative behaviors including tangential conversation, inappropriate vocalizations (screaming repetitive phrases) and hand flapping, touched staff members inappropriately, and fell asleep in class (Tr. pp. 890, 1017-18, 1244; Dist. Ex. 9 at p. 4). The hearing record also reflects student deficits in receptive, expressive and pragmatic language skills (Tr. pp. 849-50, 854, 856; Dist. Ex. 2 at p. 1), and indicates that in addition to the support provided by his 1:1 crisis management paraprofessional, Kulanu implemented a behavioral intervention plan (BIP) to assist the student to stay on task and manage his behavior (Tr. p. 891; Dist. Ex. 9 at p. 4). The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

Background

The hearing record indicates that the student was determined eligible for special education and related services, both as a preschool student with a disability by the Committee on Preschool Special Education (CPSE), and as a grade school student by the Committee on Special Education (CSE), and received special education and related services while attending several public and nonpublic schools; he was eventually placed by his parents at Kulanu, which he attended since September 2007 (Tr. pp. 1512-16; Dist. Ex. 6 at p. 2).

In February 2008, the parents obtained a psychological evaluation of the student "to document [the student's] current cognitive skills, academic attainments and emotional functioning in order to develop a comprehensive support plan" (Dist. Ex. 6 at pp. 1-2).

On April 21, 2009, the CSE convened for the student's annual review to develop his individualized education program (IEP) for the 2009-10 school year (Parent Ex. F at pp. 1-2). The April 2009 CSE recommended a 10-month¹ educational program consisting of a 15:1 special class in a community school, a full time 1:1 crisis management paraprofessional, and related services consisting of counseling, OT, PT, and speech-language therapy (id. at pp. 1, 13-14). The parents

¹ Although the April 2009 IEP indicated that the student was not recommended for a 12-month program, the April 2009 CSE nevertheless recommended "related services for July and August 2009 (6 weeks only)" (Parent Ex. F at p. 1).

ultimately enrolled the student at Kulanu for the 2009-10 school year (see Dist. Exs. 6 at p. 2; 8 at pp. 1-3).

On January 20, 2010, and January 31, 2010, respectively, the student's speech-language pathologist and OT therapist, both from Kulanu, generated progress reports describing the student's performance during the first semester of the 2009-10 school year (Dist. Exs. 2-3). On February 1, 2010, the student's PT therapist and social worker who provided counseling services to the student, both from Kulanu, also generated progress reports (Dist. Exs. 4-5). A February 9, 2010 vocational education progress report generated by Kulanu's vocational education coordinator described the student's performance in the school's vocational education program during the first semester of the 2009-10 school year (Dist. Ex. 1).

On March 10, 2010, the CSE convened for the student's annual review to develop his IEP for the 2010-11 school year (Dist. Ex. 9 at pp. 1-2; Parent Ex. Q). The CSE was comprised of a special education teacher, who dually functioned as a district representative, a school psychologist, an additional parent member, and both parents; participating telephonically from Kulanu were the student's special education teacher, and the student's related services providers of counseling, speech-language, OT, and vocational services (Dist. Ex. 9 at p. 2; see Tr. pp. 30-31; Parent Ex. Q at p. 1).

The March 2010 CSE continued the student's eligibility for a special education program and related services as a student with a speech or language impairment, and recommended a 12-month educational program consisting of a 12:1+1 special class in a special school; a 1:1 crisis management paraprofessional; related services consisting of counseling, once per week for 45 minutes per session in a 1:1 setting and once per week for 45 minutes per session in a group of 3, OT, twice per week for 45 minutes per session in a group of 3, PT, twice per week for 45 minutes per session in a 1:1 setting, and speech-language therapy, twice per week for 45 minutes per session in a 1:1 setting and twice per week for 45 minutes per session in a group of 3, all of which were to be provided at a separate location; program modifications consisting of preferential seating, verbal and visual cues, small group instruction, teacher redirection to task, directions/instructions repeated and rephrased as needed, scaffolding, a multisensory approach, and positive reinforcement of on-task behaviors; and a transition plan (Dist. Ex. 9 at pp. 1-5, 13, 15-16, 17; see Parent Ex. Q at p. 2). The CSE also developed a BIP and determined that the student was eligible to participate in alternate assessment (Dist. Ex. 9 at pp. 15-16, 18; see Tr. pp. 95, 580).

In a letter dated June 10, 2010, the district summarized the recommendations of the March 2010 CSE and notified the parents of the school to which the student was assigned for the 2010-11 school year (Dist. Ex. 10). By letter to the district dated June 21, 2010, the student's father acknowledged receipt of the district's June 10, 2010 letter, and advised that, although he would be "unable to review the recommended program and consider its adequacy" within the timeframe provided in the district's letter, he intended to provide a response to the assigned school "as soon as possible thereafter" (Parent Ex. D).

By letter to the district dated July 2, 2010, the student's father referenced a visit to the assigned school on June 15, 2010 and a subsequent telephone conversation with the district's unit coordinator on June 23, 2010, and rejected the recommended placement (Parent Ex. E; see Tr. pp. 1533-36). Specifically, the student's father asserted that: the transition work class offered by the assigned school was inappropriate for the student, because the student would not have been

afforded the opportunity to attend actual worksites, which would have caused a "regression in his current level of work-readiness," because the student would have been the oldest member of the class, and because the class did not offer a 1:1 "work coach;" the environment of the gymnastics room at the assigned school would have distracted the student; the assigned school was too large for the student; and the assigned school would have been unable to fulfill the levels of the student's related services as recommended in the March 2010 IEP or provide the student with adequate individual attention (Parent Ex. E at p. 1). The student's father also advised the district that he intended to enroll his son at Kulanu for the 2010-11 school year and would seek public funding of his tuition (id. at p. 2).

On September 3, 2010, the student began the 2010-11 school year at Kulanu (see Parent Exs. J; Z). On September 12, 2010, the student's father executed an enrollment contract with Kulanu reserving the student's seat in the school for the 2010-11 school year, and, two days later on September 14, 2010, he remitted his first payment for the student's tuition for the 2010-11 school year (Tr. p. 1551; Parent Exs. X-Y). On September 20, 2010, the student's teacher from the preceding school year at Kulanu completed a career assessment educational staff report,² which included a career skills profile of the student (Parent Ex. EE). The student's previous teacher indicated that with "continued coaching," the student demonstrated skills in the areas of basic academic skills, thinking skills, personal qualities, interpersonal skills, use and understanding of resources, information systems, technology, career development, integrated learning, and career majors (id. at pp. 1-5). The student's previous teacher also indicated that the student utilized strategies or accommodations, including written instructions and behavior modification, to remain on task, that he had prior experience in stocking shelves at a food pantry, and that the student was currently participating in a "shadowing program" (id. at pp. 5-6). She further identified the student's strength in "looking for items that [were] the same" and his weakness in "attention to task," and noted that he exhibited "behavioral issues [that] prohibit[ed] some growth" (id.).

In November 2010, the student was reevaluated by the private psychologist who conducted his February 2008 psychological evaluation (Parent Ex. P). Standardized test results continued to place the student within the extremely low range of functioning (id. at pp. 2-3), while results from standardized assessments of his academic achievement, which ranged from the low average to average range of functioning, reflected academic abilities well above those expected based upon his verbal IQ (id. at pp. 4, 5).³

The student's first trimester report card from Kulanu for the 2010-11 school year indicated that the student was "approaching expectations" in reading, writing, and speaking/listening, was "meeting expectations" in functional math, was passing his "life skills science" and occupational/vocational classes, and that his effort and class behavior "needed attention" (Parent Ex. AA at p. 1).

² According to the hearing record, career assessment educational staff reports were typically completed in September of each school year by each student's classroom teacher from the preceding school year, and the content was based upon the teachers' knowledge of the student accumulated over the course of the preceding school year (see Tr. p. 1140).

³ The psychological evaluation report reflected that because the student's pragmatic language problems made tasks of reading comprehension extremely difficult for him, the evaluating psychologist obtained no formal measure of the student's reading comprehension (Parent Ex. P at p. 5).

On December 15, 2010, the student's job coach from Kulanu completed a work-based learning profile of the student wherein she rated the student's work performance in the school's vocational education program in the areas of basic (academic) skills, thinking skills, personal qualities, interpersonal skills, using technology, managing information and resources, understanding systems, and career and life choices; review of the profile indicates that the student received assessments of "need[ing] development" and showing "no evidence of skill" across multiple domains (Tr. pp. 1135, 1143, 1227; Parent Ex. FF at pp. 1-8).

The student's second trimester report card from Kulanu for the 2010-11 school year demonstrated improvement in his academic performance in writing, in which he was assessed as "meeting expectations," and effort, which was deemed "acceptable," and further reflected that he was passing his life skills science, occupational/vocational, physical education, and music classes (Parent Ex. BB at p. 1). A vocational progress report attached to the report card described the student's progress in decreasing his inappropriate behaviors at worksites and increasing his independence level, but also noted that additional improvement was needed in the rate at which he worked and in his ability to attend to tasks in order to improve his efficiency (*id.* at pp. 4-5). His job coach targeted increasing the student's work-related conversations with his co-workers and managers, considering alternative solutions to solve problems, and discriminating quality in completed tasks as skills to be addressed going forward (*id.* at p. 5).

On March 29, 2011, a transition meeting was conducted at Kulanu to discuss the student's transition plan (Parent Ex. DD at p. 1). Meeting attendees included the Kulanu's director of education, the school coordinator, the student's job coach, the student's current classroom teacher, and the parents (Tr. pp. 1135-36, 1141; Parent Ex. DD at p. 1). The resultant report reflected that, among other things, the meeting discussed the student's living options, program choices, service coordination, and guardianship options (Parent Ex. DD at pp. 1-3).⁴

Due Process Complaint Notice

By amended due process complaint notice dated April 21, 2011,⁵ the parents alleged, among other things, that the March 2010 IEP was invalid and that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year, that Kulanu was an appropriate placement for the student for the 2010-11 school year, and that equitable considerations supported the parents (Parent Ex. A at pp. 1-5). Specifically, the parents alleged that the March 2010 CSE was improperly constituted and failed to consider current, sufficient, and appropriate evaluative data in developing the student's March 2010 IEP (*id.* at pp. 2-3). The parents asserted that the March 2010 IEP contained deficient present levels of performance and annual goals and short-term objectives, because the academic goals did not identify grade levels corresponding to the materials to be used to implement each goal, and because there was an insufficient number of goals, including only three generic goals addressing the student's receptive, expressive, and pragmatic language deficits and processing issues, and only one transition goal

⁴ I note that the student's transition plan for the 2010-11 school year at Kulanu was not included in the hearing record.

⁵ The hearing record reflects that the parents filed their original due process complaint notice on February 15, 2011 (*see* Dist. Ex. 11; Parent Ex. B), and that the district responded on February 25, 2011 and filed an amended response on March 16, 2011, which incorrectly referenced the date of the original due process complaint notice as "February 18, 2011" (*see* Dist. Ex. 12; Parent Ex. C at p. 1).

(id. at p. 3). They also contended that the transition plan was deficient, because: the CSE failed to consider or discuss adequate evaluative materials addressing the student's vocational skills or interests when developing the transition plan; the transition plan failed to include promotional criteria; it failed to identify the party responsible for providing the recommended transition services; and the recommended transition services were vague, generic, and insufficient (id.). The parents also alleged that the BIP developed by the district was deficient because: it was copied from the student's previous IEP; it was developed without a functional behavioral assessment (FBA); it failed to identify the student's problem behavior; it failed to include hypotheses as to why such behavior occurred; and it failed to propose appropriate intervention strategies to address said behaviors (id.). The parents also argued that the school to which the student was assigned was inappropriate for the student because: it was too large for the student; it would not have provided the student with the requisite levels of individual attention and support that he required to make academic and social progress; and because the "workforce training class" at the assigned school would not have provided the student with an appropriate student-teacher ratio, would not have appropriately grouped the student for functional purposes, would not have provided the student with a 1:1 work coach, and would not have enabled the student to spend time at work sites (id. at pp. 3-4).

The parents sought an order from an impartial hearing officer finding that the district failed to offer the student a FAPE for the 2010-11 school year and directing the district to reimburse them for the student's tuition, privately obtained related services, and transportation expenses incurred relative to their son's 2010-11 school year at Kulanu (Parent Ex. A at p. 5).

Impartial Hearing Officer Decision

An impartial hearing convened on April 28, 2011, and concluded on August 11, 2011, after nine days of proceedings. On October 4, 2011,⁶ the impartial hearing officer issued a decision, in which she determined, among other things, that the district failed to offer the student a FAPE for the 2010-11 school year, that the student's unilateral placement at Kulanu was appropriate, and that equitable considerations supported the parents' request for reimbursement (IHO Decision at pp. 14-48). The impartial hearing officer found that the parents were afforded the opportunity to meaningfully participate in the development of their son's IEP (id. at pp. 23-24). However, she further found that the March 2010 CSE improperly relied exclusively on progress reports and input from staff from Kulanu in developing the student's IEP and neglected to conduct updated evaluations or to adequately discuss the February 2008 psychological evaluation of the student (id. at pp. 16-18).

With respect to the March 2010 IEP, the impartial hearing officer found that the present levels of performance contained in the student's IEP were deficient because they provided an "incomplete portrait" of the student; the annual goals and short-term objectives were deficient because they were vague, not objectively measurable, and failed to list evaluative criteria; and the

⁶ The impartial hearing officer's decision bears the date of October 4, 2011 in the signature portion of the decision, but on the cover sheet, lists the decision date as October 11, 2011 (compare IHO Decision at p. 48, with IHO Decision coversheet). This discrepancy is not explained in the hearing record. I note that the district's appeal was timely commenced under the State regulations regardless of which date is ascribed to the impartial hearing officer's decision (see 8 NYCRR 279.3); however, for the sake of consistency, I use the October 4, 2011 date when referencing the impartial hearing officer's decision.

student's transition plan was deficient because it provided an incomplete description of one of the transition services listed and because it failed to identify the party responsible for implementing the transition services (IHO Decision at pp. 18-23, 25-26). The impartial hearing officer also found that the BIP developed by the district was deficient because it was developed in the absence of an FBA; it did not adequately identify or address the student's behaviors that interfered with learning, such as the student's inappropriate touching; it failed to address the frequency, duration, intensity, and/or latency of the targeted behaviors; it did not identify a schedule to measure the effectiveness of interventions; and it lacked hypotheses as to why the problem behaviors occurred (*id.* at pp. 18-19, 25-29).

With regard to the assigned school,, although the impartial hearing officer found that the student would have been appropriately grouped in the assigned class and that the parents' arguments that the assigned school was too large for the student, that the student would not have been offered the opportunity to participate in a worksite program, and that the student required the additional support of a 1:1 "work coach" at a worksite were not supported by the hearing record, she nevertheless found that the assigned school was inappropriate for the student because the one academic period per day offered to the student would have been insufficient to enable the student to progress, and because the assigned school would not have been able to deliver the student's related services at the levels recommended in the March 2010 IEP (IHO Decision at pp. 29-37).

In finding Kulanu an appropriate placement for the student for the 2010-11 school year, the impartial hearing officer concluded that it provided the student with appropriate special education programs and services to meet his unique needs, the student was appropriately grouped and received an appropriate amount of academic instruction per week, the related services and transition services provided to the student were designed to meet his individual needs, and the school's BIP⁷ was appropriate (IHO Decision at pp. 37-44). The impartial hearing officer rejected the district's argument that Kulanu was too restrictive, noting that the student was "exposed to and interacted with non-disabled members of the community at the worksites . . ." (*id.* at p. 44). In finding that equitable considerations supported the parents, the impartial hearing officer determined that the parents cooperated with the CSE, communicated their concerns about the assigned school, and provided "ample notice" of their intent to enroll the student at Kulanu (*id.* at p. 45). She rejected the district's contention that the parents were unwilling to place the student in an appropriate public school placement as unfounded "innuendo" (*id.* at pp. 46-47).

The impartial hearing officer ordered the district to reimburse the parents for tuition and privately obtained related services relative to the student's 2010-11 school year at Kulanu (IHO Decision at p. 48).^{8, 9}

⁷ I note that the student's BIP from Kulanu for the 2010-11 school year was not included in the hearing record.

⁸ According to the hearing record, the related services received by the student at Kulanu during the 2010-11 school year were not covered under the terms of the enrollment agreement, but rather, under a separate related service agreement that required the parents to reimburse Kulanu for said services (*see* Tr. pp. 1265-66, 1553-55; *compare* Parent Ex. X at p. 2, *with* Parent Ex. U).

⁹ The impartial hearing officer did not address the issue of reimbursement of transportation expenses in her decision (*see* IHO Decision at p. 48).

Appeal for State Level Review

The district appeals from the impartial hearing officer's decision, arguing that the 12:1+1 special class and related services recommended in the March 2010 IEP offered the student a FAPE in the least restrictive environment (LRE), that Kulanu was not appropriate for the student for the 2010-11 school year, and that equitable considerations favored the district. Specifically, the district asserts that: the March 2010 CSE relied upon appropriate evaluative data in developing the student's IEP; the annual goals and short-term objectives in the student's IEP were appropriate and were agreed upon during the CSE meeting by the parents and the student's special education teacher from Kulanu; the transition plan contained in the IEP was appropriate; and the BIP developed by the district was appropriate. The district further contends that it was not required to conduct an FBA prior to developing the student's BIP because the student was attending Kulanu at the time that the March 2010 CSE convened. The district also maintains that contrary to the impartial hearing officer's determination, the assigned school would have been able to implement the student's IEP, insofar as it could have provided the student with the levels of related services recommended in the student's IEP and would have provided him with meaningful educational benefits.

The district also alleges that the impartial hearing officer erroneously determined that Kulanu was appropriate for the student for the 2010-11 school year because: Kulanu did not offer the student a 12-month program; the student's class at Kulanu was overly restrictive; Kulanu failed to implement a BIP or provide the student with counseling services until halfway through the 2010-11 school year; Kulanu's BIP was inappropriate; and the student was not progressing academically or socially at Kulanu. Furthermore, the district argues that the impartial hearing officer erred in finding that equitable considerations supported the parents because the parents failed to establish that they had an obligation to reimburse Kulanu for any of the related services the student received during the 2010-11 school year. The district seeks an order reversing the impartial hearing officer's decision awarding reimbursement for tuition and related services to the parents.

The parents answer, countering, among other things, that for reasons similar to those advanced in their amended due process complaint notice, the impartial hearing officer correctly found that the district failed to offer the student a FAPE for the 2010-11 school year, that Kulanu was an appropriate placement for the student for the 2010-11 school year, and that equitable considerations favored the parents and did not preclude a reimbursement award. Specifically, the parents assert that Kulanu's 10-month educational program was appropriate for the student because the parents elected not to enroll their son in a summer program for the 2010-11 school year;¹⁰ that the student's class at Kulanu was not overly restrictive; that Kulanu appropriately addressed the student's needs; and that the student achieved academic and social progress during the 2010-11 school year at Kulanu. With regard to equitable considerations, the parents maintain that they cooperated with the CSE, they were willing to consider an appropriate public school placement, they visited the assigned school, and they properly notified the district of their rejection of the assigned school and their intention to enroll the student at Kulanu at public expense.

¹⁰ In their answer, the parents argue that the district should be precluded from raising arguments regarding the 12-month school year; however, as the impartial hearing officer correctly explained, the parents elected not to accept the district's offer of a summer program for the 2010-11 school year and it is of little consequence since they did not provide consent for the provision of summer services (see Tr. p. 1523; IHO Decision at p. 24).

The parents also object to the impartial hearing officer's dismissal of their arguments that the assigned school would not have enabled the student to participate in a worksite program and that the student required the additional support of a 1:1 "work coach" when attending a worksite.¹¹ The parents seek an order dismissing the district's petition and affirming those aspects of the impartial hearing officer's decision finding in their favor.

In its reply, the district argues that the parents should be precluded from asserting that the impartial hearing officer erred in dismissing some of their claims because they did not properly raise such objections in the form of a cross-appeal.

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

¹¹ In their answer, the parents also assert that the impartial hearing officer erroneously dismissed their argument that the assigned school was inappropriate because it would have been unable to deliver the levels of related services recommended in the March 2010 IEP. To the extent that the parents failed to cross-appeal the impartial hearing officer's decision to reject reliance on Special Education Delivery Reports, they cannot raise this point now (IHO Decision at p. 34; see Dist. Exs. M; N). However, I have addressed the parties' arguments below to the extent that the district was aggrieved by and appealed the impartial hearing officer's decision with regard the implementation of the student's related services at the school to which the student was assigned.

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

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

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

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

Discussion

Scope of Review

Unappealed Impartial Hearing Officer Findings

I note that the parents do not cross-appeal the impartial hearing officer's findings that they were afforded an opportunity to meaningfully participate in the development of their son's IEP, that the student would have been appropriately grouped in the assigned school, that the district did not improperly fail to obtain the parents' written consent to provide a 12-month educational program to the student pursuant to 8 NYCRR 200.5(b)(1)(iii), and that the hearing record did not support their arguments that the size of the assigned school was too large for the student and that the assigned school was insufficiently staffed to deliver the student's mandated OT and PT,¹² nor the impartial hearing officer's decision insofar as it did not address their allegation that the March 2010 CSE was improperly constituted (IHO Decision at pp. 23-24, 29-30, 33-34). 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.

Objections Set Forth in Parents' Answer

Turning to the parents' objections contained in their answer, State regulations further provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer" (8 NYCRR 279.4[b]). Although the parents assert in their answer objections to the impartial hearing officer's dismissal of their arguments that the assigned school would not have enabled the student to participate in a worksite program, and that the student required the

¹² Even assuming for the sake of argument that the parents cross-appealed the impartial hearing officer's determination, the school psychologist confirmed that during the 2010-11 school year, the assigned school offered each of the related services recommended in the student's March 2010 IEP (Tr. p. 168), and the principal of the assigned school testified that during the 2010-11 school year, the assigned school had students who were authorized to receive related services during the school day pursuant to related services authorizations (RSAs) (Tr. pp. 200-01). Moreover, a June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. According to the document:

[S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

(<http://www.emsc.nysed.gov/resources/contractsforinstruction/qa.html>, Question 5; see <http://www.emsc.nysed.gov/resources/contractsforinstruction/>)

additional support of a 1:1 work coach when attending a worksite, a review of the parents' verified answer indicates that the parents do not cross-appeal from the impartial hearing officer's decision (see Answer). Raising additional issues in a respondent's answer without a cross-appeal is not authorized by State regulations and, in effect, deprives the petitioner of the opportunity to file responsive papers on the merits because State regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). In essence, a party who fails to obtain a favorable ruling with respect to an issue submitted to an impartial hearing officer is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal. Accordingly, I will not consider the parents' objections in this appeal.

Scope of Impartial Hearing — Sufficiency of Academic Instruction

Next I will consider the district's argument that the impartial hearing officer improperly determined *sua sponte* that the amount of academic instruction offered to the student in the recommended program was insufficient to address the student's needs. According to the district, the parents failed to raise this issue in their amended due process complaint notice. The parents contend that the district's argument should be rejected because it is improperly raised in its memorandum of law rather than the petition, and alternatively, because the hearing record demonstrates that this issue arose during the impartial hearing, that the district questioned its own witnesses regarding this issue, and, by doing so, purportedly waived its objection below.

State regulations require the petition for review to clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and to indicate what relief should be granted by a State Review Officer to the petitioner (8 NYCRR 279.4[a]; see Application of the Dep't of Educ., Appeal No. 09-051; Application of the Bd. of Educ., Appeal No. 07-097). A memorandum cannot substitute for a pleading (see 8 NYCRR 279.4, 279.6; Application of the Bd. of Educ., Appeal No. 11-142; Application of the Bd. of Educ., Appeal No. 10-122; Application of the Dep't of Educ., Appeal No. 09-051; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-121; Application of a Child with a Disability, Appeal No. 07-113; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031). The district's petition adequately complies with the pleading requirements, including identifying the facts surrounding the issue of academic instruction, had the student attended the assigned school (see Pet. ¶ 51). The district provided further legal argument in its memorandum of law that the impartial hearing officer erred in examining the issue of the sufficiency of the level of academic instruction offered to the student in the recommended program, because parents failed to raise the issue in their amended due process complaint notice.

With respect to these contentions, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR

200.5[i][7][b]; see M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; 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. of City of New York, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of a Student with a Disability, Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-065; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Upon review of the parents' amended due process complaint notice, I find that it may not be reasonably read to raise the sufficiency of academic instruction issue (see Parent Ex. A). Additionally, while the district indirectly elicited testimony on this issue from its own witness in response to a question posed about the assigned school's transition program (see Tr. p. 164), and although the hearing record contains a closing brief submitted by the parents relating to this issue (see IHO Ex. III at p. 16), I find that the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include this issue (Application of the Bd. of Educ., Appeal No. 10-073). I also note that the district's closing brief did not even address this issue (see IHO Ex. II). Further, the hearing record does not reflect that the parents submitted, or that the impartial hearing officer authorized, a second amendment of the parents' April 2011 amended due process complaint notice to include this issue.

Accordingly, the issue was not properly before the impartial hearing officer, and she should have confined her determination to only those claims that were raised in the parents' amended due process complaint notice (see IHO Decision at pp. 30-31, 37; see also 20 U.S.C. § 1415[c][1],[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[b],[d][3], 300.511[d]; 8 NYCRR 200.5 [i][1][iv],[i][7],[j][1][ii]; M.R., 2011 WL 6307563, at *12-*13; C.F., 2011 WL 5130101, at *12; C.D., 2011 WL 4914722, at *13; R.B., 2011 WL 4375694, at *6-7; Application of the Bd. of Educ., Appeal No. 11-129; Application of the Bd. of Educ., Appeal No. 11-096; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 99-060). Therefore, I will annul this aspect of the impartial hearing officer's decision.

March 2010 IEP

Sufficiency of the Evaluative Data

I will next consider the parties' claims that pertain to the adequacy of the March 2010 IEP. As set forth in greater detail below, the hearing record reflects that, contrary to the impartial hearing officer's finding, the March 2010 CSE relied on a variety of sources of information, including input from the student's teacher and related service providers from Kulanu and the Kulanu reports in order to create the student's needs and to develop appropriate educational program recommendations for him.

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii];

see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and 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). 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 (34 C.F.R. § 300.303[b][1]; 8 NYCRR 200.4[b][4]). 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]). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]). 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]).

According to the hearing record, the March 2010 CSE considered the following documentation: the February 9, 2010 vocational education progress report (Dist. Ex. 1), the January 20, 2010 speech-language progress report (Dist. Ex. 2), the January 31, 2010 OT progress report (Dist. Ex. 3), the February 1, 2010 PT annual report (Dist. Ex. 4), the February 1, 2010 counseling progress report (Dist. Ex. 5), the February 2008 psychological evaluation (Dist. Ex. 6), the 2009-10 transition plan (Dist. Ex. 7), and the student's first trimester report card from Kulanu for the 2009-10 school year (Dist. Ex. 8) (see Tr. pp. 32-33, 54-59, 1519; Dist. Ex. 12 at pp. 2-3; Parent Ex. C at pp. 2-3).

The February 2008 psychological evaluation report reflected that during the testing, the student exhibited repetitive hand movements, eye rolling, difficulty sustaining attention, impulsivity, perseveration, difficulty changing tasks, and hypersensitivity to both auditory and visual stimuli in his environment resulting in overstimulation (Dist. Ex. 6 at pp. 2-3). The student reportedly responded well to redirection and was cooperative throughout the evaluation, but required a high level of structure and frequent cues to refocus (*id.*). Administration of the Wechsler Intelligence Scale for Children-fourth Edition (WISC-IV) yielded a full scale IQ of 54, placing the student in the extremely low range of intelligence; the evaluating psychologist recommended caution in interpreting the student's scores, which, she opined, could underestimate the student's true potential due to "significant intra and inter test scatter secondary to severe language processing difficulties, and problems with executive skills" (*id.* at pp. 3, 10). Consistent with this opinion, administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) reflected that the student's basic decoding, spelling, listening comprehension and numerical operation skills

were in the average range of functioning; however, his reading comprehension and math reasoning skills fell in the below average range, compromised by the student's language processing problems and weak executive skills (id. at pp. 4, 6, 11). The private psychologist also identified the student's pragmatic language difficulties, and noted that although the student related positively to supportive adults, his self-regulatory issues and resultant behaviors significantly compromised his interactions with peers (id.). Among the private psychologist's recommendations were a 12:1+1 classroom setting including a peer group functioning within the average range intellectually, a 1:1 therapeutic support teacher, and development and implementation of classroom strategies addressing the student's academic and social skills deficits (id. at pp. 7-8).

The student's 2009-10 transition plan from Kulanu outlined long term adult outcome statements, assessments for the upcoming school year, short term goals, transition activities, and future transition goals for the student (Dist. Ex. 7).

The student's first trimester report card from Kulanu for the 2009-10 school year reflected that from September through November 2009, the student was assessed as "approaching expectations" with regard to his academic, occupational/vocational, and physical education classes, and contained teacher comments citing the student's incremental progress on specific tasks and noted the student's continuing areas of need, including maintaining attention and decreasing inappropriate classroom behaviors (Dist. Ex. 8).

In her January 20, 2010 speech-language therapy progress report, the student's speech-language pathologist from Kulanu indicated that the student's therapy, delivered four times per week, focused on receptive, expressive and pragmatic language deficits affecting his academic development and social abilities, and reported that the student often required both visual and verbal prompting to attend, focus and maintain eye contact as well as incentives/rewards to motivate him to complete activities and tasks (Dist. Ex. 2 at p. 1). She also observed that the student produced perseverative statements usually irrelevant to topics and exhibited hand flapping and other inappropriate facial/body behaviors, but also acknowledged the student had made slight progress since the beginning of the 2009-10 school year toward his goals and regarding his abilities to attend to and complete speech-language activities with the assistance of visual and verbal cuing and a behavior modification program, which rewarded the student with music or computer time as motivation to attend to and complete tasks and visually reminded him to decrease/eliminate inappropriate behaviors (id. at pp. 1-2). The student's speech/language pathologist recommended continued speech-language therapy to address the student's expressive, receptive and pragmatic language delays, and suggested modified annual long term goals and short term objectives for the student in advance of the upcoming CSE meeting (id. at pp. 3-4; see Parent Ex. F at p. 8).

In his January 31, 2010 OT progress report, the student's OT therapist from Kulanu confirmed that the student was receiving OT twice per week in a combination of push-in services, which addressed writing tasks, and pull-out services, which focused on self-care skills, vocational skills, sensory motor exercises, and keyboarding skills (Dist. Ex. 3 at pp. 1-2). The OT therapist reported that the student had made "significant progress" in his cooperation level and ability to transition to therapy since the implementation of his BIP, and noted that while the student demonstrated increased ability to work on task for longer periods of time, the frequency of his perseverative behaviors decreased, adding that the BIP successfully addressed the student's needs to work quietly with his hands down on his desk, to increase his focus, to move more quickly from room to room, and to get up from his chair without assistance (id. at p. 1). The student's OT

therapist observed that the student was motivated to work for one of the many reinforcers made available to him under the BIP, and that at the time of the report, the student required "moderate prompting" in order for the BIP to succeed (id.). He recommended continued OT to address the student's handwriting, keyboarding, self-care, and vocational skills, and drafted updated annual goals and short term objectives for the upcoming CSE meeting (id. at pp. 2-3).

The February 1, 2010 PT annual report indicated that the student received individual PT services twice weekly to improve balance, trunk muscle strength (to reduce kyphosis and improve posture), and weight bearing on both legs (Dist. Ex. 4 at pp. 1-2). The student's PT therapist noted that the student was typically cooperative and able to follow simple directions during therapy, but added that he was easily distracted, required a calm room for therapy, and, at times, exhibited clapping and finger wringing (id. at p. 1). She identified the student's strengths and weaknesses with regard to areas targeted in therapy, recommended continued PT, and drafted updated annual goals and short term objectives for the student (id. at pp. 1-2).

In her February 1, 2010 counseling progress report, the student's counselor from Kulanu advised that their twice weekly sessions targeted the student's ability to follow directions/instructions as well as improving his social competence, cooperation, classroom interaction, and self regulation (Dist. Ex. 5). His counselor cited the student's increased ability to become engaged and more focused on tasks, but acknowledged that he continued to require prompting in both areas (id.). The counselor noted the student's "positive response" to his BIP, as demonstrated by his improved abilities to work on tasks for increased periods of time, to transition from his classroom to the therapy room with less prompting, to engage in activities with fewer verbal outbursts and less self-stimulatory behaviors, to demonstrate his "emergent skill in social reciprocity in conversation," and to engage in and complete classwork (id.). She recommended continued counseling and maintaining the student's current social and conversational goals (id.).

The February 9, 2010 vocational education progress report detailed the student's participation in Kulanu's vocational education program since September 15, 2009, and addressed both his on campus placement in the school's retail training center and his offsite placement at a food pantry (Dist. Ex. 1). The progress report reflected that the student received the 1:1 support of a job coach at each placement and characterized him as cooperative and following the directions of the job coach (id.). Kulanu's vocational education coordinator reported that the student acclimated well to the environment of the food pantry worksite, and demonstrated an ability to follow a task list of eight to ten food items which he packed in baskets, identifying each item and placing the required number in different baskets (id.). The progress report indicated that the student was able to follow routine and maintain his focus and attention to the task for 15- minute intervals with 3 verbal prompts for a 5-step task, and that he made significant gains in the speed and accuracy with which he completed the task and required fewer prompts to do so (id.). The progress report also cited the student's "emergent skills in seeking and utilizing natural supports in the work environment," noted that he "ha[d] begun to verbalize his wants and needs and appropriately communicate [them] in the work place," and indicated that although the student "continue[d] to exhibit moderate to significant social and behavioral issues" in the workplace, as a result of his overall progress at the food pantry, the frequency and duration of the student's placement was scheduled to be increased beginning in March 2010 (id.).

The hearing record reflects that the district did not reevaluate the student using formal testing in preparation for the March 2010 annual review meeting (Tr. pp. 114, 119-21, 1518-20);

however, there are no specific allegations or evidence contained in the hearing record suggesting either that the educational or related services needs of the student warranted a reevaluation or that the parents or the student's teacher requested a reevaluation of the student prior to the March 2010 CSE meeting. During the impartial hearing, the school psychologist testified that the CSE considered "progress reports related to [the student]" received by the CSE from Kulanu, advising that "... we got ... the vocational, the [speech-language], OT, PT, counseling, and transition, and a report card" and "a psychological [evaluation] from February of 2008," as well as verbal input from the five Kulanu representatives participating telephonically and the student's father, who acknowledged that "I contributed to the discussion" during the CSE meeting (Tr. pp. 32-33, 50-59, 88, 1519, 1573; see Dist. Exs. 1-8). The hearing record reflects that the March 2010 CSE relied on these reports when it considered and ultimately rejected the option of placing the student in a 15:1 special class in a community school, because, according to the school psychologist, "[t]he [CSE] team felt that it was in [the student's] best interest to have the small class setting based on the documents that Kulanu provided. And we just also felt based on his level of need that he would benefit from the 12-month school year" (Tr. pp. 36-37, 68-70; Dist. Ex. 9 at p. 14; see Tr. p. 134; Parent Ex. Q at p. 2). Furthermore, contrary to the impartial hearing officer's finding, a CSE is not required to use its own evaluations in the preparation of an IEP and in the recommendation of an appropriate program for a student and is not precluded from relying upon privately obtained evaluative information in lieu of conducting its own evaluation (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at *9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]; Application of a Student with a Disability, Appeal No. 11-100; Application of the Dep't of Educ., Appeal No. 10-025; Application of a Student with a Disability, Appeal No. 10-004; Application of a Child with a Disability, Appeal No. 02-098; Application of a Child with a Disability, Appeal No. 01-040; Application of a Child with a Disability, Appeal No. 96-87); Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 92-12; see also Application of a Child Suspected of Having a Disability, Appeal No. 98-80)., and neither the IDEA nor State nor federal regulations require a specific number of evaluations to be considered during a CSE meeting.

With regard to the impartial hearing officer's finding that the district denied the student a FAPE because it failed to discuss the February 2008 psychological evaluation with the CSE members from Kulanu, the school psychologist testified that it was "part of the basis of [the CSE's] analysis" that a 12:1+1 special class in a special school was appropriate for the student (Tr. pp. 140-41; see Tr. pp. 50-52, 88-89, 135; Dist. Ex. 12 at p. 2). However, the hearing record also reflects that this report was not shared or discussed with the Kulanu representatives who participated in the CSE meeting telephonically (Tr. pp. 88-89). Although the hearing record contains no explanation as to why the evaluation was not discussed with the Kulanu representatives during the meeting, there is no evidence demonstrating that its failure to do so compromised their abilities to meaningfully participate in the development of the student's IEP. The hearing record reflects that during the meeting, which lasted "45 minutes to an hour," the Kulanu representatives briefed the other CSE members on the student's current functioning as described in their respective reports, and, according to the school psychologist, were asked by the other CSE members for their opinions regarding the appropriateness of the 12:1+1 special class placement for the student, but "they were quiet" (see Tr. pp. 52-53, 57, 59, 92-93, 123; Parent Ex. Q at p. 1). Furthermore, I find that the Kulanu representatives' familiarity with the student, having worked with him in their respective roles during the 2009-10 school year, which was reflected in the detailed documents they provided to the CSE, rendered them qualified to discuss the student's current academic and social/emotional functioning levels and progress, and to identify strategies and supports and to

recommend counseling, speech-language, OT, PT, and transition goals to enable the student to be successful in the classroom. Consequently, I also find that the district's failure to discuss the February 2008 psychological evaluation with the Kulanu representatives on the CSE did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Dist. Exs. 1-5, 7-8).

Accordingly, based on the evidence contained in the hearing record, I find, contrary to the determination of the impartial hearing officer, that the evaluative data considered by the March 2010 CSE and the direct input from the student's special education teacher and counseling, speech-language, OT, and vocational services providers during the CSE meeting provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

Present Levels of Performance

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]). Although the impartial hearing officer found that the March 2010 IEP was insufficient because the student's present levels of performance "resulted in an incomplete portrait" of the student, a review of the academic and social/emotional provisions of the IEP reflect that these descriptions of the student were gleaned from the evaluative data available to the CSE and the input from the student's special education teacher and related service providers from Kulanu (compare Dist. Ex. 9 at pp. 3-4, with Dist. Exs. 1-8).

Academically, the March 2010 IEP reflected that "[a]ccording to teacher reports, [the student was] performing significantly below grade level in all academic areas," and placed his instructional levels in reading at sixth grade for decoding and fifth-sixth grade for reading comprehension, and at sixth grade for math computation and problem solving, all based upon teacher estimates rather than standardized testing data from the February 2008 psychological evaluation, because, according to the school psychologist, "... the school, they know [the student] better than anybody, and we felt that that was a very accurate reflection of where he's currently functioning," and added that "[w]e based his needs ... on the information we got from the school" (compare Dist. Ex. 6 at pp. 4, 10-11, with Tr. pp. 114-17, and Dist. Ex. 9 at p. 3, and Parent Ex. Q at p. 1; see Tr. pp. 992-93, 1246-47). The IEP indicated that the student's reading performance was "inconsistent," and "tended to improve [w]hen he [was] interested in the reading material;" identified responding to multiple choice questions as a strength of the student; identified critical thinking questions (such as predicting, sequencing, and referencing) as his weaknesses; noted his ability to write five to seven sentences in his journal with modifications and prompting; identified his need to improve his abilities to write complex sentences and a sequentially correct five sentence paragraph; noted his abilities to add, subtract, multiply, and divide with regrouping; and advised that the student was currently working on multiplication and division with decimals, working with

perimeters, areas, comparing equivalent fractions, and on applying math skills to solve real life situations, such as budgeting and shopping (compare Tr. pp. 59-61, and Dist. Ex. 8 at pp. 2-3, with Dist. Ex. 9 at p. 3, and Parent Ex. Q at p. 1). To address the student's academic management needs, the March 2010 CSE recommended preferential seating, verbal and visual cues, small group instruction, teacher redirection to task, directions/instructions repeated and rephrased as needed, scaffolding, and a multisensory approach, which, according to the school psychologist, were all academic management needs that were currently being provided to the student by Kulanu at the time of the CSE meeting, and which were not objected to by any of the CSE members during the March 2010 CSE meeting (Tr. pp. 60-61, 111; Dist. Ex. 9 at p. 3).

With regard to the student's social/emotional performance, the March 2010 IEP reflected the students "weak" executive skills, social communication deficits, pragmatic language difficulties, impulsivity, fluctuating attention, distractibility, and self-regulatory difficulties described in the evaluative data and input from the Kulanu representatives (compare Dist. Ex. 2 at pp. 1-2; Dist. Ex. 6 at p. 6; Dist. Ex. 8 at p. 3, with Tr. pp. 45, 61, 95-96, and Dist. Ex. 9 at p. 4).¹³ The March 2010 IEP also noted the student's improvement in attention and focus during his current semester at Kulanu, decreases in his perseverative behaviors and tangential conversation, improvement in his engagement in activities, alertness, focus, and occasional interactions with peers, his work at the school store and ability to follow directions, and that he remained on task with the assistance of a BIP (compare Tr. pp. 882, 891-92, 897, 1023-24, 1154-58, and Dist. Ex. 1; Dist. Ex. 2 at pp. 1-2; Dist. Ex. 3 at p. 1; Dist. Ex. 5; Dist. Ex. 8 at p. 2, with Dist. Ex. 9 at p. 4, and Parent Ex. Q at p. 2). To address the student's social/emotional management needs, the March 2010 CSE recommended a 1:1 crisis management paraprofessional, small group instruction, positive reinforcement for on-task behaviors, and teacher redirection to task through verbal and visual cues which, according to the school psychologist, were all social/emotional management needs that were being provided to the student by Kulanu at the time of the CSE meeting, and which were not objected to by any of the CSE members during the March 2010 CSE meeting (Tr. pp. 45, 61-63, 111-12; Dist. Ex. 9 at pp. 4, 13, 16). Because the CSE determined that the student's behaviors seriously interfered with instruction and required additional adult support, the development of a BIP was recommended (Dist. Ex. 9 at pp. 4, 18).

I note that the health and physical development section of the March 2010 IEP did not reference the student's gross and fine motor deficits as identified in the January 31, 2010 OT progress report and the February 1, 2010 PT annual report, both of which were available to the March 2010 CSE (compare Dist. Ex. 3, and Dist. Ex. 4, with Dist. Ex. 9 at p. 5). However, the hearing record reflects that the March 2010 CSE addressed the student's deficits despite this omission by incorporating the draft annual goals for the 2010-11 that were recommended in these reports into the student's March 2010 IEP (compare Dist. Ex. 3 at p. 3, and Dist. Ex. 4 at p. 2, with Dist. Ex. 9 at pp. 6-7; see Tr. pp. 54-55, 769, 818-20, 832).¹⁴ I also note that during the impartial hearing, the student's father acknowledged that he did not object to the March 2010 CSE's

¹³ Although the hearing record reflects that the student's proclivities to inappropriately speak to and touch one of his related service providers were discussed during the March 2010 CSE meeting (see Tr. pp. 99-102, 844-45, 865-66, 870-72, 874, 1017-18), there were no references to these specific behaviors in the reports considered by the CSE or on the March 2010 IEP (see Dist. Exs. 1-9).

¹⁴ I remind the district to take greater care when preparing the present levels of performance for this student in the future.

"characterization of [the student's] challenges [on] the IEP" during or after the CSE meeting (Tr. pp. 1570-74).

Based upon the foregoing, I find that the district had sufficient information relative to the student's present levels of academic achievement and functional performance—including the teacher estimates of the student's current skills levels—at the time of the CSE meeting to develop an IEP that accurately reflected the student's special education needs (see 34 C.F.R. § 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dept. of Educ., Appeal No. 10-099; Application of the Dept. of Educ., Appeal No. 08-045).

Annual Goals and Short-Term Objectives

Turning to the impartial hearing officer's finding that the March 2010 IEP was insufficient because it contained annual goals and short-term objectives that were vague, not objectively measurable, and lacking evaluative criteria (IHO Decision at pp. 18-21, 25-26), I note that an IEP must include a written 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][III]; 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 annual goals and short-term objectives¹⁵ contained in the March 2010 IEP were developed based upon the evaluative data received from Kulanu and discussion with the student's special education teacher and related service providers from Kulanu; the hearing record also reflects that there was unanimity among the CSE members as to the appropriateness of the goals (see Tr. pp. 53-55, 64-68, 769, 818-20, 832; compare Dist. Ex. 2 at pp. 3-4; Dist. Ex. 3 at p. 3; Dist. Ex. 4 at p. 2, with Dist. Ex. 9 at pp. 6-12; Parent Ex. Q). Aligned with the student's needs per the aforementioned evaluative data, the March 2010 IEP included two annual goals and five short-term objectives addressing the student's OT needs, one annual goal and six short-term objectives addressing the student's PT needs, one annual goal and three short-term objectives addressing the student's reading needs, one annual goal and two short-term objectives addressing the student's writing needs, one annual goal and five short-term objectives addressing the student's math needs, three annual goals and ten short-term objectives addressing the student's speech-language needs, one annual goal and eight short-term objectives addressing the student's social/emotional needs, one annual goal and five short-term objectives addressing the student's transition needs, and one annual goal to be addressed with the student's 1:1 crisis management paraprofessional (Dist. Ex. 9 at pp. 6-12).

¹⁵ Because the hearing record reflects that the student participated in New York State alternate assessment, the district was required to include short-term objectives in the March 2010 IEP (8 NYCRR 200.4[d][2][iv]; Dist. Ex. 9 at pp. 15-16, 18; see Tr. pp. 95, 580).

A review of the academic goals included in the March 2010 IEP demonstrates that they were sufficiently linked to the student's deficits as identified in the present levels of performance contained in the IEP. For example, short-term objectives included in the IEP targeted the student's needs in reading comprehension, writing complex sentences and sequentially correct five sentence paragraphs, and applying math skills to real-world situations within the community (see Dist. Ex. 9 at pp. 3, 7-8). With regard to the student's needs identified in the IEP's social/emotional present levels of performance, short-term objectives targeted the student's social communication and pragmatic language difficulties, self-regulation difficulties, distractibility, perseverative behaviors, and tangential conversation (id. at pp. 4, 11-12). Lastly, the student's transition needs, as identified through his participation in a transition/vocational training program at Kulanu and as reflected in the social/emotional present levels of performance section of the IEP, were addressed by an annual goal designed to improved the student's work skills and build independence (id. at p. 4, 11).

Although the annual goals contained in the March 2010 IEP identified "class activities" and/or "teacher/provider observations" as their methods of measurement, all of the annual goals lacked evaluative criteria (Dist. Ex. 9 at pp. 6-12). However, their corresponding 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 the Dep't of Educ., Appeal No. 11-134; 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 the student's progress toward meeting his OT, PT, reading, writing, math, and speech-language goals would be measured by written reports three times during the school year, and that his progress toward meeting his social/emotional, transition, and crisis management paraprofessional goals would be measured by written reports twice during the school year (compare Dist. Ex. 9 at pp. 6-10, with Dist. Ex. 9 at pp. 11-12). Moreover, based upon the hearing record, I find that the student's annual goals and short-term objectives contained in the March 2010 IEP adequately addressed the student's significant areas of deficit as identified in the evaluative data considered by the March 2010 CSE, and therefore, contrary to the finding of the impartial hearing officer, I decline to find a denial of a FAPE for the 2010-11 school year on the basis of inappropriate goals.

Special Factors and Interfering Behaviors

The impartial hearing officer also determined that the district denied the student a FAPE for the 2010-11 school year because the BIP it developed was inadequate, insofar as it had been developed without an FBA, it failed to adequately address the student's behavior needs, adequately identify the student's behaviors that interfered with learning, or adequately address the frequency, duration, intensity, and/or latency of the student's targeted behaviors, and it lacked a schedule to measure the effectiveness of interventions or any hypotheses as to why the problem behaviors occurred (IHO Decision at pp. 18-19, 25-29).

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and

supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Board of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavriety v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (*id.*).¹⁶ State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration,

¹⁶ While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).¹⁷ Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, although the hearing record establishes that the district did not conduct an FBA prior to developing the student's BIP (see Tr. pp. 131-33), according to the school psychologist, the CSE discussed formulation of the BIP with the Kulanu representatives, and "took what he was working on last year and had a discussion as to where he [was] at now. And, basically, in talking to [Kulanu] and his needs within the classroom, that [was] what we focused on . . . the behaviors that interfere with learning . . . focusing and staying on task" (Tr. p. 73). Per the information gleaned by the CSE from the aforementioned evaluative reports, the BIP described the student's interfering behaviors as "difficulty with focus and staying on task. . . random outbursts and

¹⁷ The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

perseverative, self-stimulatory behaviors;" consistent with the information contained in the social/emotional present levels of performance contained in the March 2010 IEP, the BIP noted that these behaviors had decreased (compare Dist. Ex. 2 at p. 1; Dist. Ex. 5; Dist. Ex. 6 at pp. 5-6; Dist. Ex. 8 at pp. 2-3; and Dist. Ex. 9 at p. 4, with Dist. Ex. 9 at p. 18). The BIP identified the expected behavior changes as improvement in the student's abilities to initiate work, remain on task, and engage in socially appropriate behavior (Dist. Ex. 9 at p. 18). Proposed strategies to change the student's behavior included "redirection, positive reinforcement, modeling, frequent reinforcement with social skills and use of para[professional]" and "verbal reminders;" it was also recommended that the student "[keep] his [BIP] with him which helps reinforce what he needs to do" (id.). The BIP also identified counseling services and the student's 1:1 behavior management paraprofessional as supports to be employed to help the student to change the interfering behavior (id.). However, the BIP lacked a schedule to measure the effectiveness of interventions as mandated by 8 NYCRR 200.22[b][4] (see id.).

However, notwithstanding the lack of a schedule to measure the effectiveness of interventions in contravention of State regulations, I find that the student's interfering behaviors were sufficiently addressed by the March 2010 IEP, which alleviated the effects of the BIP's technical deficiency. Both the academic and social/emotional management needs contained in the March 2010 IEP addressed the student's target behaviors as identified above, specifically through preferential seating, visual and verbal cues, small group instruction, teacher redirection to task, directions/instructions repeated and rephrased as needed, scaffolding, a multisensory approach to instruction and positive reinforcement for on task behavior (Dist. Ex. 9 at pp. 3-4). Additionally, the IEP recommended individual and group counseling services twice per week and provided the student with a full-time crisis management paraprofessional (id. at pp. 4, 15-16; see Tr. p. 45; Parent Ex. Q at p. 2). Accordingly, in this case, where the district formulated a BIP based on information from the evaluative reports available to the CSE and input from the student's special education teacher and related service providers from Kulanu, and developed management needs designed to target the student's interfering behaviors, I find that, contrary to the determination of the impartial hearing officer, the absence of an FBA and a schedule in the BIP to measure the effectiveness of interventions neither resulted in any substantive harm to the student nor rose to the level of a denial of a FAPE (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8-*9 [S.D.N.Y., Dec. 8, 2011]; C.F., 2011 WL 5130101, at *9-*10; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *10 [S.D.N.Y., Mar. 30, 2011]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. Oct. 13, 2009]).

Transition Plan

Next, I turn to the impartial hearing officer's finding that the March 2010 IEP was inappropriate for the student based upon an inadequate transition plan, which the impartial hearing officer found failed to adequately describe one of the listed instructional activities and failed to identify the party responsible for implementing the transition plan (IHO Decision at pp. 22-23, 25). 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.).

Here, where the district offered a transition plan as part of the student's March 2010 IEP, the issue in dispute is whether the transition plan was adequate, and, if not, whether the inadequacy rose to the level of denying the student a FAPE. According to the school psychologist, the March 2010 CSE developed the student's transition plan through discussion with the parents and the Kulanu representatives as to "what [the CSE] felt his long-term goals should be" (Tr. pp. 70-72); I also note that the student's 2009-10 transition plan from Kulanu was available to the CSE when it developed the transition plan (see Dist. Ex. 7). The transition portion of the student's March 2010 IEP included four measurable long-term adult outcomes (goals) for the student, including: integrating into the community with support; attending a vocational training program; living independently with support; and being employed with support (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 9 at p. 17). However, there is no indication in the hearing record that the student's postsecondary goals were based upon appropriate transition assessments related to training, education, employment, or independent living skills (see 8 NYCRR 200.4[d][2][ix][b]).

State regulations require that the IEP include a statement of the transition service needs of the student that focuses on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations further require that the student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, acquisition of daily living skills and a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]). The March 2010 IEP indicated that the student would be pursuing an IEP diploma, which, according to the school psychologist, "was more realistic" than a higher level diploma based upon the student's academic functioning level (Tr. pp. 70-71; compare Dist. Ex. 7 at p. 1, with Dist. Ex. 9 at p. 17). For transition activities, the transition plan provided that the student would "participate in instructional activities that will prepare him for real life such as functional math skills," but did not specify the activities through which the student was to develop these skills; the transition plan also contained an incomplete requirement that the student "work on social skills that will help ...," but failed to specify either the social skills referenced or the specific activities through which the student was to develop these social skills (Dist. Ex. 9 at p. 17). During the impartial hearing, the school psychologist acknowledged that the description of this transition activity on the IEP "looks like it got cut off somewhere" (Tr. p. 72), but the information missing from the description was not addressed elsewhere in the hearing record. The transition activity linked to community integration required that the student "participate in community based activities that will help him highlight his strengths and weaknesses," but failed to identify either the proposed activities or the student's strengths and weaknesses (Dist. Ex. 9 at p. 17). The transition activity linked to postsecondary placement required that the student "explore post high school programs" and connect with agencies, but did not identify specific post high school programs (id.). The transition activity linked to independent living required that the student "develop self help skills in preparation for independent living," but identified neither the skills nor the manner through which the student was to develop them (id.).

Additionally, the transition plan failed to identify either the party responsible for implementing the transition activities or the applicable time frame for such implementation (id.;

see 8 NYCRR 200.4[d][2][ix][e]); the school psychologist testified "[t]hat could be discussed at the [assigned] school. Once [the student] gets to the placement where he's going, they could discuss who would be responsible for each specific area" (Tr. p. 71).¹⁸ Moreover, I note that despite the evidence contained in the evaluative information available to the CSE reflecting the student's needs related to daily living skills (see Dist. Exs. 3 at pp. 2-3; 7 at p. 1; 9 at p. 6), the box in the student's transition plan for acquisition of daily living skills was left blank, as was the box indicating that a functional vocational assessment was needed (Dist. Ex. 9 at p. 17; see Tr. pp. 575-76). In consideration of the foregoing, I concur with the impartial hearing officer that the transition plan included in the student's March 2010 IEP did not comport with statutory or regulatory requirements.

However, I also find that, in this case, the hearing record does not demonstrate that the technically inadequate transition plan impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, caused a deprivation of educational benefits, or otherwise caused substantive harm which rose to the level of a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4]). The hearing record reflects that the assigned school employed both a "transition coordinator," who collaborated with outside agencies and with parents to provide students with additional transition support, and a "job developer," who provided additional support to students and parents regarding "anything involving job-related questions or concerns" (Tr. pp. 494-95, 503-05, 509-10, 561-65, 569-73, 577-80). Additionally, as discussed above, the March 2010 IEP provided for biannual written reports measuring the student's progress toward meeting his transition goal, at which time, according to the hearing record, the student's transition plan could have been adjusted, if warranted (Dist. Ex. 9 at p. 11; see Tr. pp. 564-65, 575-77, 579-80). Consequently, I find that, under the circumstances of this case, the transition plan included in the student's March 2010 IEP, although technically defective, did not rise to the level that the student was not offered a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-080; Application of a Child with a Disability, Appeal No. 07-128; Application of a Child with a Disability, Appeal No. 97-70).

In summary, I conclude that the evidence contained in the hearing record establishes that the district's recommended educational program as embodied in the March 2010 IEP, consisting of a 12:1+1 special class in a special school, a full-time 1:1 crisis management paraprofessional, and related services, was, at the time of its development, reasonably calculated to enable the student to receive educational benefits in the LRE for the 2010-11 school year.

Assigned School

Implementation – Related Services

The impartial hearing officer found that the school to which the district assigned the student was inappropriate for the 2010-11 school year because the assigned school, as a practical matter,

¹⁸ For the benefit the student's next annual review, I encourage the parties to examine a recently issued guidance document from the Office of Special Education regarding transition services and the development of transition plans ("Transition Planning and Services for Students with Disabilities" November 2011, located at <http://www.p12.nysed.gov/specialed/publications/transitionplanning-nov11.pdf>).

would have been unable to successfully implement the student's related services at the levels recommended in the March 2010 IEP, and, out of practical necessity, would have been compelled to materially alter the substance of the student's IEP, thereby denying him a FAPE (IHO Decision at pp. 31-33, 37, 48).

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 district's claims with regard to implementation of the student's related services 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 July 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 Kulanu. 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 assigned school could have offered the student his related services.

The March 2010 IEP recommended for the student to receive his 10 sessions of related services, each lasting 45 minutes, at a separate location (Dist. Ex. 9 at p. 15; see id. at p. 13; Parent Ex. Q at p. 2). The student's father acknowledged during the impartial hearing that he did not object to any aspect of the related services recommended by the March 2010 CSE during the annual review meeting (Tr. pp. 1569-70). In the decision, the impartial hearing officer concluded that "[the] only way to deliver the related services in a 'separate location' as per the IEP would be to remove [the student] from his only academic period on a daily basis. Removal from the sole academic period each day would certainly cause [the student] to regress in his academic skills and,

therefore, deprive him of a FAPE" (IHO Decision at pp. 32-33).¹⁹ The impartial hearing officer added that "[t]he evidence is patently clear that [the assigned school] was not equipped to implement [the student's] IEP as written ..." and further concluded that "... [assigned] school staff would have needed to take steps to modify the IEP by scaling back related services to such an extent that the nature of the recommended program and services would be materially different than the IEP that was developed by the CSE ...," and that this material reduction "... constitute[d] a substantive violation of a FAPE" (*id.* at p. 33).

However, the hearing record does not support the impartial hearing officer's conclusion. The school psychologist confirmed that the assigned school provided counseling, OT, PT, and speech-language therapy services (Tr. p. 168). The principal of the assigned school testified that students at the assigned school who attended worksites typically spent three periods per day in the assigned school building, plus lunch, and the rest of the school day at the worksites (Tr. p. 202). She stated that "[s]tudents come to us with mandated services. We provide them. ... ten is a lot of sessions per week for a worksite student, and our goal is transition for the student," but added "... I'm not saying that we would absolutely drop them. We can't," adding that "[i]f [the student] still needed all of these services, ... then it would be before he goes out to the worksite, while he's at the worksite, and after he comes back from the worksite" (Tr. pp. 203-05). The principal further testified that if deemed appropriate, it was possible to reduce the student's time during the school day at worksites in order to accommodate the student's ten weekly periods of related services, stating that "... some of the students [at the assigned school] return from worksites earlier than other students. So we could possibly look at that option" (Tr. pp. 227-28). Additionally, the principal advised that "[m]any of our worksites are close to the [assigned school] building. ... we have a few of the providers who go to worksites, or the students could get [related services] in the morning before they go to [a] worksite, or in the afternoon once they return" (Tr. pp. 201-02). Furthermore, the special education teacher of the assigned class testified that it was possible for OT and PT related service providers to implement related services at jobsites, stating "[t]hat's very sporadic, but they too have done it," and that speech-language services could have been provided to the student during lunch (Tr. pp. 679-80).

I also note that the impartial hearing officer found that the district failed to offer the student a FAPE because it was not equipped to implement the student's IEP and that the program and services would have been "materially different;" however, she relies on R.K. v. New York City Dep't of Educ. (2011 WL 1131492, at *20 [E.D.N.Y. Jan. 21, 2011] adopted at 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011] appeal pending) for the proposition that the district's case must be confined to the IEP that was "actually offered" to the student. Therein lies the rub. The impartial hearing officer cannot both hold the district to the "four corners" of the IEP, so to speak and, at the same time permit the parents to go beyond the IEP into claims that there was a material failure on the district's part in the implementation of the student's IEP, especially when the parents did not

¹⁹ The impartial hearing officer did not cite any evidence in the hearing record supporting her conclusion that removal of the student from his academic class would inevitably lead to his regression (*see* IHO Decision at pp. 32-33).

actually send the student to the program recommended by the district. To hold otherwise is inconsistent with the principles of due process.²⁰

Assuming, for the sake of argument, that the student had attended the assigned school and considering the totality of evidence contained in the hearing record, I do not find the impartial hearing officer's finding that the assigned school would have been unable to implement the student's related services as recommended in the March 2010 IEP without reducing the levels of these services and thereby deviating from the student's March 2010 IEP in a material or substantial way to be supported by the preponderance of evidence contained in the hearing record (see A.P., 2010 WL 1049297; Van Duyn, 502 F.3d 811, 821; 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]).

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. The hearing record contains evidence showing that the March 2010 IEP recommending a 12:1+1 special class in a special school with a 1:1 crisis management paraprofessional and 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).

Having reached this determination, it is not necessary to address the appropriateness of the student's unilateral placement at Kulanu, and I need not consider whether equitable considerations support the parent's requests; thus, the necessary inquiry is at an end (see Voluntown, 226 F.3d at 66; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; Application of the Dep't of Educ., Appeal No. 11-113; 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.

²⁰ The crux of the issue is whether or not to apply a "snapshot" theory when assessing whether a district has offered a student a FAPE. It is fair to say that viewpoints have differed within the Second Circuit as to whether adjudicators should rely on retrospective evidence (C.F., 2011 WL 5130101, at *8 [collecting cases]); however, until there is greater clarity on this issue, at the very least the same theory should be applied to both parties in the same case as a matter of fundamental fairness).

IT IS ORDERED that those portions of the impartial hearing officer's decision dated October 4, 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 tuition paid to Kulanu for the student's 2010-11 school year are annulled.

Dated: **Albany, New York**
 January 23, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER