The University of the State of New York

The State Education Department
State Review Officer
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No. 13-221

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, Neha Dewan, Esq., of counsel

Law Offices of Lauren A. Baum, PC, attorneys for respondents, Lauren A. Baum, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appealed from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2010-11 school year.[1] The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and

[1] The parents also cross-appealed the IHO's decision; however, the cross-appeal was previously addressed by the prior SRO decision and judicially reviewed by the United States District Court (Application of the Dep't of Educ., Appeal No. 12-013; P.G. v. New York City Dep't of Educ., 2013 WL 4055697 [S.D.N.Y. Jul. 22, 2013]).

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

As further described below, this State-level administrative review is being conducted pursuant to an order of remand issued by the U.S. District Court for the Southern District of New York (see P.G. v. New York City Dep't of Educ., 2013 WL 4055697 [S.D.N.Y. Jul. 22, 2013]). The factual background, including the student's educational history, was discussed in the prior decision relative to this appeal and, as such, need not be repeated again in full detail, as the parties'

familiarity with the facts therein is presumed (Application of the Dep't of Educ., Appeal No. 12-013).

On April 26, 2010, the CSE convened for the student's annual review and to develop an IEP for the 2010-11 school year (Dist. Ex. 3 at pp. 1-2). The April 2010 CSE found the student eligible for special education as a student with a speech or language impairment and recommend a 12:1+1 special class in a community school (id. at pp. 1, 14).[2] The April 2010 CSE further recommended one 40-minute session of individual speech-language therapy per week, two 40-minute sessions of speech-language therapy per week in a group of two, one 40-minute session of individual counseling per week, one 40-minute session of individual occupational therapy (OT) per week, and one 40-minute session of OT per week in a group of two (id. at p. 16). The student subsequently enrolled at Eagle Hill for the 2010-11 school year, and the parents sought tuition reimbursement for the school year (see Parent Exs. C at pp. 1-2; H at pp. 1-2).[3]

A. Due Process Complaint Notice

In a due process complaint notice dated March 3, 2011, the parents alleged that the district failed to offer the student a FAPE on procedural and substantive grounds (Parent Ex. A at pp. 1-4). The parents' particular allegations were described in full in the prior SRO decision, and as such, need not be restated herein (see Application of the Dep't of Educ., Appeal No. 12-013). Relevant to this administrative review, by decision dated July 22, 2013, the United States District Court, Southern District of New York, determined that, although the parents did not raise the issue of the appropriateness of the district's recommended 12:1+1 special class placement in their due process complaint, the district "opened the door" to the issue by raising it in its opening statement and by eliciting testimony about it from one of its witnesses on direct examination (P.G., 2013 WL 4055697 at *14, citing M.H. v. New York City Dep't of Educ., 685 F.3d 217 [2d Cir. 2012]).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 13, 2011, and concluded on September 8, 2011, after seven days of proceedings (Tr. pp. 1-930). As is described in more detail in the prior SRO decision, in a decision dated December 13, 2011, the IHO determined that the district failed to offer the student a FAPE for the 2010-11 school year, that Eagle Hill was an appropriate unilateral placement for the student, and that equitable considerations favored an award of tuition reimbursement (see Application of the Dep't of Educ., Appeal No. 12-013). Relevant to this administrative review, the IHO determined that the district failed to meet its burden to demonstrate that the recommended 12:1+1 special class in a special school was appropriate for the student (IHO Decision at p. 23).[4] According to the IHO, none of the CSE participants thought a 12:1+1 special

[2] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[3] The Commissioner of Education has not approved Eagle Hill as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[4] The IHO referred to the district's recommendation as a 12:1+1 special class in a special school; however, the April 2010 IEP reflects that the CSE recommended a 12:1+1 special class in a community school (compare IHO Decision at p. 23, with Dist. Ex. 3 at p. 1).

class was appropriate for the student and the district witnesses indicated that a 12:1+1 special class would not be an appropriate peer group for the student (id.).

IV. Appeal for State-Level Review

As is described in more detail in the prior SRO decision, the district appealed the IHO's determination that it failed to offer the student a FAPE for the 2010-11 school year, that Eagle Hill was an appropriate unilateral placement for the student, and that equitable considerations favored an award of tuition reimbursement (see Application of the Dep't of Educ., Appeal No. 12-013). Relevant to this administrative review, the district appealed the IHO's determination that the recommended 12:1+1 placement was not appropriate for the student, asserting that the IHO misconstrued testimony and that the student's then-current Aaron School teacher believed that a 12:1+1 special class was appropriate and that her recommendation was discussed at the April 2010 CSE meeting.

On April 6, 2012, this SRO rendered a decision in an administrative appeal in this matter, which sustained the district's appeal and found that the district offered the student a FAPE for the 2010-11 school year (Application of the Dep't of Educ., Appeal No. 12-013). As relevant to the instant proceeding, in that decision, I declined to review the parents' claim, which was not raised in their due process complaint notice, that the April 2010 CSE's recommendation for a 12:1+1 special class placement was not appropriate for the student and that, while there was some relevant testimony, the district had not agreed to expand the scope of the impartial hearing to include this issue, and as such, the IHO erred in addressing it (Application of the Dep't of Educ., Appeal No. 12-013).

The parent sought judicial review of the April 6, 2012 SRO decision and, on July 22, 2013, the United States District Court, Southern District of New York issued a Decision and Order, upholding in part and remanding the case back to the SRO for further proceedings (P.G., 2013 WL 4055697, at *17). The Court held that the April 2010 "IEP was both procedurally and substantively sufficient to provide [the student] with a FAPE" (id. at *7). Specifically, the Court held that the district afforded the parent an opportunity for meaningful participation in the development of the student's April 2010 IEP; the April 2010 IEP adequately addressed the student's present levels of educational performance; the April 2010 IEP contained adequate, measurable, and objective annual goals and short-term objectives; and that the absence of specified services to assist the student's transition from a nonpublic to public school did not rise to the level of a denial of FAPE (id. at *8-13). While the Court agreed with and gave deference to the SRO's decision (id.), the Court also held that the SRO erred by not addressing the appropriateness of the 12:1+1 special class (id. at *7, *14, *17). The Court also found that, in finding the 12:1+1 special class placement was not appropriate for the student, the IHO mischaracterized the record (id. at *15). Specifically, the Court indicated that the IHO found that no one at the CSE thought that a 12:1+1 placement was appropriate, whereas the hearing record demonstrated that the student's then-current special education teacher stated otherwise (id.). The Court further noted that, contrary to the parents' contention, the IHO did not make a credibility determination with respect to conflicting testimony from witnesses as to the appropriateness of a 12:1+1 placement (id.). Finally, the Court further determined that, although not raised in the due process complaint notice, the issue of the appropriateness of the 12:1+1 special class placement could nonetheless be considered in light of the Second Circuit's holding in June 2012 that a district "opens the door" by raising a new issue

with the purpose of defeating a claim that was raised in the due process complaint notice (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]). The Court accordingly remanded the issue as a matter of education policy to be determined by an SRO (id.). Accordingly, in accordance with the Court's decision, the remainder of this decision addresses the issue of whether the IHO erred in her determination that the 12:1+1 special class placement was inappropriate for the student (id. at *17).

V. Applicable Standards

Two purposes of the 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., 557 U.S. 230, 239 [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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H., 685 F.3d at 245; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; 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], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; 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 IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; 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 CFR 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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 includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also 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]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see 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 CFR 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 R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

In this instance, although the sufficiency of the evaluative data available to the April 2010 CSE is not at issue, a discussion thereof provides context for the discussion of the issue to be resolved—the appropriateness of the program recommendation set forth in the April 2010 IEP.

The hearing record demonstrates that, in formulating the student's April 2010 IEP, the CSE utilized a December 2009 classroom observation that was conducted by a district special education teacher, a March 2007 psychological evaluation report, an April 2009 IEP, a November 2009 Aaron School fall report, an October 2009 Aaron School counseling plan, an October 2009 OT progress report, and an October 2009 speech-language therapy plan (Tr. pp. 149, 152-53, 199, 203-04, Dist. Exs. 11-16; Parent Ex. D).[5] The hearing record shows that the student exhibited delays in pragmatic language, communication, sensory regulation, social skills, anxiety, frustration tolerance as well as fine and gross motor skills as indicated in the documents reviewed by the CSE (Dist. Exs. 11-16; Parent Ex. D). The student exhibited difficulties in the areas of auditory/visual processing, visual-spatial reasoning, memory, semantics and grammar, handwriting, visual sequencing, memory, physical rigidity, and a prosodic tone (Dist. Ex. 16 at p. 11). Standardized testing in the area of adaptive behavior, with the student's mother serving as informant, indicated that the student exhibited clinically significant delays in communication, socialization, and activities of daily living (ADL) (id. at p. 10). The student's ability to maintain his attention was variable, from weak to average, but overall results did not indicate symptoms consistent with an attention deficit hyperactivity disorder (ADHD) (id. at pp. 9-10). With respect to academic achievement, results of the standardized testing indicated that the student achieved average to high average skills in the areas of reading, writing, math, and academic fluency (Dist. Ex. 16 at p. 10). The student exhibited below average to average skills in writing mechanics due to deficits in the areas of use of precise words, spelling, and grammar (id. at p. 11). The student's executive functions were found to be in the average to superior range including regulation of attention and use of effective strategies (id. at p. 9).

The December 3, 2009 classroom observation of the student at the Aaron School was conducted during writing and social studies sessions and indicated that the student's class consisted of 12 students, 1 teacher, and 2 teaching assistants—one of which was a 1:1 assistant for another

[5] Although the district asserts in its petition that the April 2010 CSE also reviewed the February 2010 Aaron School mid-year report, it is unclear from the hearing record whether the report was, in fact, considered (see Tr. pp. 149, 152-53, 199, 203-04; see also Parent Ex. L).

student (Dist. Ex. 11 at p. 1). The observation report indicated that the student followed the teacher's directives, read his story to the class in a fluent manner, and followed the teacher's directive to assist another student with his work (id.). The report also indicated that the student sat as his desk during the lesson and participated in the class discussion, followed along as other students read aloud, and that he appropriately engaged in group work with his peers including participating in the group discussion (id. at p. 2). In summarizing the observation, the special education teacher indicated that the student maintained attention on all tasks, followed directions and academic instructions, and exhibited appropriate adult and peer interactions (id.).

The Aaron School 2009-10 fall report indicated that the student was an "independent learner," managed materials independently, and with support applied study skills, self-monitored attention, followed multi-step directions, interpreted social cues/body language accurately, articulated his ideas clearly, managed frustration appropriately, and solved conflicts appropriately (Dist. Ex. 12 at pp. 1-2, 4).

The October 2009 Aaron School counseling plan indicated that the student exhibited difficulties in the area of social skills, pragmatic language, and cognitive flexibility (Dist. Ex. 13). The plan indicated that the student found it a challenge to incorporate the ideas and interests of peers during play, and that he demonstrated difficulties with interpreting nonverbal cues and quickly processing social information during social interactions, including during conflicts with peers (id.).

The October 2009 Aaron School OT progress report indicated the student's OT goals including improvement in the areas of fine motor skills, graphomotor skills, frustration tolerance during group activities, cooperation during group work with peers, motor planning, and gross motor skills (Dist. Ex. 14).

The October 2009 speech and language therapy plan developed by the Aaron School described the student's goals including improvement in the areas of oral/written language skills, understanding of literal and abstract concepts, spoken/written language, pragmatic language, conversational skills, verbal reasoning, and problem-solving skills (Dist. Ex. 15).

In addition to the above evaluative information, the hearing record reveals that, in formulating the student's IEP, the April 2010 CSE also obtained and relied on information about the student from the student's then-current Aaron School teacher, who provided information to develop the present levels of performance, including information regarding the level of individual support required by the student and the level of the student's distractibility (Tr. pp. 154, 767).

A. 12:1+1 Special Class Placement

After reviewing the evidence above and turning to the parents challenge to the district's representations that 12:1+1 special class in a community school was appropriate, State regulations provide that a 12:1+1 special class placement is designed to address students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). These regulations further define management needs for students with disabilities as "the nature of and degree to which environmental modifications and human or material resources are required to

enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). Given the level of management strategies required to support the student that are included in the April 2010 IEP, it was reasonable for the CSE to conclude that the student's needs were of such a substantial nature so as to "interfere with the [student's] instructional process" (8 NYCRR 200.6[h][4][i]; see Dist. Ex. 3 at pp. 3-5). Thus, the recommended 12:1+1 special class placement was appropriate under the circumstances (Dist. Ex. 1 at pp. 2, 12).

The hearing record shows the April 2010 IEP contained environmental modifications and human/material resources to address the student's management needs as follows: (1) redirection, repetition, and preview of material; (2) modeling; (3) use of graph paper/calculator and graphic organizers; (4) markers to maintain place; (5) tasks broken down into small steps; (6) sensory tools, water breaks, and body breaks; (7) instruction regarding perspective taking, anxiety, social problems solving, and transitions; and (8) related services of counseling and OT (Dist. Ex. 3 at pp. 3-5). The hearing record shows that the strategies and accommodations recommended in the April 2010 IEP addressed the student's needs in language processing, auditory and visual processing, sensory regulation, motor skills, writing, and social/emotional functioning, and were appropriately targeted to reinforce and facilitate the student's ability to acquire and develop academic skills, especially in light of the student's strength in executive functions and his ability to follow directions (see Dist. Exs. 11 at p. 2; 16 at p. 9).

Testimony by the district school psychologist supports the April 2010 CSE's recommendation of a 12:1+1 special class in the IEP (Tr. pp. 155-56, 171-86). The school psychologist testified that the April 2010 CSE reviewed the evaluative information and input from the CSE members to develop a program for the student for the 2010-11 school year and considered the student's needs in the areas of academic achievement, speech-language, and social/emotional functioning (Tr. pp. 153-56, 168-69, 171-87). Consistent with the testimony of the school psychologist, the student's April 2010 IEP reflects the CSE's discussion regarding the student's current functioning and needs in the areas of academics, language processing, social skills, attention, sensory regulation, anxiety, cognitive flexibility, memory, and confidence, as well as fine and gross motor skills (Tr. pp. 171-87; Dist. Ex. 3 at pp. 1-16). The CSE recommended the related services of speech-language therapy, OT, and counseling based on the student's needs in the areas of pragmatic language, conversational speech, verbal reasoning, fine and gross motor skills, frustration tolerance, and group social skills (Tr. pp. 186-90, 230; Dist. Ex. 3 at p. 14).

The student's parent and Aaron School teacher provided input at the CSE meeting regarding the student's educational program, including the consideration of the recommended 12:1+1 special class (Tr. pp. 153-54, 168-69). As previously noted by the District Court, the school psychologist testified that the student's Aaron School teacher believed that a 12:1+1 special class "was warranted" (Tr. p. 191; see P.G., 2013 WL 4055697, at *15). The school psychologist testified that, because the Aaron School teacher "was the individual working with [the student] every day, [the CSE] listened to her and took her perspective into consideration" (Tr. p. 191). Although, as the parents point out, the student's Aaron School teacher participated in the CSE meeting by telephone and was not available for the entire meeting, the school psychologist testified that the CSE discussed the 12:1+1 special class recommendation with the teacher prior to her leaving the meeting (Tr. pp. 170, 183). The testimony of the parent's advocate, who also attended the April 2010 CSE meeting, indicated that the Aaron School teacher expressed to the CSE that the student "needed at least a 12:1[+]1" and did not recommend a particular classroom ratio (Tr. p. 767). With

respect to this potentially contradictory testimony, the District Court has already observed that the IHO did not make a credibility determination (see P.G., 2013 WL 4055697, at *15). Therefore, to the extent that I disagree with certain of the IHO's findings of fact, it is with regard to the weight to be accorded to the witnesses' testimony, not their credibility (see L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 485 [S.D.N.Y. 2013]; E.C. v. Bd. of Educ., 2013 WL 1091321, at *18 [S.D.N.Y. Mar. 15, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *9-*10 [S.D.N.Y. Feb. 20, 2013]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581 [S.D.N.Y. Feb. 14, 2013]).

The hearing record shows that the April 2010 CSE rejected an integrated co-teaching (ICT) class and both a 12:1 and a 6:1+1 special class for the student because these placements would not address his needs (Dist. Ex. 3 at p. 15; see Tr. pp. 190-91;). According to the parents' advocate, the district special education teacher expressed at the April 2010 CSE meeting that a 12:1 special class would have been more academically appropriate for the student (Tr. pp. 788-89). On the other hand, the parent's advocate testified that both the district special education teacher and the district school psychologist expressed concern that the student would not have been appropriately functionally grouped with the other students in a 12:1+1 special class (id.). The parent's advocate also relayed the Aaron School teacher's concerns about the amount of individual support needed by the student (Tr. p. 767). The school psychologist testified that parent was undecided regarding the 12:1 and 12:1+1 special classes but that she was "open" to both recommendations (Tr. p. 191). Far from reflecting an inappropriate placement recommendation, the foregoing testimony reflects that the April 2010 CSE appropriately weighed various considerations prior to reaching the ultimately appropriate recommendation of a 12:1+1 special class.

The hearing record shows that the parent and the advocate requested that the April 2010 CSE defer to the central based support team (CBST) for a placement in a state-approved nonpublic school (Tr. pp. 191, 768-69). According to the district school psychologist, the April 2010 CSE believed that a referral to the CBST was inappropriate because the student would not have access to nondisabled peers in a state-approved nonpublic school (Tr. p. 192). The parent objects to the April 2010 CSE's decision not to recommend deferral to the CBST; however, the district was not required to consider placing the student in a non-public school if it believed that the student could be satisfactorily educated in the public schools (W.S. v. Rye City Sch. Dist., 454 F.Supp.2d 134, 148-49 [S.D.N.Y. 2006]). "If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort" (W.S., 454 F.Supp.2d at 148; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education"] [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *19-*20 [S.D.N.Y. Sept. 16, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363

[S.D.N.Y. 2009]; Patskin, 583 F.Supp.2d at 430-31). Thus, although the parent might have preferred otherwise, given the availability of an appropriate program for the student in this instance, the district was not required to recommend a nonpublic school.

Moreover, the hearing record shows that, for the 2009-10 school year, the student was being successfully educated in a 12:1+1 special class at the Aaron School (see Dist. Exs. 11 at p. 1; 12). As described above, the December 3, 2009 classroom observation of the student at the Aaron School reported that the student followed directions, stayed at his desk, participated in class, remained attentive, and engaged in group work (Dist. Ex. 11 at pp. 1-2). Similar to the various strategies and accommodations recommended by the April 2010 IEP to address the student's management needs, the Aaron School 2009-10 fall report identified similar methods utilized during the 2009-10 school year in a class with the same student-to-adult ratio as that which was recommended by the April 2010 CSE (compare Dist. Ex. 3 at pp. 3-5, 14, 16, with Dist. Ex. 12 at pp. 1-2, 4).

Based upon the foregoing, the hearing record supports a finding that the recommended 12:1+1 special class in a community school, along with related services, was reasonably calculated to enable the student to receive educational benefits for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

VII. Conclusion

In summary, the IHO's determination that the recommended 12:1+1 special class was not appropriate for the student is unsupported by the hearing record. Thus, for the reason set forth in this decision, as well as the reasons detailed in my previous decision and by the District Court (P.G., 2013 WL 4055697; Application of the Dep't of Educ., Appeal No. 12-013), I find that the district offered the student a FAPE for the 2010-11 school year. It is therefore unnecessary to reach the issue of whether the student's unilateral placement at Eagle Hill was an appropriate placement or whether equitable considerations support an award of tuition reimbursement, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated December 13, 2011 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2010-11 school year and directed the district to reimburse the parent for the student's tuition costs at Eagle Hill for the 2010-11 school year.

Dated: **Albany, New York**
December 31, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER