



The University of the State of New York

The State Education Department State Review Officer

No. 08-037

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

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Karyn R. Thompson., Esq., of counsel

Skyer, Castro, Foley & Gersten, attorneys for respondent, Jesse Cole Foley, 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 respondent's (the parent) son and ordered it to reimburse the parent for her son's tuition costs at the Aaron School for the 2007-08 school year. The appeal must be sustained.

At the outset, I will address a procedural issue arising on appeal. The parent attaches as an exhibit to her answer an Aaron School Mid Year Report dated February 2008 for the student and offers it as additional documentary evidence for consideration in this appeal (Answer Ex. 1). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003). The district has objected in its reply to the admission and consideration of this exhibit, arguing that the document is unnecessary and improper because it was not referenced in the parent's answer.¹ I

¹ A petitioner may serve and file a reply for consideration by a State Review Officer "to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6).

will not consider the February 2008 Mid Year Report from the Aaron School because it is not necessary in order to render a decision.

At the time of the impartial hearing, the student was enrolled in a 10:1+1 special education class at the Aaron School (Tr. p. 33).² The Aaron School is not approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education 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]).

The hearing record reflects that when the student was two years old and attending a preschool program, he received a diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS) and subsequently received applied behavior analysis (ABA) therapy, speech-language therapy, occupational therapy (OT), and physical therapy (PT) through the Early Intervention Program (Parent Ex. G at p. 2).

In September 2005, the student transitioned to services under the auspices of the district's Committee on Preschool Special Education (CPSE) and attended a class comprised of four children at a general education preschool (Parent Ex. G at p. 2).

On October 6, 2006, a neurodevelopmental evaluation of the student was conducted (Parent Ex. G). The evaluation reflects that the student achieved gross motor developmental milestones within age expectations, with the exception of walking up stairs; however, his early fine motor milestones were delayed and his speech-language milestones were reportedly "significantly" delayed (*id.* at p. 1). The evaluation report indicated that the student communicated a wide variety of intentions using complex sentences, requested play dates with children in his class, exhibited difficulty with word and idea retrieval and demonstrated poor use of accurate sentence structure (*id.* at p. 2). The evaluation report also stated that the student reportedly required the support of his special education itinerant teacher (SEIT) during circle time, visual perceptual activities and social skills instruction (*id.*). The evaluator noted free range of motion in all four of the student's extremities, reduced muscle tone in his facial muscles and fine and gross motor incoordination (*id.*). The evaluator reported that the student's hand dominance was not yet established (*id.*).

The evaluator administered the Kaufman Brief Intelligence Test, Second Edition (KBIT-2), which yielded a nonverbal intelligence standard score of 118 (above average), a verbal intelligence standard score of 105 (average) and an IQ composite standard score of 114 (average) (Parent Ex. G at p. 3). The evaluator also administered Module 2 of the Autism Diagnostic Observation Schedule (ADOS), described in the report as a "standardized, semi-structured observation instrument used to assess social and communicative behaviors in children" (*id.*). In the area of communication, the student was able to maintain conversation for two turns; however, he did not readily initiate conversations without contextual support and the quality of his "turns" was reported to be poor (*id.*). The student's responses to the evaluator were not always related to

² I note that the hearing record contains multiple duplicative exhibits. For purposes of this decision, only Parent exhibits were cited in instances where both a District and Parent exhibit were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

the topic, he used "scripted" language and pronoun reversal and he exhibited echolalia several times during the evaluation (id.). The evaluator reported that when the student was given time for free play using dolls and various pieces of furniture, the student did not know how to play with these items and stated, "I want to play something else" (id.). The evaluation report indicated that the student demonstrated a number of strengths including, instrumental and informational gestures to supplement verbal expression, responding well to cues for joint attention with gaze shifts, listening attentively to a story, asking questions regarding the story and commenting about the events of the story (id.). With regard to reciprocal social interactions, the evaluator reported that the student's eye contact was fleeting; however, the student occasionally looked toward the evaluators and smiled to share enjoyment (id. at p. 4). The student required the use of an activity schedule and reinforcers (id.). The evaluator noted that although he exhibited social interactive strengths, such as commenting, requesting with a variety of sentence structures and inquiring during several interactions; overall, the student demonstrated difficulty initiating, maintaining and terminating conversations and his play skills were limited to parallel and associative play (id.).

Administration of the Oral and Written Language Scales (OWLS) revealed age appropriate expressive and receptive language skills and the evaluator opined that the student had the ability to use and understand language "within age level expectations" and that his language skills were a "significant strength" (Parent Ex. G at p. 4). The evaluator determined that the scores achieved by the student on the OWLS were grossly consistent with the language skills he exhibited throughout the evaluation with regard to vocabulary, sentence structure and general knowledge (id. at pp. 4-5). The evaluator noted that although the student's language skills were considered age appropriate based on standardized testing, his ability to use his knowledge of content (vocabulary), form (grammar) and use (pragmatics) concepts in successful social interactions was poor (id. at p. 5).

The evaluator reported that the student separated easily from his parents and that while he was cooperative and compliant during the lengthy testing, the student required the support of an activity schedule and reinforcers, as well as, structure to maintain his focus and complete tasks (Parent Ex. G at p. 5). Frequent redirection back to task was necessary, however; the student demonstrated a desire to communicate and interact with the evaluators throughout the evaluation (id.). To gain additional information about the student's skills, the evaluator contacted the student's SEIT and his ABA therapist who reported that the student had made particular progress in the areas of language, social interaction and self help skills (id.). The SEIT and ABA therapist indicated to the evaluator that in the classroom the student improved with teacher-directed and structured activities, but continued to require support in higher order social skills, including flexibility with imitation and maintenance of peer interaction (id.). The student also required the use of reinforcers and a token economy system for low interest activities (id.).

The evaluator determined that the student continued to exhibit some mild features of PDD-NOS, but also exhibited a number of strengths, including a desire to communicate, to interact with his peers, to follow adult direction, to imitate and to learn from his environment (Parent Ex. G at p. 5). The evaluator also cited the student's expressive and receptive language skills and his cognitive skills as strengths, indicating that functionally the student's language skills were affected by his inability to generalize the skills into successful social interactions (id. at pp. 5-6). Additionally, the evaluator reported that the student presented with sensory integration dysfunction, hypotonia and fine motor incoordination characterized by poor graphomotor skills and decreased sensory processing that could affect his attending ability (id. at p. 6). The evaluator

recommended a small, structured class for the 2007-08 school year with support for task completion and socialization, opportunities to interact with "mainstream" peers, and given his cognitive potential, a class where the student would not be the highest functioning child (id.). The evaluator also recommended speech-language therapy to improve sentence structure and conversational skills and to foster generalization of the student's language knowledge base into socially appropriate interactions (id.). The evaluator recommended OT to address fine motor skills and improve sensory motor integration, preferably in a sensory enriched gym (id.). The evaluator opined that the student would benefit from a socialization group to emphasize peer relations and interaction under the supervision of a professional trained in improving socialization skills (id.).

On March 5, 2007, a progress report/IEP review was developed by the student's SEIT, speech-language therapist, preschool head teacher, and assistant teacher which stated that the student was greatly motivated by his peers and that when play themes remained fairly consistent throughout a game, the student was an independent participant (Parent Ex. I at p. 1). The student followed along easily, responded to verbal comments and nonverbal gestures of other children and added ideas of his own (id.). The student became overwhelmed and needed adult facilitation with less defined fantasy play that required the student to keep up with more than one theme, determine how to play without group cohesion, or participate with competing verbal and nonverbal cues (id.). The progress report indicated that the student had made considerable progress in the fine motor domain and drew figures regularly, adding details when engaged in conversations about his drawings (id.). The student also reportedly demonstrated better use of scissors and regularly manipulated other classroom tools with ease (id. at p. 2). The report described the student as "motivated by children and his own achievement" and "more independent and engaged in his own progress" (id.).

On April 24, 2007, the district's school psychologist conducted an observation of the student in his preschool classroom as part of a "Turning Five Summary Report" (Parent Ex. F). At the time, the student was attending a general education preschool and receiving 12 hours per week of SEIT services and two hours per week of speech-language therapy at the school (id. at p. 1). Additionally, the student received three hours per week of OT in a sensory gym and ten hours of SEIT services at home (id.). The school psychologist reported that based on information received from the student's in-school SEIT and related service providers, the student had made significant improvement and progress in his language, social, self-help and motor skills during the 2006-07 school year, but still required adult support to sustain complex, reciprocal conversations, with social and pragmatic language and with fine motor and visual motor skills (id.). The school psychologist observed the student during free play, at which time the class was comprised of thirteen students and four adults, including the student's SEIT (id.).

As part of the Turning Five Summary Report, the district's school psychologist administered the Developmental Assessment of Young Children (DAYC) through parent report, direct observation, the student's participation in specific tasks and teacher interviews (Parent Ex. F at p. 2). The student's general developmental quotient was determined to be in the average range, as were his scores in the cognitive and communication domains (id.). His scores in the social/emotional, physical development and adaptive behavior domains were determined to be in the below average range (id.). Based on her observation of the student in his classroom, parent and teacher interviews, and reports of the student's progress and capabilities from both of his SEIT providers and his related service providers, the school psychologist recommended that the student

enter kindergarten in a collaborative team teaching class (CTT) with speech-language therapy, OT and counseling (id. at p. 3).

On April 27, 2007, in a social history update, the student's parents reported to the district's social worker that their son required a small class setting with continued speech-language and OT services (Parent Ex. E at p. 1). The social history described the student as a highly energetic, well-behaved, bright child who struggled with social relationships, loved school and was making progress (id. at p. 2).

By letter dated April 27, 2007, the student's developmental pediatrician requested that the district provide the student with round trip bus transportation for the 2007-08 school year (Parent Ex. H at p. 1). The pediatrician's letter stated that due to the student's limitations in coordination and in his ability to express himself verbally, the student needed to be picked up in front of his doorstep and required a "matron" on the bus for supervision (id.).

On May 9, 2007, the district's Committee on Special Education (CSE) convened at the request of the parent and developed an individualized education program (IEP) for the student for the 2007-08 school year (Parent Ex. C at p. 2). Participants included the student's mother and father, the school psychologist, who also acted as the district representative, a regular education teacher from the proposed school, a special education teacher, an additional parent member, the student's school-based SEIT, the student's ABA provider and the parents' advocate (Tr. pp. 81-82; Parent Ex. C. at p. 2). The May 2007 CSE determined that the student was eligible for special education services as a student with a speech or language impairment (Parent Ex. C at p. 1). For the 2007-08 school year, the CSE recommended a program consisting of a 10:1 CTT class with related services of two 30-minute sessions of speech-language therapy per week in a group of three, two 30-minute sessions of OT per week in a group of three and one 30-minute session of counseling per week in a group of three (id. at pp. 1, 15). The May 2007 IEP indicated that the CSE considered and rejected placement of the student in a general education class, a general education class with special education teacher support services (SETSS) and a special class in a special school because "[the student's] academic and social success requires a combination of consistent, intensive remediation within an intellectually stimulating, structured class with typically developing peer models to address academic delays, deficits in speech/language and motor development, and social/emotional delays" (id. at p. 14).

A May 24, 2007 Final Notice of Recommendation (FNR) indicated that the student was offered a specific CTT class at one of the district's schools with related services of speech-language therapy, counseling and OT for the 2007-08 school year (Parent Ex. D).

Dated only "2007," an OT progress report indicated that since September 2006, the occupational therapist provided the student with 60-minute sessions of individual OT three times per week in a clinic setting to address his motor planning skills, ability to functionally respond within a busy environment, upper extremity and core strength, bilateral coordination and fine motor skills (Parent Ex. J at p. 1). The student's occupational therapist reported that the student showed significant progress in his attention to task, peer relations, willingness to attempt novel activities and frustration tolerance, which all assisted in his progress toward his IEP goals (id.). The occupational therapist administered select subtests of the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI) and the Peabody Developmental Motor Scales – Second

Edition (PDMS-2) (id.). The student achieved scores in the average range on the visual motor integration and visual perceptual subtests of the VMI and below average scores on the motor coordination subtest of the VMI and the visual motor integration subtest of the PDMS-2 (id.).³ He achieved a fine motor quotient score of "poor" and a score rated "very poor" on the grasping subtest of the PDMS-2 (id.). The occupational therapist reported that the student was easily distracted by both internal and external stimuli, which affected his functioning both in testing situations and during daily tasks (id.). She also stated that when the student initially believed a task was too difficult he would immediately express frustration, which although improved, continued to affect his fine motor skills (id.). The occupational therapist reported progress in all of the student's short-term objectives, with "significant progress" noted in the student's objectives related to transitions and completion of a 3-4 step obstacle course (id. at p. 2). At the time of the report, the student had mastered two of his three short term objectives related to fine motor skills (id. at pp. 2-3). The student's occupational therapist recommended the student continue to receive individual OT three times per week for 60-minute sessions in a clinic environment until the end of August (id. at p. 3).⁴ The occupational therapist developed new annual goals and short-term objectives for the student's IEP (id. at pp. 3, 4-6).

By letter dated August 20, 2007, the parent provided notification to the CSE chairperson of her intention to unilaterally place the student at the Aaron School for the 2007-08 school year, effective the first day of school (Parent Ex. B). Further, the parent advised the CSE chairperson that she was rejecting the district's IEP and placement proposed at the "last IEP meeting" (id.). Specifically, the parent stated that no valid IEP was created for her son, that she had been denied meaningful participation in the development of the IEP and that the CSE had not recommended an appropriate placement that would provide suitable and functional grouping for the student (id.).

On September 8, 2007, the student attended his first day of school at the Aaron School (Tr. p. 183). The hearing record reflects that between April 2007 and December 2007, the parent made tuition payments totaling \$31,000 to the Aaron School (Dist. Ex. 6).

By due process complaint notice dated September 24, 2007, the parent requested an impartial hearing, stating that the district failed to offer the student a free appropriate public education (FAPE) (Parent Ex. A). In the due process complaint notice, the parent challenged the qualifications of the regular education teacher who attended the CSE meeting (id. at p. 2). The parent further maintained that the recommended class size of 25 children and two teachers was inappropriate for the student (id. at p. 3). Due to the student's sensory needs and fine motor delays, the parent alleged that a CTT class was inappropriate because the recommended school was crowded and exceeded its capacity, which contributed to "a very noisy environment" (id.). Moreover, the parent maintained that placement in a general classroom would "over stimulate and overwhelm [the student]" (id.).

³ The progress report does not indicate a possible reason for the difference in the student's scores on the visual motor integration subtests of the VMI and the PDMS-2.

⁴ I note that the hearing record includes Parent Ex. K which contains identical information to Parent Ex. J, but recommends a reduction of OT to two times per week for 60-minute sessions (compare Parent Ex. J at p. 3, with Parent Ex. K at p. 3). This discrepancy is not explained in the hearing record.

On December 4, 2007, the impartial hearing officer held a telephone conference with both parties (Tr. pp. 1, 3). During the conference call, the signing of a subpoena and scheduling matters were discussed (Tr. pp. 3-6).

On January 15, 2008, the student's mother visited the CTT class placement that the district had recommended for the student (Tr. p. 179).

The hearing began on January 16, 2008 and concluded on January 22, 2008, after two days of testimony (Tr. pp. 8, 203). The impartial hearing officer rendered her decision on March 19, 2008 (IHO Decision at p. 10). She found that the district did not offer the student a FAPE for the 2007-08 school year (id. at p. 8). The impartial hearing officer gave "credit [to] the parent's, and [the parents' advocate's] testimony that the CSE Team did not develop the IEP goals during the Review and that [the parent] did not have an opportunity to effectively participate as a Team member in developing the IEP goals" (id. at p. 9). Additionally, the impartial hearing officer found that this "seriously impeded" the parent's opportunity to participate in the decision making process (id.). The impartial hearing officer decided that the May 9, 2007 IEP was void (id.). The impartial hearing officer also found that the parent's placement of the student at the Aaron School was appropriate because the student made "significant improvement in language and motor development with the current supports in place" (id.). Lastly, the impartial hearing officer determined that there were no equitable considerations that barred the parent from receiving an award of tuition reimbursement, as the parent made the student available for evaluations and cooperated with the district (id. at pp. 9-10). The impartial hearing officer credited the testimony of the student's mother because she was "open to accepting an appropriate public school placement" (id. at p. 10). The impartial hearing officer ordered that the district conduct a CSE review and develop an IEP for the student (id.). The impartial hearing officer further ordered the district to reimburse the parent for tuition paid to the Aaron School for the student's 2007-08 school year (id.).

Initially, it should be noted that that the impartial hearing officer failed to cite to any evidence in the hearing record to support the factual determinations in her decision. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). The impartial hearing officer is reminded to comply with State regulations and cite to relevant facts in the hearing record.

The district appeals and asserts that the impartial hearing officer erred in finding that it did not offer the student a FAPE for the 2007-08 school year. In particular, the district asserts that the impartial hearing officer erred in considering the parent's allegation that she did not have an opportunity to participate in the development of the student's IEP goals because such issue was not alleged in her due process complaint notice. The district further asserts that the impartial hearing officer erred in finding that the Aaron School was an appropriate placement for the student and that equitable considerations weighed in favor of the parent. Lastly, the district maintains that the

impartial hearing officer erred in directing the district to reimburse the parent for tuition paid to the Aaron School for the 2007-08 school year.⁵

The parent submitted an answer admitting and denying the district's allegations.

A central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).⁶

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 (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]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of

⁵ I note that the district does not appeal from the portion of the impartial hearing officer's decision that ordered the district to conduct a CSE review and develop a new IEP for the student. 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, the district is bound by the impartial hearing officer's order that it conduct a CSE review and develop a new IEP for the student.

⁶ The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

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 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).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (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).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).⁷

Turning to the issues presented in this case, the district maintains that it offered the student a FAPE for the 2007-08 school year. The district asserts that the impartial hearing officer erred by considering the parent's claim that she did not have an opportunity to participate in the development of the student's IEP goals because such issue was not raised in her due process complaint notice.

A party requesting an impartial hearing may not raise issues at the impartial due process hearing that were not raised in its original due process request 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 request is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; see Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-139). Although in the instant case the parent failed to raise in the due process complaint notice the allegation that she was impeded from participating in the development of the student's IEP goals, the hearing record reflects that the parent raised this

⁷ New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. Accordingly, in the instant case, the burden of persuasion that the district failed to offer the student a FAPE rested with the parent (see Application of the Dept. of Educ. Appeal No. 08-018).

issue during the course of the impartial hearing and the district did not object to it being raised. Therefore, I will address the issue.

The district contends that, even if the parental participation issue could have been considered by the impartial hearing officer, both the student's parents and their advocate were able to participate in the development of the student's goals at the CSE meeting.

The IDEA sets forth procedural safeguards that include providing parents with an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 C.F.R. § 300.322; 8 NYCRR 200.5[d]). In deciding whether parents were afforded an opportunity to participate in the development of their child's IEP, courts have considered the extent of the participation (Cerra, 427 F.3d at 193 [finding meaningful parental participation when the student's mother attended numerous CSE meetings and a CSE meeting transcript reflected that she "participated actively" in the development of her daughter's IEP and was "frequently consulted for input about the CSE's proposed plan"]; Perricelli, 2007 WL 465211, at *14-15 [finding no denial of a meaningful opportunity to participate when the student's mother was in "frequent contact" with teachers and school officials, "active[ly] participat[ed]" at her daughter's CSE meetings, and questioned the CSE about documents that she did not understand]; Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d. 366, 378-79 [S.D.N.Y. 2006] [finding that the school district's failure at the time of the CSE meeting to have completed an annual report concerning the student's progress toward goals and objectives did not deprive the parents of meaningful participation where the parents attended the CSE meeting and admitted that they were informed of the information to be contained in the report]; see also Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006] [finding no denial of a meaningful opportunity to participate when the parents were involved in the development of the IEP, had a "special education representative," and visited the school recommended by the school district]; A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208 [D. Conn. 2006]).

In the instant case, the impartial hearing officer gave credence to the testimony of the student's mother and the parents' advocate that they did not "effectively participate" as team members in developing the May 2007 IEP goals (IHO Decision at p. 9). The State Review Officer gives due deference to the findings of credibility of the impartial hearing officer, unless the record read in its entirety would compel a contrary conclusion (see Carlisle Area School v. Scott P., 62 F. 3d 520, 524 [3d Cir. 1995]; Application of the Bd. of Educ., Appeal No. 04-091; Application of the Bd. of Educ., Appeal No. 03-062; Application of the Bd. of Educ., Appeal No. 03-038; Application of a Child with a Disability, Appeal No. 03-025; Application of a Child with a Disability, Appeal No. 01-019; Application of a Child with a Disability, Appeal No. 97-73). Here, however, the hearing record does not support such a finding. The hearing record factually shows that the student's parents meaningfully participated in the overall formulation of their son's program for the 2007-08 school year.

The hearing record reflects that the May 2007 CSE meeting participants included the student's mother and father, the school psychologist, who also acted as the district representative, a regular education teacher from the proposed school, a special education teacher, an additional

parent member, the student's school-based SEIT, the student's ABA provider and the parents' advocate who was familiar with the student (Tr. pp. 81-82; Parent Ex. C at p. 2). The parents' advocate testified that his role at the CSE meeting was to ensure that the CSE team classified the student "in a manner appropriate to drive the program on his IEP's and then to place him in an appropriate program to meet his current educational needs" (Tr. p. 84). According to the parents' advocate, the May 2007 CSE meeting lasted approximately 1½ hours and included extensive discussion primarily regarding the appropriate placement for the student and the classification of the student's educationally handicapping condition; however, the student's IEP goals were not discussed during the meeting (Tr. p. 85). The hearing record reflects that following discussion at the May 2007 CSE meeting and based on the parents' preference, the CSE changed the student's classification to speech or language impairment (Tr. pp. 86, 254, 228-29, 271-72). The student's mother testified that she had opportunities to provide input about her thoughts at the May 2007 CSE meeting and that she felt that she was a member of the team and included in the process (Tr. p. 180). The student's mother testified that she "was feeling at ease" and open to whatever the team had to say (Tr. p. 150). The hearing record further reflects that at the May 2007 CSE meeting, the student's mother told the CSE that she disagreed with the CTT recommendation and that she felt that the student needed adult support in the classroom (Tr. pp. 151, 153). The student's mother and her advocate also expressed their dissatisfaction with the recommended amount of counseling, maintaining that it was not sufficient to meet the student's needs (Tr. p. 95). The parents' advocate admitted that he and the parents did not raise any concerns during the meeting specific to the large setting of the proposed placement (Tr. p. 129). He further testified that they did not raise concerns about the reduction in related services or the student's goals and that they had the ability to do so (Tr. pp. 128-29, 133-34). The district's school psychologist testified that the CSE reduced the frequency and duration of the student's speech-language therapy and OT due to schedule differences in transitioning from preschool to kindergarten and based on the progress reported by the student's related service providers (Tr. pp. 273-75). She further testified that the parents were informed at the May 2007 CSE meeting that, if after working with the student, the student's service providers determined that his speech-language and OT services needed to be increased, such services would be modified at another CSE meeting (Tr. p. 274). The hearing record reflects that although the student's mother testified that there was no discussion regarding the student's related services, the parents' advocate testified that he did not recall if he and the parents raised concerns about the reduction in related services, but that they had the ability to do so at the meeting (Tr. pp. 126-28). Moreover, the student's mother testified that she anticipated that the student's related services would be reduced (Tr. p. 80). The hearing record further reveals that the student's occupational therapist recommended a reduction in OT frequency (Tr. p. 180; Parent Ex. K at p. 3). Based on the above, including the parents' participation at the May 2007 CSE meeting as aided by their advocate, the district's demonstrated responsiveness to the parents' suggestions at the meeting (i.e. change in classification), the parents' testimony that they felt that they were part of the CSE team, and the acknowledged opportunity for the parents to discuss all aspects of the IEP at the CSE meeting, supports the conclusion that a reading of the entire hearing record demonstrates that the parents were not significantly impeded from participating in the formulation of their son's May 2007 IEP despite the lack of formal discussion of the goals.

Additionally, as stated above, the hearing record demonstrates that the student's IEP goals were not discussed during the May 9, 2007 CSE meeting (Tr. pp. 85, 155, 157, 232, 250, 308-09). However, the parents' advocate testified that that he was "pretty sure" that the goals were written by the student's then current service providers and incorporated into the IEP (Tr. pp. 85-86). The

district's school psychologist testified that the student's SEIT provided the information to develop the academic goals (Tr. pp. 284-85). She further testified that all of the goals on the May 2007 IEP were based on the recommendations of the student's service providers (Tr. pp. 285, 320-21). I note that the student's May 2007 IEP goals and short-term objectives relative to the student's needs in reacting to environmental stimuli, motor planning, fine motor skills and visual motor skills were developed by his occupational therapist (compare Parent Ex. J at pp. 3, 4-6, with Parent Ex. C at pp. 8-10) and that the goals and objectives relative to the student's social, expressive language, and pragmatic language needs contain language from and are directly supported by the March 2007 progress report and the April 2007 classroom observation, as well as, the recommendations made by the student's developmental pediatrician in October 2006 (see Parent Exs. F at pp. 1-2; G at pp. 6-7; I). A thorough review of the hearing record reveals that the goals and short-term objectives contained in the May 9, 2007 IEP reflect the requisite correspondence to and alignment with the student's identified needs and skill deficits and that the goals are substantively appropriate.

On the issue of goals, the hearing record reflects that the parent could have discussed the goals or suggested substantive changes at the May 2007 CSE meeting or thereafter. Although the hearing record contains conflicting information regarding when the parent received the final written May 2007 IEP, I note that there was sufficient time for the parent to express any concerns that she may have had about the goals and short-term objectives to the CSE for resolution prior to her unilateral placement of the student at the Aaron School.⁸ Significantly, although the parent contends that the student's IEP goals were made through an inadequate process, at no time has the parent asserted that the goals themselves were inappropriate. Nor has the parent suggested how the goals should be changed. Based upon the foregoing, the hearing record does not support a finding that the CSE significantly impeded the parent's opportunity to participate in the formulation of the student's May 2007 IEP (see Cerra, 427 F.3d 186; see also Viola, 414 F. Supp. 2d 366).

The district also asserts that the recommended program of CTT was appropriate and that the parent failed to satisfy her burden of persuasion to show that the district did not offer the student a FAPE for the 2007-08 school year. I agree.

In this case, the hearing record reflects that the student exhibits delays in motor planning, body awareness, bilateral coordination, fine motor and visual motor skills, as well as delays in the social/emotional and adaptive behavior domains (Parent Exs. C at p. 5; F at p. 2). His cognitive ability falls in the above average range of intellectual functioning, and academically the student is reportedly at a late kindergarten/early first grade reading level and at an early first grade level in math (Tr. pp. 41, 44-45; Parent Ex. C at p. 3). The hearing record also reflects that the student continues to exhibit mild features of PDD-NOS and reportedly becomes overwhelmed with less defined fantasy play that requires him to keep up with more than one theme or to participate with competing verbal and nonverbal cues (Parent Exs. G at p. 5; I at p. 1).

⁸ The student's mother testified that she received the May 2007 IEP in the mail "a couple weeks" after the meeting, in June 2007 (Tr. p. 157). Testimony from the school psychologist and documentary evidence contained in the hearing record reflect that the IEP was provided to the parent at the CSE meeting (Tr. p. 283; Parent Ex. C at p. 2).

The school psychologist observed the student in April 2007 during a free play activity in his general education preschool class (Parent Ex. F at p. 1). With some facilitation by the student's SEIT, the student engaged in symbolic play with another student by pretending to have a meal together (id.). With prompting from the SEIT, the student elaborated on creative themes and remained engaged in the activity (id.). When the children in the class later pretended to be riding a train, the student used a toy plate to symbolize a steering wheel and announced, "This is Franklin Street. Park Place next" (id. at p. 2). The school psychologist reported that throughout her observation the student referenced the actions of his classmates and occasionally asked questions about what another student was doing (id.). He did not seek support from his SEIT who allowed him to explore the room and initiate play independently (id.). The SEIT reported that the student's behavior during the classroom observation was typical of the student's general behavior in school and indicated to the school psychologist that the student's greatest motivation was his desire to "connect" with his peers (id.). Furthermore, the school psychologist recommended that the student attend kindergarten in a CTT class (id. at p. 3).

The observations of the student reported by the school psychologist are consistent with the March 5, 2007 progress report/IEP review developed by the student's SEIT, speech-language therapist, preschool head teacher, and assistant teacher (Parent Ex. I at p. 1). The report stated that the student was greatly motivated by his peers and that when a play theme remained fairly consistent throughout a game, the student was an independent participant (id.). He followed along easily, responded to verbal comments and nonverbal gestures of other children and added ideas of his own (id.). According to the student's in-school SEIT and related service providers, the student made significant improvement and progress in his language, social, self-help and motor skills during the 2006-07 school year, but still required adult support to sustain complex, reciprocal conversations, with social and pragmatic language and with fine motor and visual motor skills (Parent Ex. F at p. 1).

For the 2007-08 school year, the CSE recommended a program consisting of a 10:1 CTT class with related services of two 30-minute sessions of speech-language therapy per week in a group of three, two 30-minute sessions of OT per week in a group of three and one 30-minute session of counseling per week in a group of three (Parent Ex. C at pp. 1, 15). The resultant IEP stated that the student demonstrated a joy of learning and an enthusiasm for social engagement and that despite a significant improvement in his language, social and self-help skills, the student continued to require adult support to sustain complex, reciprocal conversations and attempt new challenges (id. at p. 3). The May 2007 IEP described the student as generally well behaved, comfortable with classroom rules and routines, and responsive to adult facilitation of social or academic challenges (id. at p. 4). The IEP also noted the student's delays in motor planning, body awareness and bilateral coordination, as well as in his fine and visual motor skills (id. at p. 5). The May 2007 IEP contained goals and corresponding short-term objectives to address the student's understanding of basic concepts, attending skills, play skills, and his problem solving/coping skills (id. at pp. 6-7). The IEP also contained goals and short-term objectives to address the student's deficits in his reactions to environmental stimuli, motor planning, fine motor skills, visual motor skills, and expressive and pragmatic language skills (id. at pp. 8-12).

The special education teacher of the proposed CTT class for the student testified that the class is comprised of fourteen general education and eight special education students, who will remain together with the same teachers for both kindergarten and first grade (Tr. pp. 329-31). She

further testified that the class includes students on the autism spectrum, students with speech-language needs and students with social needs (Tr. p. 332). The class profile for the district's CTT placement during 2007-08 reveals that two students have above average cognitive ability, fifteen students function in the average range and five students have below average cognitive ability (Dist. Ex. 5 at pp. 1, 2). The profile also reflects that eight students exhibit below average social development and that three students exhibit below average ability in oral expressive language (*id.*). The special education teacher testified that based on her review of the student's May 2007 IEP and other reports, the student would have been functionally grouped with the other students in her class, that his goals and needs are consistent with those of the other students and that she believes that "he was a perfect candidate" (Tr. pp. 346-47).

The special education teacher testified that peer modeling was an important part of the CTT class (Tr. p. 332). She further testified that when students with social needs are around students who exhibit developmentally appropriate social behavior, "they really pick up on it" and are able to follow that behavior (Tr. pp. 332-33). She also indicated that much of the class work focuses on social skills because many of the students, including the general education students, need reinforcing and benefit from modeling (Tr. p. 333). The district's regular education teacher testified that the counseling recommended for the student was "not so much therapy as it is social skills" and that the social worker works with a small group of children "on how to talk to each other and how to play together" (Tr. p. 252). She further testified that for children who have speech-language needs, the counseling group provides an opportunity for the students to practice their speech-language skills (Tr. p. 253).

Regarding the student's deficits in his reactions to environmental stimuli, as well as, his distractibility, testimony elicited from the district's school psychologist and the special education teacher of the proposed CTT class reveal that plastic "dots," beanbag chairs, weighted vests and "chewy-tubes" are used in the classroom to address students' sensory needs, and classroom teachers consult regularly with the occupational therapist to ensure that students' needs are met in and out of the classroom (Tr. pp. 323-24, 334-35, 352). The special education teacher testified that although the school's OT gym is not a "sensory" gym, it contains much of the same equipment and materials as a sensory gym (Tr. pp. 335-36). The special education teacher further testified that her classroom is the largest in the school, is located away from the street and that she is able to position those children who are easily distracted away from windows and into a quiet alcove area of the room (Tr. pp. 353-55). The proposed classroom is on the first floor of the school and is located at the back of the school building with its own bathroom and door to the outside so that the students are "in their own little world with their classroom" and unaware of the size of the school (Tr. pp. 338, 383).

For the reasons described above, I find the district's proposed program and placement to be appropriate to meet the student's special education needs as identified at the time of the May 2007 CSE meeting.

The district also argues that the parent abandoned her allegation set forth in the due process compliant notice regarding the composition of the CSE, namely the qualifications of the regular education teacher, by failing to address the issue at the impartial hearing. The qualifications of the regular education teacher, although raised in the parent's due process complaint notice, were not raised at the hearing, and, therefore, the issue is not properly raised in this appeal (Application of

a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024).

However, if the issue had been properly raised at the impartial hearing, federal and State regulations require that a CSE include at least one regular education teacher of the student (if the student is, or may be participating in the general education environment) (34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher member "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and, supports, and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; see 34 C.F.R. § 300.324[a][3][i],[ii]; 8 NYCRR 200.3[d]). The regular education teacher must participate in the review and revision of the IEP (20 U.S.C. § 1414[d][4][B]; see 34 C.F.R. § 300.324[b][3]; 8 NYCRR 200.3[d]).

The parent contends that "the general education teacher could not have possibly been the kindergarten teacher for [the student] because she would have never recommended such a large, over stimulating classroom ... if she had reviewed the file" (Parent Ex. A at p. 2). The parents' advocate testified that it was not the regular education teacher's credentials that were in dispute, but the fact that she was not a regular education teacher or one that could have been the student's teacher (Tr. p. 119).

In this case, I find that the regular education teacher was an appropriate member of the student's May 2007 CSE and met the standards set forth in the State regulations. The district's regular education teacher, who participated in the May 2007 CSE meeting, testified that she was a kindergarten and first grade teacher for ten years prior to her current position as a first grade reading teacher and library teacher at the district school proposed for the student (Tr. p. 207). The regular education teacher testified that she is also responsible for assisting the principal in establishing the kindergarten classes, which includes making visits to preschools and meeting with preschool directors to discuss the children who would be attending the district's school and reviewing student specific information gathered at the time of kindergarten registration (Tr. pp. 214, 221-22). She further testified that because the 2007-08 kindergarten CTT class was new, she and the principal met with preschool directors, conducted observations and carefully selected students for the CTT class who would be strong models for the students with IEPs (Tr. p. 214). Therefore, the regular education teacher knew the makeup of the proposed CTT classroom "very well" (id.).

The regular education teacher testified that she also participates in all CSE meetings held for students who are transitioning from preschool (Tr. pp. 207-08). Prior to the May 2007 CSE meeting, she reviewed all the information collected about the student (Tr. p. 210). She further testified that she met with the school psychologist and the special education teacher prior to the CSE meeting (id.). The regular education teacher testified that her role at the "Turning Five" CSE meeting was "to know what the regular education program would look like, and to think about a child coming in and whether they fit that profile" (Tr. p. 233).

Even though I find that the regular education teacher was appropriate, I note that regardless of whether the regular education teacher was qualified or not to attend the May 2007 CSE, the

parent has not demonstrated that the qualifications of the regular education teacher impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused 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]).

Generally, having determined that the challenged IEP offered the student a FAPE for the 2007-08 school year, I need not reach the issue of whether the parent's unilateral placement of the student at the Aaron School was appropriate, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).⁹ However, in the instant matter, I elect to examine the issue because the impartial hearing officer's determination was based upon erroneous findings of fact.

As explained more fully below, I concur with the district's assertion that the impartial hearing officer made erroneous findings of fact in reaching her determination that the Aaron School was an appropriate placement for the student. In her decision, the impartial hearing officer found that at the Aaron School the student was "placed in a class of 13 students with 4 adults" (IHO Decision at p. 9). However, a review of the hearing record indicates that the impartial hearing officer erred as the student's preschool class was comprised of 13 students and 4 adults (Parent Ex. F at p. 1), while his class at the Aaron School was comprised of ten students, two teachers and a student teacher (Tr. p. 33). Additionally, the impartial hearing officer, citing to the Turning Five Summary Report, concluded that the student "made significant improvement in language and motor development with the current supports in place" while at the Aaron School (IHO Decision at p. 9). However, the impartial hearing officer erred in her reliance on this report as this report was generated approximately five months before the student began attending the Aaron School and was referring to the progress the student had made at his preschool (Parent Ex. F). Accordingly, I will annul the portion of the impartial hearing officer's decision that found that the Aaron School was appropriate because it was based on erroneous findings of fact.

Having already determined that the school district offered the student a FAPE for the 2007-08 school year, and after annulling the impartial hearing officer's determination that the parent's unilateral placement was appropriate, I need not reach the issue of whether equitable considerations support the parent's claim for reimbursement, and the necessary inquiry is at an end (Application of the Bd. of Educ., Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-055; Application of a Child with a Disability, Appeal No. 05-119).

⁹ In this case, regardless of who has the burden of proof, the hearing record amply demonstrates that the district offered the student a FAPE for the 2007-08 school year.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the decision of the impartial hearing officer dated March 19, 2008 is annulled in its entirety.

Dated: **Albany, New York**
 June 11, 2008

PAUL F. KELLY
STATE REVIEW OFFICER