



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-052

### **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 Thompson, Esq., of Counsel

The Law Offices of Skyer, Castro, Foley and Gersten, attorney for respondents, Sonia Mendez-Castro, Esq.

#### **DECISION**

Petitioner (the district), appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents) son and ordered it to reimburse the parents for the costs of their son's special education itinerant teacher (SEIT) services and related services for the 2007-08 school year. The appeal must be dismissed.

The student has diagnoses of hypotonia and a global developmental delay, which specifically includes a developmental dyspraxia or motor coordination disorder, and mild ataxia (Parent Exs. P at p. 17; R at p. 5). He also has a moderate oral-motor/sensory disorder and lack of muscular development (dysarthria), which affects the clarity of his speech production and saliva management skills (Parent Ex. O at pp. 2, 4). The student exhibits delays in the areas of organization and formulation of thoughts, word retrieval and expressive narrative language skills (*id.* at pp. 4-5, 7). He functions in the low average range of cognitive abilities (Parent Ex. P at p. 6). The student displays evidence of a learning disability, behavior difficulties that include some features of a mild autism spectrum disorder, and other behaviors that indicate the presence of an attention deficit disorder (Parent Ex. R at p. 5). The student's eligibility for special education services as a student with an other health impairment is not in dispute in this proceeding (*see* 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]). During the 2007-08 school year, the student attended Park Avenue Methodist Christian Day School (Park Avenue) three hours per day in a general education prekindergarten program with the assistance of a SEIT 12 hours per week (Tr. pp. 39-40). The student also received privately funded related services outside of the Park Avenue setting consisting of three 60-minute sessions of physical therapy (PT) per week, three 45-minute sessions of speech-language therapy per week and two 60-minute sessions of occupational therapy (OT) per week (*see* Tr. pp. 228, 236-37, 553; Parent Exs. S-U).

The student began receiving early intervention services including "special education teacher services," OT, PT and speech-language therapy through the Early Intervention Program (EIP)<sup>1</sup> when he was approximately one year old (Tr. pp. 458-59; Dist. Ex. 7 at p. 2). At approximately two years of age, the parents discontinued related services through EIP and obtained private OT, PT and speech-language therapy services for their son (Tr. pp. 547-49). The student received special education teacher services through EIP until July 2005 (Dist. Ex. 7 at p. 2).

In August 2005, the student underwent a Committee on Preschool Special Education (CPSE) psychosocial evaluation where he reportedly exhibited expressive language, fine-motor and social skill delays, sensory integration difficulties and muscle weakness (Dist. Ex. 7). The CPSE determined that the student was eligible for special education services as a preschool student with a disability and for the 2005-06 school year he attended All Souls Preschool (All Souls), a private general education preschool program four days per week for approximately three hours per day, with two hours per day of SEIT support at school funded by the district (Tr. pp. 38, 535-36; Parent Exs. C at p. 1; D at p. 3). His class was composed of 13 students and three teachers (Parent Ex. C at p. 1).

On January 30, 2006, a developmental pediatrician/pediatric neurologist evaluated the student (Parent Ex. C). She reported that the student exhibited hypotonia,<sup>2</sup> muscle weakness, and hypermobility of his joints that affected his gross, fine and oral-motor skills (*id.* at p. 4). She further reported that aside from the low muscle tone and weakness, the student's neurological examination was intact (*id.*). Recommendations included continuation of current therapies, and consideration of the use of a compression vest for stability and orthotics to keep his feet in more natural alignment (*id.*).

On May 5 and June 13, 2006, a private neuropsychologist evaluated the student (Parent Ex. D at p. 4).<sup>3</sup> Although she reported that the student's expressive language skills had significantly improved since she had last observed him in September 2005, he continued to exhibit severe articulation deficits that limited his speech intelligibility (*id.*). She reported that the student's attention levels were variable and that he continued to struggle with gross-motor, fine-motor and oral-motor deficits (*id.*). Administration of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) yielded a verbal index composite score of 120 (superior), a performance index composite score of 87 (low average), a full scale IQ index composite score of 105 (average), and a global language index composite score of 107 (average) (*id.* at p. 5). The neuropsychologist reported that the student's full scale IQ score was an "averaging out" of discrepant scores which reflected his superior verbal comprehension and his low average visual-motor abilities (*id.* at p. 6). As measured by the Clinical Evaluation of Language Fundamentals-Preschool, the student achieved a total language score in the average range (*id.* at p. 7). Following administration of the Beery-Buktenica Developmental Test of Visual-Motor Integration, 5th Edition (VMI), the neuropsychologist reported that the student had above average visual recognition skills in contrast to his below age-expected level visual-motor integration skills and graphomotor stability (*id.* at p. 8).

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<sup>1</sup> see Pub. Health Law § 2541(7).

<sup>2</sup> The student's occupational therapist described "hypotonia" as a "looseness in [the student's] body" (Tr. pp. 134, 156).

<sup>3</sup> In September 2005, the private neuropsychologist had reviewed the student's developmental history with his parents and observed him during an OT session (Parent Ex. D at p. 1).

Results of the Vineland Adaptive Behavioral Scales (Interview Edition-Survey Form) (Vineland), completed by interview with the parents, indicated that the student continued to "lag behind same-age peers" in the communication, socialization, daily living skill and motor skill domains (Parent Ex. D at p. 8). Compared with Vineland results from the previous year, the student exhibited the most improvement in the areas of daily living skills and communication, while the motor skills domain remained his greatest area of challenge (*id.*). The parents completed the Conners' Parent Rating Scales-Revised: Long (CPRS-R/L) and his SEIT and classroom teachers completed the Conners' Teachers Rating Scales-Revised: Long (CTRS-R/L) (*id.* at p. 10). The student's parents did not report significant problems with their son's attention, anxiety, restlessness or emotional lability, although they noted that he was sometimes inattentive and impulsive (*id.*). All of the student's teachers reported that he often exhibited difficulties with attention at school, in that he was easily distracted, had a short attention span, was physically restless, needed help finishing tasks, had difficulty with organization, only paid attention to what he was really interested in, and often did not seem to listen (*id.*). The neuropsychologist concluded that many of the student's delays and behaviors were neurodevelopmental in nature and could be summarized as a static encephalopathy with concurrent motor coordination disorder, phonological (articulation) disorder and oral-motor apraxia (*id.* at p. 12). Her report contained recommendations for neurological and ophthalmology evaluations, related service provision, including participation in a social pragmatics group, and recommendations for the classroom environment and teaching methods (*id.* at pp. 13-15).

At the commencement of the 2006-07 school year, the student continued attending All Souls three hours per day, five days per week in a class composed of 16 students and three teachers, and continued receiving eight hours of in-class SEIT services per week funded by the district (Tr. pp. 78, 80, 486-87, 535-36; Parent Ex. K at p. 1). He received individual, 60-minute sessions of speech-language therapy three times per week, PT three times per week and OT twice weekly outside of school (Parent Exs. K at p. 1; *see* Parent Ex. B at p. 17).<sup>4</sup> In November 2006, the student's SEIT prepared a progress report (Parent Ex. K). The SEIT reported that the student's weak expressive language skills often affected his ability to interact appropriately in the classroom setting and with peers (*id.* at pp. 1-2). She stated that she provided the student with additional support to expand his use of language; encourage and facilitate appropriate socialization with peers; and during teacher-guided activities, meeting/circle time, snack time and on the playground (*id.* at p. 1). She provided the student with verbal prompts and assistance when talking to peers, who at times had difficulty understanding his speech (*id.*). The student attended to a story read in a 1:1 situation and answered questions about the story with prompts (*id.* at p. 3). He rote counted to five, but did not demonstrate 1:1 correspondence and inconsistently identified colors (*id.*). The student rarely initiated, but enjoyed engaging in parallel play with peers (*id.*). The SEIT reported that the student did not exhibit the language skills to play with peers without adult intervention and he often imitated peers' actions (*id.* at pp. 4, 7). The report provided details about the student's communication, fine and gross-motor skills and self-help skills (*id.* at pp. 4-6). The SEIT indicated that the student benefited from visual cues when following basic multi-step directions (*id.* at p. 2). He worked best in 1:1 or small groups with few distractions and when provided with increased time to allow him to respond (*id.*). The SEIT opined that the student's related and SEIT services were necessary to expand his academic, social/play and communication skills (*id.* at p. 7).

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<sup>4</sup> The student sees two speech-language pathologists, one who uses the "PROMPT" method for one session per week and another who uses other methods (oral-motor) for two sessions per week (Parent Ex. K at p. 1). "PROMPT" was described as a "tactile kinesthetic technique that guides the oral musculature to facilitate connected speech" (Parent Ex. E at p. 1).

On November 24, 2006, the student's private occupational therapist prepared an OT progress report (Tr. p. 524; Parent Ex. L). The occupational therapist reported that the student attended "very well," did not display impulsive behavior and although he responded to extraneous noise, he was able to quickly shift his attention back to tasks (Parent Ex. L at p. 1). She also reported that the student was very motivated by fine-motor activities and exhibited "excellent" frustration tolerance (id.). Administration of the Peabody Developmental Motor Scales, Second Edition (PDMS-2) yielded a 73 percent delay in the grasping domain and a 45 percent delay in the visual-motor domain (id.). The occupational therapist reported that the student sought vestibular, tactile and proprioceptive input and exhibited improved postural and weight-shifting skills when planning movement on equipment (id.). She recommended that the student receive two individual 60-minute sessions of OT per week to address, among other things, his fine-motor, self-care and sensory-motor skill development (id. at p. 3). The occupational therapist's report provided specific short and long-term goals to address the student's reported deficits (id.). She also recommended an increase in the student's SEIT services to 12 hours weekly, due to his fine-motor, expressive language and social interaction deficits (id.).

On December 1, 2006, the student's private physical therapist prepared a PT progress report (Parent Ex. M). The physical therapist reported that his sessions with the student focused on improving overall muscle strength and control, increasing bilateral integration and control, improving control and coordination of movement and improving functional skills for age appropriate play and community activity (id. at p. 1). The report indicated that the student exhibited considerably low muscle tone and mildly increased active range of motion in his upper and lower extremities (id.). He exhibited reduced muscle strength and demonstrated difficulty controlling the force, duration and velocity of movement (ataxia) (id. at p. 2). The ataxia led to the presence of mild tremors observed during the student's attempts to stabilize his body while performing complex or delicate movements (id.). The physical therapist reported that the student exhibited significantly reduced balance and coordination skills for his age, and reduced body awareness and equilibrium responses (id. at p. 3). The student also exhibited poor motor planning skills (dyspraxia) and poor ability to gauge distance, force and velocity of movement (dysmetria) (id. at pp. 3-4). Administration of an assessment identified in the hearing record as the Peabody Scales of Motor Development yielded skill scores at the 33-month level, which although the physical therapist reported was within the "lower percentiles" for the student's age, reflected a significant increase in motor skills in recent months (id. at p. 4). The report summarized the student's functional physical skills and included a recommendation that he continue to receive his current level of PT (id. at pp. 2-5).

On January 18, 2007, the CPSE convened to increase the student's SEIT services to 12 hours per week (Parent Ex. B at p. 2). The student's OT, PT and speech-language therapy services continued at their current levels (id. at p. 17).

In March 2007, one of the student's private speech-language pathologists (PROMPT therapist) prepared a progress report (Tr. pp. 306, 308, 311; Parent Ex. E). She indicated that the student exhibited delays in expressive and receptive language, pragmatic, oral-motor and articulation skills (Parent Ex. E at p. 1). Her therapy consisted of a combination of semi-structured and structured activities, and oral-motor exercises including PROMPT methods (id.). The progress report indicated that the student exhibited "significant gains" in all areas of weakness (id.). The student was able to communicate in complete sentences, ask a variety of "Wh" questions, name categories, repeat sentences, and use a variety of grammatical forms; although the PROMPT therapist reported that the student continued to demonstrate difficulty with many age appropriate expressive language skills (id.). Receptively, the student understood many descriptive concepts,

plurals, use of objects and a variety of "Wh" questions (*id.*). He followed simple one-step and familiar two-step related directions and demonstrated comprehension of several spatial concepts (*id.*). The progress report indicated that the student continued to exhibit difficulty with understanding many early academic skills such as consistent recognition of shapes, letters and numbers (*id.*).

The PROMPT therapist reported that although the student was able answer questions, return a greeting, express emotions, take turns, ask questions to gain information and ask for assistance/permission; pragmatic language continued to be an area of concern in that he demonstrated inconsistent eye contact, engaged in inappropriate vocalizations/behaviors, and needed verbal cues to greet adults/peers, remain on task, attend to conversations and to keep his body "appropriately seated" (Parent Ex. E at pp. 1-2). She judged that the student's speech intelligibility was fair to good in shared contexts, but was compromised by his oral-motor weakness and difficulty with motor planning (*id.* at p. 2). Despite progress in this area, the student continued to present with poor jaw grading, lip rounding, breath support and inadequate lingual control; all of which often resulted in poor quality of speech (*id.*).<sup>5</sup> The PROMPT therapist reported that the student demonstrated a variety of skills in a 1:1 therapy situation or with his parents that did not generalize to the classroom, play dates or social settings with multiple peers (*id.*). The student continued to require assistance in those "more overwhelming" environments to help him organize his thoughts, communicate with peers and participate in activities (*id.*). In addition, the student continued to require assistance to develop appropriate social skills with peers (*id.*). The PROMPT therapist recommended that the student continue to receive related services outside of school and that he receive support in the classroom to encourage the use of his language/cognitive skills, improve socialization with peers, increase attention and develop academic skills (*id.*).

On March 20, 2007, the student's preschool teacher and SEIT completed a teacher questionnaire for the Committee on Special Education (CSE) (Tr. pp. 111-12; Parent Ex. J). The report indicated that the student continued to work on assimilating the classroom curricular content and focusing his attention on skills that would enhance his academic progress (Parent Ex. J at p. 1). The report stated that the student successfully adapted to the classroom routines and he became engaged with the classroom materials (*id.* at p. 2). During the course of the school year, he increased his ability to try new materials and was very motivated to make connections with peers (*id.*). Due to his difficulties expressing his knowledge, the teachers reported that they were uncertain how much information the student retained (*id.* at p. 1). The report described the student's difficulty understanding his peers' social cues, imitation of inappropriate behavior, and need for adult assistance during play (*id.*). Although the report stated that the student's social interaction skills had increased, they were not consistent with age expectations (*id.* at p. 2). The teacher and the SEIT reported that they worked to increase the student's familiarity with the letters of his name, name-writing skills and following through with a plan without prompts (*id.*). For the 2007-08 school year, they opined that a small class size or setting with a "low teacher/child" ratio with SEIT services was appropriate for the student, in addition to having teachers trained to address

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<sup>5</sup> In an undated progress report to the CSE, the student's other private speech-language pathologist (oral-motor therapist) indicated that the student's oral-motor delay was characterized by low tone which affected his co-articulation and saliva management skills (Tr. pp. 228-29; Parent Ex. F at p. 2). She reported that the student was unable to express his ideas/thoughts orally and was unable to ask for information/assistance when having difficulty (Parent Ex. F at p. 1).

the student's specific needs and a shortened or half-day schedule (id.).<sup>6</sup> Despite the gains made during the year, the preschool teacher and SEIT reported that the student was not ready to begin a kindergarten curriculum and stated that the biggest concern for the student was not related to his behavior, but that he continue to receive the necessary services to manage the classroom's social and learning environment (id.). They opined that without the assistance of support services such as a SEIT, the student would receive "little or no benefit from a setting that does not specifically cater to his specific needs" (id. at p. 4).

In an undated progress report to the CSE, the private physical therapist reported that the student runs, walks and ascends and descends stairs with reduced balance, coordination and body awareness for his age (Parent Ex. G at p. 1). In addition, the student exhibited reduced muscle strength, tone and safety awareness (id. at p. 2). His sensory processing skills affected his motor planning, posture and attention skills (id.). The physical therapist reported that the student would benefit from a learning environment that provided exposure to typical peers, a "good child to teacher ratio," and support to address his sensory processing and motor needs (id.).

On April 20, 2007, one of the district's special education teachers conducted a classroom observation of the student at All Souls (Dist. Exs. 2 at p. 2; 3). The special education teacher stated that there were 16 students in the class and three teachers, in addition to the student's SEIT (Dist. Ex. 3 at p. 1). She observed the student riding a tricycle, navigating around people and objects that were in his way, cleaning up with assistance and initiating conversation with his SEIT (id.). The student paid attention during a large group activity on the rug and interacted with peers with verbal prompting from adults (id.). He chose to play with play-doh during choice time, answered questions about remote events posed by the SEIT and after he received assistance to get started, completed a fine-motor activity (id. at p. 2). The special education teacher observed the SEIT providing verbal prompting to the student to facilitate peer interaction (id.).

On May 17, 2007, the CSE convened to develop the student's 2007-08 school age individualized education program (IEP) (Dist. Ex. 2). Participants included the parents, an additional parent member and the student's SEIT; and the district's social worker, special education teacher, and school psychologist who also acted as the district representative (id. at p. 2). At the parents' request, a regular education teacher from Park Avenue participated by telephone (Tr. pp. 457, 490; Dist. Exs. 2 at p. 2; 6).<sup>7</sup> CSE conference summary notes reflect that the student's SEIT reported that he was very social, interested in school and enjoyed being read to and building with blocks (Dist. Ex. 6). The student reportedly was learning the alphabet and 1:1 correspondence skills (id.). The CSE determined that the student was eligible for special education services as a student with an other health impairment (Dist. Ex. 2 at p. 1; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The May 2007 IEP states that a general education program with special education teacher support services (SETSS) was considered and rejected because the student required additional adult support in the classroom due to delays in his speech, gross and fine-motor coordination (Dist.

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<sup>6</sup> The exhibit indicates that the SEIT and preschool teacher recommended a class with a "low teacher/child ratio" for the student (Parent Ex. J at p. 2). Based upon context, it appears that they may have recommended a class with a low child/teacher ratio, which is consistent with their other recommendations for the student.

<sup>7</sup> The student's father testified that he and his wife decided not to enroll their son at All Souls for the 2007-08 school year because its curriculum "was going to become much more language-based, much more academically rigorous," and despite the presence of the SEIT, All Souls recommended that the student attend a school for students with special needs (Tr. p. 488).

Ex. 2 at p. 14). A special class in a community school was considered and rejected by the CSE as it was determined to be too restrictive for the student (*id.*). For the 2007-08 school year, the CSE recommended placement in a 12:1 collaborative team teaching (CTT) kindergarten class with two individual OT sessions per week, three individual PT sessions per week, two individual and one group speech-language therapy sessions per week and one group counseling session per week (*id.* at p. 15). All related service sessions were recommended to be 30 minutes in duration (*id.*). The CSE conference summary notes indicate that the student had visited Park Avenue and would attend their summer program "to get used to the new school" (Parent Ex. 6; *see* Tr. pp. 427-28). The notes also reflect that the parents wanted their son's SEIT services to continue at the private preschool during the 2007-08 school year (Parent Ex. 6).

By letter dated May 23, 2007, the CSE chairperson provided the parents with a Final Notice of Recommendation (FNR) that included the student's recommended program and placement at a specific district school for the 2007-08 school year (Parent Ex. N).<sup>8</sup>

After receipt of the FNR, the parents and the student's SEIT visited the proposed CTT classroom and took a tour of the school (Tr. pp. 475-76). By letter dated June 25, 2007, the parents informed the district that they disagreed with the CSE's recommendation and requested an impartial hearing to "contest these findings and request a different arrangement for [the student's] educational needs" (Dist. Ex. 4 at p. 1). During summer 2007, the student attended Park Avenue's summer camp three hours per day with his SEIT (Tr. pp. 489-90).

In a due process complaint notice dated July 5, 2007, the parents requested an impartial hearing, alleging that the May 2007 IEP was procedurally flawed and failed to offer a free appropriate public education (FAPE) because the CSE meeting did not include an additional parent member (Parent Ex. A at pp. 1-3). The parents also argued the IEP failed to offer a FAPE in that it did not provide the student with SEIT services, which the student requires, and recommended a class with too large a teacher to student ratio given the student's needs and abilities (*id.* at p. 3). The parents also argued that the IEP failed to comport with the findings of the evaluations, that the IEP goals failed to address all of the student's needs, and that many of the goals were not measurable (*id.*). Lastly, the parents argued that the student's pendency program was the program which was provided for in the most recent agreed upon CPSE IEP, dated January 18, 2007 (*id.* at pp. 1-2, 4).

An impartial hearing convened on August 1, 2007, whereupon the parents requested an interim order of pendency. In an interim decision dated August 3, 2007, Impartial Hearing Officer 1 found that the student's pendency was contained in the last mutually agreed upon program, as set forth in the January 2007 CPSE IEP (IHO Interim Order at p. 2).<sup>9</sup> Specifically, Impartial Hearing Officer 1 held that the student should receive district funded individual 60-minute sessions

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<sup>8</sup> By correspondence dated June 6, 2007, the private oral-motor therapist provided specific speech-language and oral-motor annual goals and therapeutic techniques to be incorporated into the student's 2007-08 IEP, and recommended for that school year that the student receive three individual 30-minute sessions and one group session of speech-language therapy per week (Dist. Ex. 8). These goals are included in the final 2007-08 IEP that is contained in the hearing record (Dist. Ex. 2).

<sup>9</sup> I note that the interim decision and final decision were rendered by different impartial hearing officers. The interim decision was decided by Impartial Hearing Officer 1 after he presided over the first day of testimony, while the rest of the impartial hearing was conducted and the final decision rendered by Impartial Hearing Officer 2. The hearing record does not contain an explanation for the change in impartial hearing officers.

of OT (two times weekly); PT (three times weekly); speech-language therapy (three times weekly) and 12 hours of SEIT services per week under pendency (*id.* at pp. 2-3).

During the 2007-08 school year, the student attended a prekindergarten program at Park Avenue and continued to receive 12 hours of SEIT services per week funded by the district, pursuant to the pendency order (Tr. pp. 39-40, 478, 524; IHO Interim Order at pp. 2-3). The student's class was comprised of 18 students, two teachers and one aide (Parent Ex. R at p. 2). The student privately received two individual 60-minute sessions of PT and OT per week, and also three individual 45-minute sessions of speech-language therapy per week (Tr. pp. 228, 236-37; Parent Exs. S-U). The district did not fund these related services.

The impartial hearing resumed on November 11, 2007 and concluded on March 19, 2008 after seven days of testimony.<sup>10</sup> In a decision dated April 30, 2008, Impartial Hearing Officer 2 found that the district had failed to offer the student a FAPE primarily because the student still required SEIT services (IHO Decision at pp. 12-13). Impartial Hearing Officer 2 further found that the district's offer of 30-minute related services sessions, rather than one hour related services sessions, was insufficient to meet the student's needs (*id.*). Impartial Hearing Officer 2 also determined that the parents had met their burden and proved that the private related services they had obtained met the student's special education needs (*id.* at p. 13). Lastly, with regard to the equities, Impartial Hearing Officer 2 found that the parents had cooperated with the district and the CSE, and had visited the CSE's proposed placement in good faith (*id.*). Impartial Hearing Officer 2 ordered the district to reimburse or fund SEIT services in the amount of 12 hours per week, two individual 60-minute sessions of PT and OT per week, and also two individual 45-minute sessions of speech-language therapy and one individual 60-minute session of speech-language therapy per week for the 2007-08 school year (*id.* at p. 14). The district was ordered to reimburse the parents for the cost of the OT, PT and speech-language therapy sessions at the rate of \$135.00 per hour upon proof of payment (*id.*).

The district appeals, contending that it offered the student a FAPE because the student would not need — and the district was prohibited from providing — a SEIT in the CTT class; the IEP's related services were appropriate and the parents did not contest the recommended related services; the IEP's goals were appropriate; and the CTT placement was appropriate. The district also argues that the parents' placement was inappropriate because the general education preschool class was not appropriate and the placement does not offer speech-language therapy or counseling. The district further argues that the equities favor the district because the parents never intended to

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<sup>10</sup> I note that after the brief hearing and resulting pendency order on August 1, 2007, there was a delay of more than three months before the impartial hearing resumed on November 11, 2007 (Tr. pp. 4, 19). Based upon a review of the hearing transcripts, the delay appears to have been caused by both parties failing to cooperate with the impartial hearing officer regarding scheduling hearing dates (Tr. pp. 20-21). An impartial hearing officer presides at an impartial hearing (Application of a Child with A Disability, Appeal No. 04-010; Application of a Child with a Disability, Appeal No. 04-105), and is charged with conducting the hearing and issuing a written decision within the timeline requirements of 8 NYCRR 200.16(h)(9). The parties are required to comply with the reasonable directives of an impartial hearing officer (Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-105; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 04-010). An impartial hearing officer's authority to grant extensions is constrained by State regulations (8 NYCRR 200.5[j][5]), and each response by an impartial hearing officer to a request for an extension must be in writing and made part of the hearing record (8 NYCRR 200.5[j][5][iv]). Here, the parties should have more fully cooperated with the impartial hearing officer's efforts to comply with State regulations with regard to extensions and adjournments of hearing dates and rendering a timely final decision (8 NYCRR 200.5[j][3][xiii], [5]).



accept a public school placement. Lastly, the district argues that if it prevails on appeal, the district is entitled to reimbursement for its payments made under pendency during the 2007-08 school year.

In their answer, the parents deny many of the allegations of the district and argue that the district did not provide a FAPE because: (1) the student's IEP failed to provide a SEIT; (2) the district failed to object to many of the parents' arguments at the impartial hearing and cannot do so now; (3) the proposed placement was inappropriate because the class size was too large and the student would have regressed; (4) the CSE failed to discuss the annual goals and short-term objectives at the CSE meeting, which denied the parents meaningful participation in the formulation of the IEP; and (5) the resulting goals and objectives were insufficient and flawed. The parents also argue that their unilateral placement is appropriate, that the private SEIT and related services are appropriate to the student's needs and that the student does not require group speech therapy or counseling. The parents further argue that the impartial hearing officer properly determined that the equities favor the parents because the parents cooperated with the CSE and visited the proposed placement. Lastly, the parents argue that the district is not entitled to reimbursement for its pendency payments.

The parents limited their reimbursement request during the impartial hearing, and on appeal, to reimbursement, to the extent required, for SEIT services and related services that the student received during the 2007-08 school year. The parents do not seek reimbursement for their unilateral placement at Park Avenue in the prekindergarten program.

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).<sup>11</sup> A student's educational program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]).

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.

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<sup>11</sup> 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]).

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 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 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; 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 child 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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). 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 (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program that met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement

(Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). In addition, parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F. 3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate to meet a student's unique special education needs (Gagliardo, 489 F.3d at 115).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65; see also A.D. and H.D. v. New York City Dep't of Educ., 06 Civ. 8306 [S.D.N.Y. April 21, 2008]).

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]).<sup>12</sup>

Concerning the parents' request for reimbursement for private services they obtained for their son during the 2007-08 school year, the parents bear the burden of proof with regard to the appropriateness of the services they obtained for their son (see Application of a Child with a Disability, Appeal No. 03-067; Application of a Child with a Disability, Appeal No. 01-043; Application of a Child with a Disability, Appeal No. 95-57). In order to meet that burden, they must show that the services they obtained were reasonably calculated to meet the student's special education needs (Burlington, 471 U.S. at 370; Application of a Child with a Disability, Appeal No. 01-043; Application of a Child with a Disability, Appeal No. 94-29; cf. Mrs. C. v. Voluntown, 226 F.3d 60, 68-69 [2d Cir. 2000]).

In the instant case, the parents alleged in their due process complaint notice that the recommended CTT placement was inappropriate to meet the student's needs as identified in his May 2007 IEP and in the evaluations that the CSE relied upon to develop that IEP (Parent Ex. A at p. 3). Specifically, the parents alleged that the IEP's annual goals and short-term objectives lacked the level of specificity required and failed to address the student's social-emotional needs (id.). The impartial hearing officer determined that the hearing record reflected the parents' contention that the CSE substantially reduced their son's level of related services and discontinued his SEIT services without conducting evaluations to support the reduction (IHO Decision at p. 12). She also found that the CSE's recommendations were in "stark contrast" to the student's providers' reports, which in conjunction with their testimony, she found to be persuasive (id. at pp. 12-13).

I agree with the impartial hearing officer's finding that the student's May 2007 IEP did not offer a FAPE, but upon slightly different grounds. As explained herein, I find that the district did not offer a FAPE to the student because: (1) the May 2007 IEP did not accurately reflect the student's actual present levels of performance and needs; (2) the IEP's annual goals and short-term objectives were flawed and inadequate; and (3) the resulting CTT placement without any 1:1 assistance for the student was inappropriate.

First, the CSE's understanding of the student's needs memorialized in the May 2007 IEP did not adequately or accurately reflect his actual needs as identified in the evaluation and progress reports that were before the May 2007 CSE. The student's father testified that he submitted "reports" from his son's private therapists to the CSE prior to the meeting date (Tr. pp. 457, 509; see Parent Exs. E; F; J; L; M). The district's social worker testified that she and other members of the May 2007 CSE reviewed the student's "documentation" prior to the meeting (Tr. pp. 387, 389-40; see Dist. Ex. 3). The student's SEIT attended the May 2007 CSE meeting and presented her progress report to the CSE (Tr. pp. 36, 64-65; Parent Ex. K). The social worker testified that the CSE understood the student's needs "as well as we could" (Tr. p. 390).

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<sup>12</sup> The New York State Legislature amended the Education Law to place the burden of persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016). In this case, the parents' due process complaint notice was dated July 5, 2007, well before the burden of proof shifted to the district (Parent Ex. A at p. 1). Under the circumstances presented herein, the impartial hearing commenced prior to the effective date of the amended law. Accordingly, in the instant case, the burden of persuasion that the district failed to offer the student a FAPE rested with the parents (Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of the Dep't of Educ., Appeal No. 08-018).

Information taken from the preschool teacher and SEIT's March 2007 report and contained in the May 2007 IEP as part of the student's present levels of performance, state that the student worked on "assimilating the classroom curricular content" and "focusing his attention on a variety of different skills which will enhance his academic progress" (Dist. Ex. 2 at p. 3; see Parent Ex. J at p. 1). The May 2007 IEP states that the student worked on becoming familiar with his letters, specifically the letters of his name and how to write it (Dist. Ex. 2 at p. 3; see Parent Ex. J at p. 2). His ability to understand language was superior to his ability to express himself, and his weak expressive language skills often affected his ability to interact appropriately in the classroom (Dist. Ex. 2 at p. 3; see Parent Ex. J at p. 4). The IEP states that during the 2006-07 school year, the student successfully adapted to new classroom routines and increased his ability to try new materials (Dist. Ex. 2 at p. 3; see Parent Ex. J at p. 2). The IEP indicates that "teacher estimates" of his math and reading skills were at "pre-k" levels and that the student needed teacher prompts and positive reinforcement (Dist. Ex. 2 at p. 3).

Socially, the May 2007 IEP describes the student as "sensitive" and although interested in and motivated to make connections with his peers, he lacked the skills needed to engage with them (Dist. Ex. 2 at pp. 3-4). His poor articulation and word retrieval skills made it difficult for the student to express his thoughts and feelings in a way that was easily understood by others (id. at p. 4). The IEP indicates that the student's behavior did not interfere with instruction and could be addressed by the special or regular education teacher and also by counseling services and use of a visual schedule (id.). Physically, the IEP states that the student exhibits hypotonia, delays in gross and fine-motor coordination, speech and oral-motor skills; and that he wears glasses and orthotics (id. at p. 5).

The present levels of performance in the student's May 2007 IEP do not provide sufficient information about his special education needs and current abilities. Specifically, the IEP does not reflect evaluative data or information about the degree of the student's gross and fine-motor deficits, which according to his private occupational and physical therapists, significantly affect his ability to complete school-based activities (Tr. pp. 356-57; Parent Exs. L; M; see Tr. pp. 166-67). Although the IEP states that the student exhibits hypotonia and gross-motor coordination delays, the effects of these difficulties including reduced body and safety awareness, poor balance, problems controlling his movements, difficulty ascending and descending stairs and navigating obstacles; all which affect his safety at school, are not reflected in the IEP (Dist. Ex. 2 at p. 5; see Parent Exs. G at p. 2; M at p. 4). Similarly, other than stating that the student has "delays in fine-motor coordination," the IEP lacks information about the severity of his fine-motor impairment and how that impairment affects his ability to complete school-based fine-motor activities, nor does it provide an idea about his current level of fine-motor ability (Dist. Ex. 2 at p. 5; see Parent Exs. K at p. 5; L at pp. 2-3). The district's occupational therapist testified that the May 2007 IEP does not provide information about the student's sensory processing difficulties, which were identified in the documentation about the student that she reviewed (Tr. pp. 558, 562-63, 618-20). She further testified that "by looking at [the student's] IEP, based on what is written, the only thing that it suggests is that [the student] has delays in fine-motor skills," and that the IEP did not reflect what she had read about the student in his reports (Tr. p. 620).

Furthermore, other than to state that the student's "weak" expressive language skills affect his ability to interact appropriately in the classroom, the IEP does not describe how the student functionally communicates, the degree of difficulty he has communicating, or the level of adult prompting/assistance that is required due to his oral-motor weakness and expressive language skill deficits (Dist. Ex. 2 at pp. 4-5; see Parent Exs. E; F; K at pp. 4-5). The IEP states that the student is "aware" of his peers and although he is motivated to "make connections," he "lacks the skills"

needed to engage with them (Dist. Ex. 2 at pp. 3-4). Despite the SEIT's presentation and discussion of her March 2007 progress report at the CSE meeting, which reflects specific information about the student's social skills and needs, the IEP does not indicate what type of social skills are lacking or how the student currently interacts with peers (Tr. pp. 64-65; Parent Ex. K at pp. 2-4, 7). Although the CSE recommended one group session of counseling per week, the student's father testified that the purpose of this service was to help his son transition to the district's program without 1:1 support, not as a social skills intervention (Tr. pp. 469-70). In addition, aside from indicating that the student's math skills are at a "pre-k" level, the IEP does not provide specific information about what math concept skills the student does possess, yet the IEP includes "number" and "measurement" concept annual goals and short-term objectives (Dist. Ex. 2 at pp. 3, 6-7; Parent Ex. K at p. 3).

Second, the May 2007 IEP annual goals and short-term objectives lack the level of specificity required and fail to address the student's social-emotional needs (Parent Ex. A at p. 3). With the exception of the private oral-motor therapist (Dist. Ex. 8), the hearing record reflects that none of the student's related service providers (SEIT, PROMPT therapist, occupational therapist and physical therapist) were involved in the development of the student's IEP annual goals and short-term objectives (Tr. pp. 60-61, 174, 413-14, 465-69).<sup>13</sup> The student's father testified that his son's annual goals were developed prior to the May 2007 CSE meeting where they were "presented" in the IEP as what the district was offering (Tr. pp. 466-67). The May 2007 IEP contains annual goals and short-term objectives in the areas of reading "habits," reading skills, writing, number concepts, measurement concepts, oral-motor/sensory, expressive and receptive language, OT, PT and social skills (Dist. Ex. 2 at pp. 6-12). The parents correctly argue that some of the May 2007 IEP annual goals and short-term objectives are not measurable in that they do not contain evaluative criteria, evaluation procedures and schedules to be used to measure progress (id. at pp. 6-7, 9).<sup>14</sup> I also agree that the one annual goal and two short-term objectives contained in the May 2007 IEP to address the student's social-emotional needs inadequately address those needs as described in the documentation that was considered by the CSE (Parent Ex. K; see Tr. pp. 53-54). In addition, based on reviews of the student's documentation, the district's occupational therapist testified that she would have added sensory processing and sensory organization goals to the student's IEP; the district's physical therapist testified she would have added more "school-based" goals; and one of the district's speech-language pathologists testified that the IEP lacked pragmatic and receptive language goals (Tr. pp. 622-24, 829, 851-52, 888-89, 892, 912-14, 920-21). Importantly, the SEIT (Tr. pp. 114-18), private OT (Tr. pp. 174-79), the student's father (Tr. pp. 529-33), and the district CTT special education teacher (Tr. pp. 682, 758-60) testified that some of the student's annual goals and short-term objectives are inappropriately set above the student's skill level. The CTT special education teacher opined that some of the academic goals in the student's IEP are "set at a high level for any child in kindergarten," even a student in a general education program (Tr. pp. 758-60). The district's related service providers and CTT special education teacher testified that they could add or modify annual goals and short-term objectives after they begin working with a student (Tr. pp. 589-90, 760-61, 882; see Tr. pp. 902-03); however, for the reasons stated above, I find that the May 2007 IEP's inadequate present levels of

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<sup>13</sup> I note that the November 24, 2006 private occupational therapist's progress report contains "short and long-term goals" which address areas that the occupational therapist testified the student has made some progress in, but still need to be addressed (Tr. pp. 169-74; Parent Ex. L at p. 3). The CSE did not include those goals in the student's May 2007 IEP (see Dist. Ex. 2 at pp. 6-12).

<sup>14</sup> Although in this instance the CSE chose to adopt the oral-motor, expressive and receptive annual goals submitted by the private oral-motor therapist (Dist. Exs. 2 at pp. 7, 9; 8), this does not relieve the district of its obligation to include measurable annual goals pursuant to 8 NYCRR 200.4(d)(2)(iii).

performance in combination with the absence of goals in deficit areas and many inappropriate, immeasurable annual goals, did not provide a sufficient basis for the CSE to develop appropriate program and placement recommendations for the student.

Third, based on the hearing record, I find that the proposed CTT program without 1:1 assistance was inappropriate to meet the student's special education needs. During the 2007-08 school year, the district's recommended kindergarten CTT class was comprised of approximately 27 students, 11 who had IEPs; one full-time regular education and one full-time special education teacher; one full-time assistant teacher and one paraprofessional (Tr. pp. 631, 685).<sup>15</sup> The assistant teacher worked with both the general education students and the students who received special education services (Tr. p. 666). The assistant principal stated that most if not all students with IEPs in the CTT class received one or more related services (Tr. p. 637; see Dist. Ex. 9).

The student's SEIT testified that she participated in the May 2007 CSE meeting and voiced her concern about the removal of the student's 1:1 services (Tr. pp. 59-60, 65-66). She testified that due to the student's motor skill delays and ataxia, she needed to provide the student with prompts to ensure his safety around his peers (Tr. pp. 47-48). The SEIT also testified that due to the student's oral-motor and speech delays, she often acted as an "interpreter" when he interacted with peers (Tr. pp. 48-49, 99-100). When she visited the CTT classroom, the SEIT's "immediate concern" was the size of the class and how the desks were arranged (Tr. p. 69). She testified that she was "worried" about how the student would safely navigate in the classroom (id.). The CTT special education teacher testified that the IEP did not provide "environmental modifications" or accommodations that may be necessary for the student to attend her class, but that if he were in her classroom, she would "probably consider some more" (Tr. pp. 765-67).

Next, I turn to the district's argument that the impartial hearing officer improperly considered the parents' dispute about the duration of their son's related services sessions recommended on the May 2007 IEP because that issue was not raised in their due process complaint notice. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice 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 parents failed to raise in their due process complaint notice the allegation that the May 2007 IEP's reduction in the duration of the related services sessions contributed to a finding that the district failed to offer a FAPE, the hearing record reflects that the parents raised this issue during the course of the impartial hearing and the district did not object to it being raised (Tr. pp. 958-959). Therefore, I will address the issue. The district argues in the alternative, that the frequency and duration of the recommended related services contained in the May 2007 IEP were appropriate to meet the student's needs. The district's related service providers indicate that they could have implemented the student's IEP and addressed his needs in 30-minute sessions (Tr. pp. 558, 595-96, 615-16, 829, 857-58, 889, 924-25, 927-28). The CTT special education teacher testified that she worked with related service providers and would have carried over related service goals into the CTT classroom (Tr. pp. 682, 713-16). While I acknowledge the

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<sup>15</sup> The paraprofessional in the CTT classroom was assigned to another student as an individual paraprofessional (Tr. pp. 660-61).

district's argument that the student did not require more than 30-minute related service sessions due to the carryover that occurs in the CTT classroom, this argument is not persuasive because for the reasons stated above, the CTT program as recommended in the May 2007 IEP is inappropriate to meet the student's special education needs.

In sum, the May 2007 IEP does not sufficiently describe and provide appropriate supports to address the student's communication difficulties, physical limitations and safety concerns detailed in the private providers' reports (see Parent Exs. E-G; K; M). More importantly, the resulting CTT placement and related services recommended by the CSE, without any 1:1 assistance for the student, were inappropriate. Because the district did not offer the student a FAPE, the next inquiry is whether the parents have met their burden to show that the services they obtained were reasonably calculated to meet the student's special education needs.

The parents are seeking reimbursement for the private OT, PT and speech-language therapy that they paid for during the 2007-08 school year and request a continuation of the SEIT services (Tr. pp. 524-25, 552-54). The district counters that the parents' unilateral placement in a general education preschool was inappropriate. However, as noted above, the parents are not seeking reimbursement for that placement. The district also argues that the parents' related service program was inappropriate because it did not include group speech therapy or counseling. Although the impartial hearing officer's decision lacks sufficient analysis and citation to the hearing record to support her holding in favor of the parents on this point, for the reasons stated below, I concur with the impartial hearing officer that the private related services that the parents obtained during the 2007-08 school year were reasonably calculated to meet the student's special education needs (IHO Decision at p. 13).

The speech-language therapy obtained by the parents was appropriate. At the time of her testimony, the student's private oral-motor therapist worked with the student two times per week for 45-minute sessions and had been working with the student for approximately two years (Tr. pp. 227, 229, 231, 237, 261). She described the student's peri- and intra-oral hyposensitivity, saliva mismanagement and low muscle tone and strength in his jaw and lips (Tr. pp. 231-33), as well as how these deficits affected his speech and eating skills (Tr. pp. 232, 234-36). The oral-motor therapist described the types of interventions that she used with the student to address his needs (Tr. pp. 232-33, 237-40). She described the student's receptive and expressive language delays and opined that he also had an auditory processing disorder (Tr. pp. 243-44). The oral-motor therapist provided descriptions of the types of interventions that she used to address the student's receptive, expressive and pragmatic language skills and auditory processing difficulties (Tr. pp. 259-60, 264, 293). The student's private PROMPT therapist who worked with him during one 45-minute session per week for approximately the past two years is a PROMPT certified clinician (Tr. pp. 306-07, 310-11). The PROMPT therapist described the student's oral-motor and speech deficits, how she addressed those needs, in addition to how she addressed his expressive, receptive and pragmatic language delays in therapy (Tr. pp. 312-20, 326-28). The district argues that the student required group speech-language therapy; however, both of the student's private speech-language pathologists testified that it was more important for the student to receive individual speech-language therapy than group therapy due to his level of deficit (Tr. pp. 268, 334-36). Although the oral-motor therapist testified that "it would be great" if the student was offered "a social group with a speech and language therapist," I do not find that the lack of group speech therapy rendered the speech-language services the student received inappropriate (Tr. p. 268; Dist. Ex. 8 at p. 1).

The occupational therapy obtained by the parents was appropriate. At the time of her testimony, the student's private occupational therapist had been working with him for



approximately two years and had worked in the OT field for 30 years (Tr. pp. 134-35, 181-2). She described the student's hypotonia, dyspraxia, sensory integration difficulties, fine-motor delays and visual tracking difficulties (Tr. pp. 136-38, 146, 154-55, 158, 164-65, 170-71). She described in detail, the interventions that she used with the student to address these needs (Tr. pp. 139-43, 148-51, 214-15).

The physical therapy obtained by the parents was appropriate. The private physical therapist began working with the student approximately three years ago and at the time of his testimony had worked with children with special education needs for 11 years (Tr. pp. 346-48, 350). He described the student's difficulties related to his ataxia and hypotonia (Tr. pp. 351, 355-56, 366, 375-76). He explained the interventions that he used to address the student's ataxia, sensory-motor needs and low muscle tone (Tr. pp. 353-55, 357-59, 366-68, 370-72, 376).

In addition, the hearing record indicates that the student's SEIT and his PROMPT, oral-motor, occupational and physical therapists met one time per month for 45-minutes to an hour to discuss the student's goals and often e-mailed each other throughout the month (Tr. pp. 294-95, 335).

An additional indication that the related services obtained by the parents were appropriate is evidence showing that the student has been making steady progress in the skills targeted by his related services providers. The student's oral-motor therapist testified that the student has demonstrated "very slow but steady" progress in the areas that she has targeted (Tr. pp. 249-51, 275, 284-86). The PROMPT therapist testified that the student has made progress in all areas (Tr. p. 320). In her November 14, 2007 progress report, the occupational therapist reported that the student had made "nice improvements" in all areas of development (Parent Ex. Q) and also described his progress in her testimony (Tr. pp. 156-59, 161-62, 164-65, 171-72, 204-05). The physical therapist stated that from December 2006 until the time of his testimony, the student exhibited significant progress (Tr. pp. 379-80). Additionally, after a December 2007 evaluation, a private neuropsychologist reported that the student "had grown in every way" since her 2006 evaluation (Parent Ex. P at p. 4).

As to the SEIT services the student received during the 2007-08 school year, there is no need to discuss the appropriateness of those services because the 2007-08 school year has ended and the district has already provided and paid for those services for the entirety of that school year under the unappealed pendency order. The district cannot recoup those costs from the parents at this time, therefore, the issue of reimbursement of the SEIT services had been rendered moot (see Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 05-091; see also Bd. of Educ. v. Schutz, 137 F.Supp.2d 83, 92 n.15 [N.D.N.Y. 2001], aff'd, 290 F.3d 476 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; Murphy v. Arlington Cent. Sch. Dist., 86 F.Supp.2d 354, 367 n.9 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]).

The final criterion for a reimbursement award is that the parents' claim be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; Voluntown, 226 F.3d at 68; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"]). Such considerations "include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters" (Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001], citing Town of Burlington v. Dep't of Educ., 736 F.2d at 773, 801-02 [1st Cir. 1984], aff'd, 471 U.S. 359 [1985]). With respect to equitable considerations, the IDEA provides that tuition reimbursement

may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, fail to engage with potential placements offered by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. Appx. 62 [2d Cir. 2006]; Voluntown, 226 F.3d at n.9).

The district asserts that the impartial hearing officer's finding that the equities favored the parents was improper because the parents never intended to place the student in a public school for the 2007-08 school year, and that the parents had already decided to send the student to Park Avenue and brought a Park Avenue teacher to the May 2007 CSE meeting. However, the hearing record shows that the parents cooperated with the CSE by making the student available for a district observation and the student's father attended the CSE meeting with the student's SEIT and engaged the committee members regarding concerns he had with the IEP's reduction in services, the annual goals and the IEP's failure to provide a SEIT (Tr. pp. 465, 472, 508; Dist. Ex. 3). The hearing record reflects that the parents provided private evaluation reports to the CSE to assist in the IEP formulation (Tr. pp. 457, 509; Dist. Ex. 2 at p. 2; see Parent Exs. E; F; J; L; M). The student's father also visited the proposed CTT placement, although he had difficulty getting someone from the district to return his phone calls (Tr. pp. 476, 502). The student's father also testified that he decided to enroll his son in the private preschool only after visiting the CTT class and determining that it was not appropriate (Tr. p. 491). He denied making the decision to keep his son in preschool before the district offered a placement (Tr. p. 499). He further testified that he did not have an opinion about the CTT recommendation at the time of the CSE meeting, and that he wanted to see it first (Tr. p. 510). Although the parents brought the regular education teacher from Park Avenue to the CSE meeting, I am not persuaded by the district's argument that this action demonstrated "intent" on the part of the parents not to place their son in the public school. Based on the hearing record, I find that the parents have "cooperated sufficiently" with the CSE in formulating the IEP and therefore the district's argument is without merit (Carmel, 192 Fed. Appx. at 62).

Finally, although reasonableness of costs is relevant in determining a reimbursement award, the district has not argued that the amount of the award is excessive (see Carter, 510 U.S. at 16), and the reimbursement amount determined by the impartial hearing officer has not been cross-appealed by the parents. Given that the hearing record supports a determination that reimbursement is appropriate, it is unnecessary to reach the parties' other arguments on that issue (Application of the Dep't of Educ., Appeal No. 08-041; Application of the Dep't of Educ., Appeal No. 07-136).

I have examined the parties' remaining contentions and find that it is unnecessary to reach them in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
July 16, 2008**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**