The University of the State of New York

The State Education Department
State Review Officer

No. 08-058

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, G. Christopher Harriss, Esq., of counsel

Law Offices of 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's) son and ordered it to reimburse the parent for her son's tuition costs at the Aaron School for the 2006-07 school year. The appeal must be sustained in part.

The student has a diagnosis of nystagmus, described in the hearing record as an involuntary movement of the eyes, and his psychoeducational profile is suggestive of diagnoses of an attention deficit hyperactivity disorder (ADHD), learning disorder and generalized anxiety disorder (Parent Ex. C at pp. 1, 10). He is described as "extremely" reactive emotionally, in that when upset or angry he can remain in that state with more intensity and persistence than most children, relatively unmoved by adult attempts to influence his behavior (id. at p. 2). Academically, he exhibits deficits in math, reading and writing skills and has difficulty with processing speed, concentration and sustaining attention (Dist. Exs. 6 at pp. 2-5; 8; Parent Ex. C at pp. 7-8). At the time of the impartial hearing in 2008, the student was attending a public school within the district (Tr. pp. 187-88; Parent Ex. A at p. 1).[1] During the 2006-07 school year, he attended the Aaron School

[1] There are three transcript volumes from the impartial hearing. The first two transcript volumes, dated March 10, 2008 and March 14, 2008, are consecutively paginated from page one to page 298. The third transcript volume, dated May 8, 2008, is incorrectly paginated such that it begins where the first transcript ended rather than where the second transcript ended. All citations to the transcript refer to the first two consecutively paginated volumes unless otherwise noted in the citation.

(Parent Ex. A at p. 1). The Aaron School is a private school 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 an other health impairment (OHI) is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]; Dist. Ex. 14).[2]

The parent obtained private psychotherapy services for her son when he was a toddler (Parent Ex. C at p. 3). Beginning in March 2001, she attempted to place her son in two different private preschool programs; however, he was asked to leave the preschools due to his behavior (Tr. pp. 133-35). One of the private preschool teachers suggested that the student undergo a Committee on Preschool Special Education (CPSE) evaluation, which was conducted in February 2002 (Tr. pp. 134-35; Parent Ex. C at p. 2). Subsequently, the CPSE recommended placement of the student at the Association in Manhattan for Autistic Children (AMAC), which he attended for two years (Tr. pp. 135-36; Parent Ex. C at p. 2).[3] The student attended a public school inclusion class for kindergarten during the 2003-04 school year (Tr. p. 137; Parent Ex. C at p. 2). In spring 2004, the CSE recommended that for the 2005-06 school year the student attend a non-public school; however, it was unable to locate an appropriate placement for him (Tr. pp. 141-44). The student attended first grade at the Aaron School where he received counseling at school and continued private psychotherapy (Parent Ex. C at pp. 2-3). In spring 2005, the student began receiving vision therapy and wearing glasses (id. at p. 1).

On May 31, 2005, the Committee on Special Education (CSE) convened for the student's annual review (Dist. Ex. 21). The CSE stated that the student's nystagmus affected his perception and caused feelings of anxiety and difficulty "finding his space" relative to his environment (id. at p. 12). The student reportedly frequently became frustrated with academic/language based tasks and removed himself from the situation or occasionally became aggressive with teachers/peers (id.). The resultant May 2005 individualized education program (IEP) described the student as "fragile" and in need of a "small, structured environment" due to his difficulty with transitions, need for refocusing/redirection and tendency to become overwhelmed (id. at pp. 11-12). The CSE determined that the student was eligible for special education services as a student with an OHI and recommended a 12:1+1 special class, individual and group counseling, and occupational therapy (OT) (id. at pp. 1, 13). The May 2005 IEP indicates that the CSE referred the student to "the CBST"[4] for placement in a "NYS approved non-public school" for the 2005-06 school year (Dist. Exs. 21 at p. 1; 22).

During the 2005-06 school year, the student continued to attend the Aaron School (Dist. Exs. 6-11). His class was comprised of ten students, a special education teacher and an assistant teacher (Tr. pp. 31-32; Dist. Ex. 6 at p. 1). The student received one individual 30-minute OT

[2] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. While some of the relevant events in the instant case took place prior to the effective date of the 2006 amendments, unless otherwise noted, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

[3] Although not diagnosed with an autism spectrum disorder, the student reportedly did "very well" at AMAC (Parent Ex. C at p. 2).

[4] The hearing record does not clarify what is meant by "CBST," but it is assumed to be an abbreviation for petitioner's Central Based Support Team.

session per week, one group 30-minute speech-language therapy session per week and one session each of counseling and reading specialist services per week (Dist. Exs. 6 at p. 1; 11).

In October 2005, the student's occupational therapist at the Aaron School prepared a report of goals addressed in OT which included improving the student's functional shoulder, arm and hand control for fine-motor and graphomotor tasks, improving attention to tasks and improving awareness of his "regulatory state" (Dist. Ex. 3). In November 2005, the student's speech-language pathologist at the Aaron School prepared a summary of goals addressed during therapy sessions that included improving the student's language processing, social problem-solving, narrative, conversation and thinking and reasoning skills (Dist. Ex. 4).

On or about November 14, 2005, the parent provided the district with consent to evaluate her son (Dist. Ex. 2).[5] On December 7, 2005, the district's social worker observed the student at the Aaron School (Dist. Ex. 5). According to the social worker, the student needed refocusing and redirection during academic tasks, conversed with peers instead of completing a library activity, and took direction from and expressed concern for a classmate (id.).

On February 6, 2006, the parent paid a deposit for the student's tuition to the Aaron School for the 2006-07 school year (Dist. Exs. 18; 19).

In February 2006, the student's providers at the Aaron School prepared mid-year academic, "specialties," reading, OT, speech-language and counseling reports (Dist. Exs. 6-11).[6] The special education teacher's report provided details about the student's social-emotional difficulties in the classroom, supports implemented to address this need and the progress he had exhibited in this area since the beginning of the school year (Dist. Ex. 6 at pp. 1-2). The special education teacher described details about the content of the student's reading, written language, handwriting, math, science, and social studies instruction and his academic progress (id. at pp. 2-7). The reading therapist's report indicated that the student "progressed nicely" during the sessions and provided specific information about his reading skills (Dist. Ex. 8 at p. 1). The OT report stated that the student worked on improving his sensory processing/regulation and fine-motor/graphomotor skills and provided information about the techniques implemented by the occupational therapist to address these needs (Dist. Ex. 9). The speech-language pathologist reported that she targeted improving the student's receptive, expressive and pragmatic language skills and she described details about the student's level of receptive and expressive language function (Dist. Ex. 10).[7] The counseling report provided information about the student's difficulty with trust and formulating relationships with adults/peers and the focus of counseling sessions (Dist. Ex. 11). On April 20, 2006, the parent "dropped off" her son's "school reports" to the district (Dist. Ex. 17 at p. 2).

[5] In September 2005 and January 2006, the district informed the parent that it needed updated "psych testing" of the student (Dist. Ex. 17 at p. 2).

[6] The hearing record defines "specialties" as classes such as art, computer, music etc. (Dist. Ex. 7).

[7] Although the exhibit list attached to the impartial hearing officer's decision states that this exhibit is one page and the exhibit received by the Office of State Review is one page, the speech-language pathologist's report appears to have been more than one page in length (see Dist. Ex. 10).

On May 9, 2006, the parent submitted the first tuition payment to the Aaron School (Dist. Ex. 19).[8]

The school psychologist at the Aaron School referred the student for a private psychoeducational evaluation, which was conducted over the course of five days in May and June 2006, to gain "greater insight" into his emotional makeup and learning profile and due to concerns about possible "psychotic processing" and possible visual hallucinations (Tr. p. 49; Parent Ex. C at pp. 1, 3).[9] Cognitive assessments revealed that the student exhibited "competence" in the areas of verbal reasoning and visual-spatial organization, but had difficulty with both processing speed and working memory (Parent Ex. C at p. 9). The private evaluator reported that the student demonstrated difficulty concentrating on more than two "chunks" of information at a time and sustaining his focus for any length of time (id.). The psychoeducational report indicated that these limitations made it challenging for the student to learn in school and to navigate the complexities of interpersonal relationships (id.). Although the student refused to participate in formal language testing, the evaluator opined that he exhibited some difficulty with both expressive and receptive language (id.). Academically, the student reportedly demonstrated reading skills that were "slightly below grade level but essentially on track," and math skills that were below grade level (id. at pp. 7-8). During the evaluation, the student refused to complete measures of his spelling and writing skills (id. at p. 7). Projective assessments revealed that the student's strong emotional reactivity was defined by fears of others' aggression and of being left alone (id. at p. 8). His responses to perceived threats were described as "fight or flight," and the evaluator reported that the student's avoidance of schoolwork was one behavioral manifestation of his tendency to respond to anxiety with either aggression (fight) or avoidance (flight) (id. at pp. 9-10). Although in general the student's perceptions were reportedly reality-based, the psychoeducational evaluation report stated that when the student was under stress his perceptions of the world may have sometimes been delusional (id. at p. 10). The evaluator opined that the student's anxiety was not the sole cause of his difficulties, but that it "undoubtedly" interfered with his attention and concentration (id.). The evaluator concluded that the student's psychoeducational profile suggested possible diagnoses of ADHD, learning disorder and generalized anxiety disorder (id.). She recommended that the student undergo a psychiatric consultation and continue psychotherapy with his school-based therapist (id.). The evaluator recommended that the student be placed in an educational setting with a high teacher-student ratio, and that his teachers have experience teaching students with both learning and emotional difficulties (id.).

In an undated letter to the parent, the district's CSE chairperson informed the parent that he had scheduled a June 17, 2006 appointment to conduct her son's social history and psychological and educational evaluations (Dist. Ex. 12). The district's "contact sheet" indicates that the letter was returned to the district as "undeliverable" on June 19, 2006 because the parent's address was incorrect and that "perhaps during the summer" the appointment could be rescheduled (Dist. Ex. 17 at p. 2). On June 30, 2006, the district contacted the parent by telephone and scheduled her son's annual review for July 7, 2006 (Dist. Exs. 13; 17 at p. 2).

[8] The Aaron School contract indicates that the first tuition payment to the school was due June 1, 2006, prior to the student's annual review by the CSE on July 7, 2006 (Dist. Ex. 18).

[9] Although the private psychoeducational assessment of the student was completed prior to the July 7, 2006 CSE meeting, the written evaluation report was not available to the CSE (Dist. Ex. 16).

On July 7, 2006, the CSE convened for the student's annual review (Dist. Ex. 14). Participants included the district's school psychologist/district representative, social worker, special education teacher, an additional parent member, and the student's parent who participated by telephone (id. at p. 2). The July 2006 IEP's present levels of performance state that the student functioned in the average range of intelligence and had made academic progress (id. at p. 3). The IEP contains specific information about the student's reading, spelling, writing and math skills taken from the February 2006 Aaron School academic mid-year report, and information about his level of arousal and OT goals from the February 2006 Aaron School OT mid-year report (id.; see Dist. Exs. 6 at pp. 2-5; 9). Teacher estimates of the student's reading, writing and math skills were noted in the IEP at a 1.5-2.5 instructional level (Dist. Ex. 14 at p. 3). The IEP provides numerous management strategies including the use of testing accommodations, praise, cues, repetition and manipulatives/flash cards; implementation of a classroom behavior management system and self-monitoring strategies; and ensuring that directions are understood and avoiding of distractions (id. at pp. 4, 13). The February 2006 Aaron School counseling mid-year report provided the description of the student's social-emotional present levels of performance contained in the IEP, which indicate that he had difficulty forming trusting relationships with new adults/children that in turn could manifest in negative behaviors (id. at p. 5; see Dist. Ex. 11). The IEP indicated that the student exhibited behaviors such as refusal to participate in school work, physical avoidance, reluctance to speak and other oppositional behaviors (Dist. Ex. 14 at p. 5). The July 2006 IEP noted that when provided with time to feel comfortable, the student became cooperative, was an active participant in the classroom and enjoyed interacting with peers (id.). The IEP indicates that the student's behavior did not seriously interfere with instruction and could be addressed by the special education teacher, in addition to counseling and paraprofessional services (id.). The student's physical present levels of performance describe his nystagmus and resulting "emotional component" and perceptual difficulties (id. at p. 6). The IEP provides annual goals and short-term objectives in the areas of counseling, math, OT, attention, reading, spelling and writing (id. at pp. 7-8). The CSE determined that the student continued to be eligible for special education services as a student with an OHI and recommended a 12:1+1 special class placement with one individual and one group counseling sessions per week and two individual OT session per week (id. at pp. 1, 12-13). On July 13, 2006, the district mailed the student's IEP to his parent (Dist. Ex. 17 at p. 3).

During the 2006-07 school year, the student continued to attend the Aaron School in a class with 11 other students, a special education teacher and a teacher assistant (Tr. pp. 200, 204-05, 217).

By letter dated September 18, 2006 the CSE chairperson provided the parent with the student's final notice of recommendation (FNR) (Dist. Ex. 15).[10] The FNR summarized the student's 2006-07 program recommended by the July 7, 2006 CSE and provided the specific district school location where the recommended program would be implemented (id.).[11]

[10] The hearing record does not specify when the parent received the FNR, although she testified it was approximately around September 17, 2006 (Tr. pp. 153-54).

[11] I note that the frequency and group size of the student's counseling services on the FNR are different from the recommended services listed in the IEP (compare Dist. Ex. 14 at p. 13, with Dist. Ex. 15).

The parent filed a due process complaint notice on September 11, 2006[12] alleging that the student was denied a free appropriate public education (FAPE)[13] for procedural and substantive reasons (Parent Ex. A). Reasons stated in the due process complaint notice include: the composition of the CSE team was defective because the district failed to secure the attendance of a "General Education Teacher;" no current formal evaluations of the student were cited in the July 2006 IEP; several pages of annual goals and short-term objectives presented for the student are generic and vague; and the FNR was not yet issued as of the date of the due process complaint notice, thereby resulting in a failure of the district to offer a specific placement by the beginning of the school year (id.). It appears that the parties either contemplated or engaged in settlement discussions, the extent of which is unclear, and the case was intermittently "reopened" three times subsequent to the filing of the September 11, 2006 due process complaint notice (Parent Exs. B; D; E). The case was last "reopened" on January 23, 2008 and the request was amended to, among other things, reflect that the parent had received an FNR dated September 18, 2008 subsequent to her initial filing (Parent Ex. B).

An impartial hearing convened on March 10, 2008 and concluded on May 8, 2008 after three days of testimony (IHO Decision at p. 3). The district called three witnesses and submitted 22 documents into evidence (id. at pp. 3-5, 11-12). The parents called two witnesses, one being the parent of the student, and submitted five documents into evidence (id. at pp. 5-7, 12).

In a decision dated May 21, 2008, the impartial hearing officer found that the placement of the student in a 12:1+1 special class was appropriate and that the recommended placement "would have been appropriate had it been offered in an appropriate time" (IHO Decision at p. 8). She found that the failure of the district to provide the placement in a "timely fashion at the beginning of the school year" constituted a denial of a FAPE to the student for the 2006-07 school year (id.). She further found that the parent had met her burden of proving the student's placement at the Aaron School was appropriate and that the equities favored the parent (id. at p. 9). Based on her findings, the impartial hearing officer ordered the district to reimburse the parent, upon proof of payment and contract, for tuition paid to the Aaron School for the 2006-07 school year (id.).

The district appeals the decision of the impartial hearing officer, alleging that the student was offered a FAPE for the 2006-07 school year, the parent did not meet her burden of proving the appropriateness of the Aaron School as a placement for the student, and that the equities do not favor the parent's receipt of tuition reimbursement. In the alternative, the district alleges that if it is determined that there was a denial of a FAPE to the student based on the "tardiness" in

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[12] The September 11, 2006 due process complaint notice is titled as an "amended request" (Parent Ex. A). The initial due process complaint notice that the September 11, 2006 complaint purportedly amended is not part of the hearing record on appeal.

[13] 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]).

providing an FNR for the student, any award of tuition reimbursement should be limited to "the amount expended between the first day of the 2006-2007 school year and the [p]arent's receipt of the FNR."

With respect to the impartial hearing officer's determination that the district denied the student a FAPE solely because the FNR for the student was not timely offered, the district contends that the "slightly delayed FNR was a de minimis procedural violation" and does not rise to the level of a substantive denial of a FAPE. As to the appropriateness of the Aaron School for the student, the district alleges that the parent has not met her burden because her placement of the student there was premised on the Aaron School being a "default choice" rather than on its appropriateness and that the Aaron School was not the least restrictive environment (LRE) for the student. Regarding its argument that the equities do not favor the parent, the district alleges that the parent did not raise any objections to the 2006-07 IEP at the relevant CSE meeting, that the parent did not give the district the requisite notice of her intention to place the student in a private school at the district's expense, and that the parent never intended to place the student in a district school.

In her answer, the parent denies many of the allegations of the district and argues, among other things, that the delay of the district in providing a placement is a substantive denial of a FAPE; the parent met her burden of proving the appropriateness of the student's placement at the Aaron School; it was reasonable to believe that the Aaron School would be an appropriate placement for the student; parents are not strictly held to the LRE mandate and that any lack of an LRE should not result in a tuition reimbursement denial where a district fails to make a FAPE available in a timely fashion; the parent would have availed herself of the placement offered by the district had it been made in a timely fashion; and the district is barred from raising a defense that the parent failed to provide notice of her intention to seek reimbursement from the district because the district did not raise that defense at the impartial hearing. With respect to the last noted argument, the parent attaches to her answer a document which purports to prove receipt by the district of a letter from the parent providing notice of her intention to place the student in a private school at the district's expense (Answer at Ex. A).

The district submitted a reply responding to the inclusion of the letter attached to the parent's answer and requesting that this office decline to accept such "additional documentary evidence."[14]

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). A student's educational program must also be provided in the 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]).

[14] It is undisputed that the document attached to the parent's answer is not part of the hearing record.

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 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). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364 [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). 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 (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [citing Frank G., 459 F.3d at 365 [quoting Rowley, 458 U.S. at 188-89] [emphasis added]]; R.C. and M.B. v. Hyde Park Cent. Sch. Dist., 07-CV-2806 [S.D.N.Y. June 27, 2008]; M.D. and T.D. v. New York City Dep't of Educ., 07 Civ. 7967 [S.D.N.Y. June 27, 2008]).

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]).

Moreover, parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S., 231 F.3d at 105).

The Supreme Court has stated that 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]). The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and 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 impartial hearing officer determined that the burden of proof with respect to whether the district failed to offer the student a FAPE remained with the parent (IHO Decision at pp. 7-8). The impartial hearing officer's determination is not raised by either party as an issue in this appeal and, therefore, the appropriateness of that determination will not be addressed herein.

After full consideration of the merits of this case, I concur with the impartial hearing officer's determination that the district's delay in offering a school site within the district at which the IEP could be implemented for the student constituted a denial of FAPE. In this case, the issuance of the FNR identifying a school site within the district where the student's education program would be implemented on September 18, 2006, approximately two weeks after the 2006-07 school year began, impeded the student's right to a FAPE and caused a deprivation of education benefits as afforded under the IDEA (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.4[e][1][i]; Matrejek, 471 F. Supp. 2d at 419 [stating "procedural inadequacies that cause substantive harm to the child or his parents – meaning that they individually or cumulatively result in the loss of educational opportunity . . . – constitute a denial of a FAPE"]; Grim, 346 F.3d at 381 [stating "[i]t is no doubt true that administrative delays, in certain circumstances, can violate the IDEA by depriving a student of his right to a 'free appropriate public education'"]).

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe v. New York City Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in September"']). In this case, it is undisputed that the IEP itself was formulated in a timely fashion (Dist. Ex. 14). However, the district failed to offer the student a FAPE because it did not offer a school site in which the IEP could be implemented. I find that,

under the circumstances of this case, the district's actions resulted in a failure to offer the student a FAPE.

I turn next to whether the parent's placement of the student at the Aaron School for the 2006-07 school year was appropriate. After carefully reviewing the entire hearing record, I am constrained to find that the parent has not met her burden to show that the Aaron School met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192; Mrs. B., 103 F.3d at 1121-22).

Although the hearing record provides general information about the Aaron School, it contains insufficient information regarding the educational services provided to the student for the 2006-07 school year or how the educational services at the Aaron School met the student's identified special education needs during that year. The hearing record describes the Aaron School as a small, private, special education school that serves "classified" students with learning disabilities, speech-language impairments, and attention and sensory deficits (Tr. p. 202). The classrooms typically consist of 10-12 students and two teachers (id.). The Aaron School offers OT, speech-language therapy, counseling and learning specialist services (Tr. p. 214).

In this case, the student has identified social-emotional deficits (Dist. Ex. 11; Parent Ex. C at pp. 1-5, 8-11). The student's 2006-07 special education teacher at the Aaron School stated that at the beginning of the school year the student was a "little bit shy," but when he became comfortable, he interacted in a friendly way with familiar peers (Tr. pp. 205-06). The special education teacher testified that the student received counseling services, but the hearing record does not specify the frequency and duration of counseling sessions, what social-emotional areas of need were targeted by the counseling services or describe what counseling interventions were used with the student to address his social-emotional needs (Tr. pp. 224-25, 232).

In October 2006, the student began receiving full-time assistance from a 1:1 teacher due to his need for teacher prompting, his low self-esteem and his difficulty participating in groups (Tr. pp. 222, 225-27). After the addition of the 1:1 teacher, the special education teacher implemented an individual behavior plan for the student, which was modified from the school-wide behavior plan in that the student had the opportunity to earn rewards twice rather than once per day (Tr. pp. 207-08, 223-25). When frustrated, the student exhibited behaviors such as aggression and the use of inappropriate language (Tr. pp. 212-13). During these episodes, he was removed from the classroom between ten minutes to one hour depending on how long it took him to regain composure (Tr. p. 213). The hearing record does not provide information about what interventions the 1:1 teacher used with the student to address his behavior.

The hearing record indicates that the student has identified deficits in writing, math and reading (Dist. Exs. 6 at pp. 2-5; 8; Parent Ex. C at pp. 7-8). During the 2006-07 school year, the student received instruction in reading, math, social studies, science, writing, language arts, gym, art and music at the Aaron School (Tr. p. 208). His daily reading and math instruction occurred outside of the classroom in a group of five students (Tr. p. 209). The administrator at the Aaron School determined the composition of the groups based upon the "levels" of the students in the class and their previous assessment results (id.). I note that during the second half of the 2006-07 school year, despite trying "different motivators" to improve his participation in the group, the student was removed from his group math session and instructed by a 1:1 teacher (Tr. pp. 209, 220-22). Although the special education teacher who testified at the impartial hearing was not the student's 2006-07 math or reading teacher, she opined that he was appropriately grouped with

students of similar academic functioning levels for those subjects (Tr. p. 209). The hearing record does not provide information about the student's reading skills during the 2006-07 school year, and the special education teacher's only comment about the student's math skills was that it was a "weak" area, and from what she understood he had "a lot of trouble" in the math group (Tr. p. 221). Additionally, although the special education teacher opined that the student did "make progress," she did not provide the student with math or reading instruction, two areas of deficit for the student, and the hearing record does not otherwise contain progress notes, report cards or any information about how the student performed academically in math, reading or any other subject during the 2006-07 school year (Tr. pp. 210-12). I note that the special education teacher testified that during the 2006-07 school year the student received one session per week of reading instruction, but the hearing record does not provide information about how this instruction was different than his daily group reading instruction, the content of the once weekly reading instruction, or what intervention strategies were used with the student to address his needs in reading skills.

The special education teacher instructed the student in science, social studies, writing and language arts (Tr. p. 210). She stated that the student's "most frustrating" activity was writing and that he was easily distracted (Tr. pp. 210-11). To address the student's difficulties, he received verbal prompting/reminders to stay on task, classroom breaks, material broken down into smaller increments and the services of a 1:1 teacher (Tr. pp. 210-12). The special education teacher testified that although the student "held back" academically due to his emotional difficulties, when he applied himself he was "on the level" of his classmates, kept up with his peers in the class and made progress with the assistance provided (Tr. pp. 206, 211-12). I find that the hearing record does not sufficiently describe the specialized instruction that the student received to address his academic deficits.

I also note that the student has identified deficits in receptive, expressive and pragmatic language skills, as well as skills that require OT (Dist. Exs. 9; 10; Parent Ex. C at p. 9). The hearing record is devoid of information about how the Aaron School addressed these deficits during the 2006-07 school year. The special education teacher testified that the student received speech-language therapy but did not specify the frequency or duration of sessions, what areas of need were addressed by the speech-language therapy or how she addressed the student's speech-language and pragmatic language needs in the classroom. Additionally, the special education teacher testified that she could not recall if the student received OT services during the 2006-07 school year (Tr. p. 232). Her testimony does not provide information about how the student's OT deficits manifested in the classroom or what interventions were used to address these needs.[15]

Also notable is that the testimony of the parent, when questioned as to why she believed the Aaron School would be an appropriate placement for the 2006-07 school year, lacks any specifics about her son's program that were focused on providing him with an educational benefit (Tr. pp. 156-57). In view of the foregoing, I find that the evidence in the hearing record with regard to how the Aaron School was an appropriate placement for the student is unpersuasive and, consequently, the parent's request for tuition reimbursement must be denied.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein. Particularly, having found that the parent failed

[15] In addition, the special education teacher testified that in February or March 2007, the student's "team" met and discussed their concern that Aaron was not an appropriate placement for him (Tr. pp. 230-31, 237-38).

to meet her burden to prove that the Aaron School was an appropriate placement for the student for the 2006-07 school year, I need not reach the issue of whether equitable considerations preclude the funding of tuition at the Aaron School (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated May 21, 2008 that found that the Aaron School was an appropriate placement for the 2006-07 school year and ordered the district to reimburse the parent for tuition for that school year is hereby annulled.

Dated: **Albany, New York**
July 30, 2008

PAUL F. KELLY
STATE REVIEW OFFICER