



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-027

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

Appearances:

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

Law Offices of Skyer, Castro, Cutler and Gersten, attorneys for respondents, Gregory Cangiano, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that it failed to offer an appropriate educational program to the student and ordered it to reimburse respondents (the parents) for the student's tuition costs at the Barrow Street Nursery School (Barrow) for the 2008-09 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending Barrow (Tr. pp. 98, 144-45). Barrow has not been approved by the Commissioner of Education as a preschool program with which districts may contract to instruct preschool students with disabilities nor has the school been approved to instruct school-aged students with disabilities (see 8 NYCRR 200.1[d], 200.1[nn], 200.7, 200.16[i]). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this proceeding (Tr. p. 116; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

On August 1, 2007, the Committee on Preschool Special Education (CPSE) convened for a review (Parent Ex. B at p. 1). The hearing record reveals that at that time the student had been receiving special education services for approximately eighteen months (Tr. pp. 97, 113). The CPSE recommended a 12-month program consisting of 15 hours of special education itinerant

teacher (SEIT) services,¹ three individual 60-minute sessions of occupational therapy (OT) per week, two individual 60-minute sessions of speech-language therapy per week, and two individual 45-minute sessions of in-class speech-language therapy per week (Parent Ex. B at pp. 1, 18).

A speech-language progress report dated January 30, 2008, noted that the student exhibited moderate delays in her receptive and expressive language skills, and a significant deficit in her pragmatic language skills (Parent Ex. F at pp. 1, 4; see Tr. pp. 127-28). The student was also noted to have moderate delays in her play skills (Parent Ex. F at p. 4). The speech-language pathologist noted that the student required time to process language, and had difficulty with directions containing complex linguistic concepts involving prepositions, time, condition, and sequence (id. at p. 2; see Tr. p. 131). The student was also noted to have difficulty answering "why" questions, questions involving past personal experiences, and questions involving hypothetical events (Parent Ex. F at p. 2). The speech-language pathologist noted that the student's reduced syntactic/morphologic skills impeded her ability to communicate effectively (id. at p. 3).² The student had difficulty engaging in verbal exchanges with others and in sustaining an ongoing conversation beyond two or three turns without introducing an off-topic comment (id.; see Tr. p. 128). Administration of the Clinical Evaluation of Language Fundamentals Preschool-Second Edition (CELF Preschool-2) resulted in scores in the low average range on both the receptive language subtests and the expressive language subtests (Parent Ex. F at p. 4).³ The speech-language pathologist reported that the student's language deficits affected her ability to engage in classroom discussions, communicate with peers and adults, and to demonstrate what she had learned (id.). The speech-language pathologist recommended that the student receive two 60-minute sessions of speech-language therapy per week to improve her language processing skills, her pragmatic language skills, her expressive language skills, and her play skills (id.). She also recommended that the student receive 12-month services in order to avoid regression (id.; see Tr. pp. 133-34). The speech-language pathologist opined that the student would benefit from remaining in her preschool setting for another year prior to entering kindergarten (Parent Ex. F at p. 4).

A speech-language progress report dated January 31, 2008, from the student's in-class speech-language pathologist, revealed that her therapy focused on pragmatic language skills including asking and answering questions, gaining the attention of peers, making comments to peers, responding to peer comments, initiating social interaction, maintaining short social interactions, and appropriately closing social interactions (Parent Ex. G at p. 1). The speech-language pathologist reported that the student was demonstrating an increased interest in her classmates, had developed a preference for certain peers and activities, and had begun to initiate social games and dramatic play (id. at pp. 1-2). However, the speech-language pathologist also

¹ The Education Law defines special education itinerant services (commonly referred to as "SEIT" services) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]).

² At the impartial hearing, the speech-language pathologist testified that the student spoke in incomplete, grammatically awkward, or incorrect sentences (Tr. p. 128).

³ The student's score in word structure, one of the expressive language subtests, placed her in the 2nd percentile (Parent Ex. F at p. 4).

reported that the student's play and interaction tended to follow the same routine and that her conversations often appeared scripted (id. at p. 2). The speech-language pathologist reported that the student required adult support to maintain and expand her play and social interactions, and to engage peers in conversation (id.). The report noted that the student was able to ask questions and provide a running dialogue regarding topics of her own choice, but required prompting to attend to the questions and comments of her peers (id.). Although the report indicated that the student had made progress, the speech-language pathologist opined that the student still required speech-language therapy, because she still required assistance to initiate, respond to, and maintain short social interactions (id.).

An OT progress report dated February 1, 2008 stated that the student's therapy addressed her inability to regulate her behavior (Parent Ex. H at p. 1). In the course of therapy, the occupational therapist focused on developing the student's attention to task, her auditory processing skills, and her ability to modulate her activity level (id.). The student's proprioceptive system and vestibular system were reported to be hypo-responsive, and she required intense and unpredictable input to these systems to achieve an optimal arousal level in order to perform age-appropriate tasks (id.). The therapist reported that the student's lack of body awareness compromised her ability to adaptively react and respond to objects and others in her environment and that she behaved without regard to her safety (id.). The student's social competency was reported to be below age level and she required verbal cues to communicate with others (id.). Additionally, the student was reported to have a compromised attention span (id. at p. 2). The occupational therapist recommended that the student continue to receive three individual 60-minute sessions of OT per week for the next twelve months in order to support the integration and generalization of age-expected skills (id.). The therapist opined that the student was not ready to participate in a kindergarten classroom due to her developmental delays and recommended that she remain in her preschool setting to continue her cognitive and social development, and to prevent regression (id.).

In a report dated March 13, 2008, the student's preschool teacher described the student's program at Barrow and her progress over the 2007-08 school year (Parent Ex. E). The preschool teacher reported that the student attended a pre-kindergarten class containing twelve students, one head teacher, and one assistant teacher (id.). The student received 15 hours per week of SEIT services, two 60-minute sessions of in-class speech-language therapy per week, and one 45-minute pull-out session of speech-language therapy in a 3:1 ratio per week (id.).⁴ The preschool teacher reported that the student had delayed language skills, particularly in her pragmatic language skills (id.). The report also noted that the student demonstrated delays in her conversational abilities, particularly in her ability to take turns during conversations, in her ability to respond to topics, and in her ability to stay on topic (id.). The student required "one-on-one" support during group discussions, group activities, and during teacher-led projects that involved multi-step directions (id.). The preschool teacher opined that the additional support of the SEIT was integral to helping the student develop communication skills (id.). The teacher concluded that the student was not

⁴ The student's August 1, 2007 IEP and progress reports from both of the student's speech-language providers indicated that the student received speech-language therapy in the classroom two times per week for 45 minutes and out of the classroom two times per week for 60 minutes (Parent Exs. B at p. 18; F at p. 1; G at p. 1).

developing at a level that would most benefit her in a kindergarten setting and therefore, she needed to remain in her current preschool setting with pre-kindergarten peer models for another year (id.).

A "Turning Five Summary Report" from the district's psychologist dated April 7, 2008, reported the student's mother's opinion that the student's weakness was speech-language related and that this weakness limited the student in her ability to interact with peers (Parent Ex. I at p. 1). The report also noted the opinion of the student's preschool teacher that the student's pragmatic language needed development (id.). Administration of the Preschool Evaluation Scale (PES) yielded a score determined by the psychologist to be "average functioning" (id. at pp. 2-3). In describing the results of the cognitive, motor, play/social skills, and self-care skills portions of this test, the psychologist reported that the student had "mastered most things" (id.). However, the psychologist reported that the student's weakest ability was her communication, noting that the student needed to work on mastering pronoun usage, answering "wh" questions, and answering questions related to her physical needs (id. at p. 3). The psychologist also reported that the student needed improvement in maintaining her attention, her self-control, and in responding appropriately to redirection (id.).

On April 15, 2008, the Committee on Special Education (CSE) convened for the student's review (Parent Ex. C at p. 1). Attendees included the student's regular education teacher, an additional parent member, a district special education teacher, the student's SEIT, the occupational therapist, a speech-language pathologist, the parents, and a school psychologist (Tr. pp. 26, 103-04; Parent Ex. C at p. 2). The CSE recommended that the student receive a 10-month collaborative team teaching (CTT) program in a community school with the following related services: three individual 60-minute sessions of OT per week, one individual 30-minute session of speech-language therapy per week, two 30-minute 3:1 sessions of speech-language therapy per week, and two individual 60-minute sessions of speech-language therapy per week (Parent Ex. C at p. 11).⁵ Prior to making these recommendations, the CSE considered and rejected a general education program with related services, and a 12:1 special class in a community school (Tr. p. 35; Parent Ex. C at p. 10).⁶ The CSE developed annual goals and short-term objectives to develop the student's fine motor skills, her ability to process and regulate sensory input, and her expressive, receptive, and pragmatic language skills (Parent Ex. C at pp. 7-8).

By Final Notice of Recommendation (FNR) dated June 11, 2008, a district representative informed the student's mother that the CSE recommended placement of the student in a CTT program with related services at one of the district's schools (Parent Ex. D; see Tr. p. 106). In June

⁵ The district's psychologist testified that the CSE came to the conclusion that the student should be placed in a CTT class because the CTT class emphasized good peer models, which several of the student's providers had mentioned as being beneficial for the student (Tr. p. 28). The CSE opted for a 10-month program and not a 12-month program because the 12-month program was thought to be too restrictive (id.). Additionally, the 10-month program was recommended because the CTT program is typically a 10-month program (Tr. p. 28).

⁶ According to the April 2008 IEP, the CSE considered and rejected the general education program because it was concerned that the student's speech-language impairment would not be addressed (Parent Ex. C at p. 10). The CSE team rejected the 12:1 program because it felt that this program was too restrictive for the student's abilities and current level of functioning (id.).

2008, the student's father visited the recommended school and received a tour (Tr. pp. 107-09, 117-19).

By due process complaint notice dated July 10, 2008, the parents' attorney advised the CSE chairperson that the parents were requesting an impartial hearing (Parent Ex. A at p. 1). The due process complaint notice alleged that the CSE's program and placement recommendations for the 2008-09 school year were procedurally and substantively flawed (id. at pp. 1-2). The due process complaint notice alleged that the April 2008 CSE did not discuss the development of the student's goals with the parent at the CSE meeting (id. at pp. 2-3). The due process complaint notice also alleged that the goals and objectives were vague and generic, did not provide "a baseline from which to work," and failed to identify how progress toward the goals would be measured (id. at p. 2). The due process complaint notice further alleged that the student's individualized education program (IEP) failed to accurately describe the student's social/emotional performance needs (id. at p. 3). The due process complaint notice also alleged that during the CSE meeting, the student's preschool teacher and the director of the preschool did not have access to the same evaluative reports or other written materials utilized by the other members of the CSE (id.). The due process complaint notice further alleged that the CSE was improperly constituted because it lacked both a regular education teacher and a special education teacher (id.). The due process complaint notice asserted that the recommended CTT program and placement would be overwhelming and overly stimulating for the student (id. at pp. 2-4). The due process complaint notice further asserted that upon visiting the proposed placement, the parents had discovered that the staff at the proposed placement could not provide any details about the class or a profile of its students (id. at p. 4). As relief, the parents sought pendency and proposed that the district maintain and fund the student in her current preschool placement until such time as the parties could agree on an appropriate school placement (id. at pp. 4-5).⁷

The impartial hearing began on August 25, 2008 (Tr. p. 1). On this date, the parties addressed the student's pendency placement and the impartial hearing was adjourned to October 30, 2008 (Tr. pp. 1-10, 12). On August 28, 2008, the impartial hearing officer issued an interim pendency order which found that the August 1, 2007 CPSE IEP was the parties' last agreed upon IEP and that this program would be the student's pendency placement during the resolution of the substantive issues for the 2008-09 school year (IHO Interim Order on Pendency at pp. 2, 3). In accordance with that prior CPSE IEP, the impartial hearing officer ordered that the district fund 15 hours of SEIT services per week, three hours of individual OT per week, and 3½ hours of individual speech-language therapy per week as pendency services (id. at p. 3; see Tr. pp. 97-98; Parent Ex. B at pp. 1, 18).⁸ Neither party appealed the interim decision on pendency.

The impartial hearing resumed on October 30, 2008 and concluded on January 12, 2009, after three more days of testimony (Tr. pp. 12, 51, 122, 180). The impartial hearing officer

⁷ Although the parents did not seek tuition reimbursement, the parents' attorney indicated that the parents retained "the right to seek reimbursement" for monies that the parents might expend in obtaining SEIT services, OT, or other related services (Parent Ex. A at p. 5).

⁸ Although not clearly reflected in the impartial hearing officer's interim pendency decision, the August 1, 2007 CPSE IEP reflects that the student's 3½ hours of speech-language therapy consisted of two individual 60-minute sessions of speech-language therapy and two individual 45-minute sessions of in-class speech-language therapy (Parent Ex. B at p. 18).

rendered her decision on January 27, 2009 (IHO Decision at p. 9). The impartial hearing officer found that the April 2008 IEP improperly omitted academic goals, inadequately described the student's deficits, especially her social/emotional and management needs, and that the IEP also failed to mention how the student's language needs would be addressed in the proposed inclusion classroom (id. at pp. 7-8). The impartial hearing officer also found that the proposed CTT class setting had too many students, especially without any additional 1:1 management support for the student (id.).⁹ The impartial hearing officer also determined that, in order to prevent regression, the speech-language therapy recommended by the CSE should be provided for a full 12 months (id. at p. 8). Additionally, the impartial hearing officer found that the program at Barrow met the student's individualized needs and further that the student's SEIT services should be continued because they were a necessary component of the student's success (id.). The impartial hearing officer also found no equitable impediment to the parents' request for relief, indicating that the parents were cooperative with the CSE throughout the process, attended CSE meetings, and visited the recommended placement (id.). She found that it was reasonable for the parents to make a contingency plan as an alternative to the district's recommendations (id.). The impartial hearing officer ordered the district to "pay for or reimburse" the parent for ten months of tuition at Barrow, and for ten months of SEIT services provided at 15 hours per week (id. at pp. 8-9). The impartial hearing officer further ordered the CSE to reconvene to provide one 30-minute individual session of speech-language therapy per week, two 60-minute sessions of individual speech-language therapy per week, and two 30-minute 3:1 sessions of speech-language therapy per week, all on a 12-month basis (id.).

The district appeals and asserts that the impartial hearing officer erred in granting the parents tuition reimbursement because they had not requested this relief in their due process complaint notice or at the impartial hearing. The district also asserts that the impartial hearing officer incorrectly raised the issue of the student's sensory needs because the parents failed to raise this issue in the due process complaint notice. The district argues that the parents should be limited to asserting only those issues raised in their due process complaint notice. The district also asserts that the impartial hearing officer erred in determining that it had failed to offer a free appropriate public education (FAPE). The district asserts that the IEP failed to quantify the student's performance levels and failed to provide academic goals in the IEP because the student had mastered her pre-reading and pre-math skills and that her only needs were speech-language therapy and OT related. The district further asserts that even if these procedural errors were present, they did not rise to a deprivation of a FAPE. The district also asserts that, contrary to the impartial hearing officer's finding, the IEP did address the student's sensory needs. The district disputes the parents' claim that the student should receive a 12-month program because the district's psychologist opined that a 10-month program would sufficiently address the student's needs. Moreover, the district asserts that there was no evidence that a 10-month program would cause substantial regression during the summer. The district characterizes the parents' assertion that the recommended placement was too large as being speculative. The district further asserts that the recommended placement was appropriate because the teacher from the proposed class testified that the other students in the class had strengths and weaknesses similar to those of the student.

⁹ The impartial hearing officer noted that all of the student's educators and providers reported that the student was not ready to move on to a larger kindergarten class (IHO Decision at p. 7).

Moreover, the district asserts that the recommended placement was appropriate because it provided peer modeling.

The district further asserts that the parents' unilateral placement at Barrow was inappropriate because the student is of school age during the 2008-09 school year. The district also asserts that SEIT services are inappropriate as a matter of law because SEIT services are not an available service on the continuum of services offered to school-aged students. The district further argues that SEIT services address only socialization skills and not academics, the hearing record reveals that the student was able to function without the SEIT, the presence of a SEIT violated the least restrictive environment (LRE) mandates contained in the Individuals with Disabilities Education Act (IDEA), and a paraprofessional could be used to provide the services instead of a SEIT. The district also asserts that there was insufficient evidence of any coordination between the home portion of the parents' proposed program and the school portion of that program.

The district also argues that the parents are not equitably entitled to relief because the parents failed to notify the district of their intention to re-enroll the student at Barrow. The district also asserts that the student's father's testimony at the impartial hearing revealed that prior to the CSE meeting, the parents had decided to maintain the student at Barrow and never intended to consider a public school placement. Finally, the district asserts that, if it is successful in this appeal, it is entitled to recoup the funds paid for the student's pendency placement.

In their answer, the parents assert that the impartial hearing officer correctly determined that the district failed to offer a FAPE. The parents contend that all of the student's providers opined that the student required a 12-month program, wouldn't make progress in a kindergarten CTT class, and needed 1:1 instruction in a nursery school. The parents also assert that the IEP failed to specify the student's present levels of performance. The parents further assert that even though the student had mastered pre-reading and pre-math skills, academic and functional goals were still required in order to gauge the student's performance. The parents also assert that the student required SEIT services to foster appropriate interactions, to reinforce appropriate behavior, to assist with communication skills, to assist with receptive and pragmatic language skills, to assist with play skills, and to assist with sensory integration and redirection. The parents also assert that the impartial hearing officer's decision regarding the student's sensory needs was appropriate because they raised this issue at the impartial hearing. Additionally, the parents assert that equitable considerations support their position because they fully cooperated with the CSE (as evidenced by the student's father's visit to the proposed placement), provided the requisite ten-day notice of the student's removal from public school, and because it was reasonable for the parents to make contingency plans. Finally, the parents assert that the district is not entitled to recoup the funds expended for the student's pendency placement.

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]; E.G. v. City Sch. Dist. of New Rochelle, 2009 WL 773960, at *4 [S.D.N.Y. Mar. 16, 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046;

Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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

The 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 law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

Initially, I will address the district's argument that it was improper for the impartial hearing officer to award tuition reimbursement to the parents when the parents did not request reimbursement in either their due process complaint notice or at the impartial hearing. To counter this argument, the parents admit that they did not request tuition reimbursement, but assert in their answer that the impartial hearing officer had the authority to direct reimbursement. Pursuant to the IDEA, the due process complaint notice must provide "a proposed resolution of the problem to the extent known and available to the party at the time" (20 U.S.C. § 1415[b][7][A][ii][IV]; 34 C.F.R. § 300.508[b][6]; 8 NYCRR 200.5[i][1][v]). As admitted by the parents in their answer, they did not seek tuition reimbursement in their due process complaint notice (Ans. ¶ 33; see Parent Ex. A). Moreover, the issue of tuition reimbursement was not raised at the impartial hearing nor did the parents seek to amend their due process complaint notice to include such a claim (see 20 U.S.C. § 1415[c][2][E][i]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][i]). Therefore, I find that it was improper for the impartial hearing officer to sua sponte grant tuition reimbursement to the parents.¹⁰

The district also contends that it was improper for the impartial hearing officer to raise the student's sensory concerns because the parents failed to raise this issue in their due process complaint notice. I disagree. The parents' due process complaint notice alleged that the IEP failed

¹⁰ The party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of a Child with a Handicapping Condition, Appeal No. 91-40).

to accurately describe the student's social/emotional performance needs and further that the CTT program and placement would be overwhelming and overly stimulating for the student (Parent Ex. A at pp. 2-4). Additionally, significant evidence was introduced at the impartial hearing on this issue and the district did not object (Tr. pp. 73, 76-79, 102, 110, 143; Parent Ex. H at pp. 1-2).

I now turn to an analysis of the appropriateness of the district's recommended program and placement. The hearing record reflects that the recommended CTT class has one special education teacher and one regular education teacher (Tr. pp. 27, 57). Both the special education teacher and the regular education teacher in the CTT class are State certified (Tr. pp. 55, 58). While one teacher instructs the students, the other teacher circulates throughout the room and assists the students (Tr. p. 59). According to the district's psychologist, the CTT class is designed to provide good general education peer models for the special education students in the class (Tr. p. 27). Forty percent of the students in the class have IEPs and the other sixty percent of the students are general education students (Tr. pp. 27, 57). Although the CTT classroom could have as many as 25 students, at the beginning of the 2008-09 school year there were approximately 11 students in the class, and at the time of the impartial hearing there were 16 students in the recommended class (Tr. pp. 42-43, 59). Of those sixteen students, six had IEPs and ten were general education students (Tr. p. 59). All of the students in the class were either five or six years old (Tr. pp. 59-60). The reading levels in the proposed class ranged from the end of a pre-K level to the beginning of a first grade level (Tr. p. 60). In math, all of the students were at the same kindergarten level (*id.*). The students are grouped for instruction, based on their needs, in groups ranging from three to five children (*id.*). The groups change as the students' needs change (*id.*). The class utilizes the "Balanced Literacy" and "Everyday Math" curriculums (Tr. p. 61). The teachers and students have daily 1:1 opportunities during their writing time and during their small group work (Tr. p. 66). The students are assessed with using a city-wide standardized assessment and also assessed using 1:1 conferencing during math, reading, and writing instruction (Tr. pp. 62-63). The two CTT teachers determine the areas in which the students are having difficulty or success and plan accordingly (Tr. p. 62). Of the six students with IEPs, five receive speech-language therapy (Tr. p. 63). Students also receive counseling, OT, and physical therapy (*id.*). All related services are available at the school (Tr. pp. 57, 65). The students in the CTT class eat breakfast and lunch in the cafeteria with approximately 46 students (Tr. p. 67).

In considering all of the evidence in the hearing record, I agree with the impartial hearing officer's finding that the proposed CTT program is not appropriate for the student (*see* IHO Decision at pp. 7-8). The hearing record establishes that the district's proposed CTT program does not provide enough support to meet the student's expressive, receptive and pragmatic language deficits, her sensory integration problems, or her attention difficulties (Tr. pp. 74, 80-81, 86-87, 100-01, 128; Parent Exs. E; F at pp. 3, 4; G at p. 2; H at pp. 1-2).

Although the CSE was cognizant of the student's speech-language needs and provided significant related services to address those needs, the hearing record establishes that the large student body in the CTT program would limit the ability of the CTT teachers to be able to provide the level of individual support required to address the student's limited language skills in the classroom (Tr. p. 30; Parent Ex. C at pp. 2, 11). The student's SEIT, both speech-language pathologists, the occupational therapist, and the student's father all indicated that the student needs significant support to address her expressive and pragmatic language difficulties (Tr. pp. 74-76, 80, 100-01, 128; Parent Exs. F at pp. 3, 4; G at p. 2; H at p. 1). The student's SEIT testified that

she assists the student in her language comprehension and expression through modeling and repetition (Tr. pp. 75, 80). The SEIT also testified that she offers suggested phrases to the student to assist her with communication (Tr. pp 75-76). The student's Barrow teacher opined that the student requires "one-on-one" support during group discussions, group activities, and projects involving multi-step directions (Parent Ex. E). The hearing record supports a finding that the student requires a significant level of in-class support with language and communication in order to participate, and that the district's recommended CTT program would not be able to provide the appropriate level of language and communication support to the student.

Moreover, the CTT class is also inappropriate because it does not sufficiently address the student's sensory needs (Parent Ex. C). The hearing record reflects that the student's inability to regulate sensory input interferes with her ability to perform age appropriate tasks and to respond to others (Tr. pp. 77-79; Parent Ex. H at p. 1). During periods of increased noise or activity, the student is affected by overstimulation or sensory overload and may exhibit tantrums or screaming outbursts (Tr. pp. 78, 102). The occupational therapist reported that the student requires intense and "unpredictable" input to her proprioceptive and vestibular systems in order to achieve an optimal arousal level to perform age appropriate tasks (Parent Ex. H at p. 2). The occupational therapist also reported that the student's lack of body awareness compromised her ability to react and respond to objects and others in her environment and that she often behaved without regard to safety awareness (id. at p. 1). The student's SEIT testified that she would calm the student down and reintegrate the student during such episodes through strategies suggested

by the occupational therapist (Tr. pp. 76-79, 83).¹¹ According to the student's father, a large class like the CTT class and environments such as lunch or recess, would significantly overload the student on a sensory level (Tr. p. 110).

Additionally, the hearing record reveals that the student's sensory needs make it difficult for her to maintain her attention, to participate in activities, and to complete assigned tasks (Parent Ex. H at p. 1). The student's occupational therapist reported that the student's limited attention span requires verbal cues to redirect her to complete activities (id. at pp. 1, 2). According to the student's SEIT, the student's attention span lasts about five to ten minutes (Tr. p. 81). The student's SEIT further testified that she modified tasks for the student by breaking them down into multiple steps (Tr. pp. 80, 81). According to the SEIT, the student would be "lost" in the large CTT classroom and would regress (Tr. pp. 86-87).

In conclusion, I find that the hearing record reveals that the CSE's recommended CTT program would not have met the student's classroom language needs, sensory integration difficulties, and attention deficits. The recommended CTT program recommended in the April 15, 2008 IEP was not reasonably calculated to confer educational benefits upon the student. As such, I find that the district failed to offer a FAPE to the student for the 2008-09 school year.

Having found that the district did not offer a FAPE to the student for the 2008-09 school year, I now turn to the issue of the relief to be granted to the parents. As discussed above, the parents' due process complaint notice did not request tuition reimbursement. Rather, the parents

¹¹ The SEIT testified that if she were not there to apply the strategies suggested by the occupational therapist, then the student "would just shut down and the rest of the day would be gone" (Tr. p. 77).

requested that the district "maintain and fund" under pendency the student's placement in her current program at Barrow until such time as an appropriate placement has been agreed upon (Parent Ex. A at pp. 4-5).¹² The 2008-09 school year is nearly over and the parents have already received most of their requested relief through pendency. Therefore, unless the parties can otherwise agree, I will order that the CSE reconvene in this matter in order to devise an educational program which offers a FAPE to the student for the remainder of the 2008-09 school year.¹³

Regarding the SEIT services ordered by the impartial hearing officer, I note that the student will have received SEIT services at district expense until the issuance of this decision by virtue of the impartial hearing officer's interim pendency order. The hearing record does not establish that the student requires SEIT services at all times because both the SEIT and the student's father testified that the student's Barrow teachers were able to intervene to help meet the student's needs on the two weekdays that the SEIT was not present (Tr. pp. 92, 112-13). Additionally, I decline to order the continuation of SEIT services at district expense for the remainder of the 2008-09 school year because the student is no longer a preschool student (Tr. p. 97; Educ. Law §§ 3202[1]; 4410[1][i]; see also Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]).

However, because the hearing record reveals that the student needs additional classroom support and because the district concedes that services provided by a paraprofessional would effectively provide the needed additional assistance (Pet. ¶¶ 48, 49), I will order that the student be provided with a 1:1 paraprofessional to provide classroom support for the remainder of the 2008-09 school year (Tr. pp. 75, 80-81, 86-87, 100-01, 128; Parent Exs. E; F at pp. 3, 4; G at p. 2; H at pp. 1-2).

Because neither party has appealed the speech-language therapy ordered by the impartial hearing officer, I will not address that aspect of the impartial hearing officer's decision. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[i][5][v], [k]). Consequently, the impartial hearing officer's decision directing the CSE to reconvene to provide speech-language therapy to continue on a 12-month basis is final and binding upon the parties (see Application of a Student with a Disability, Appeal No. 08-021; Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).¹⁴

I have examined the parties' remaining contentions, including the district's request that it be reimbursed for payments made pursuant to pendency, and find that they are without merit.

¹² The parents did not introduce any evidence of the amount of any tuition they may have paid to Barrow.

¹³ The parties might want to address the 2009-10 school year when they reconvene to discuss the remainder of the 2008-09 school year pursuant to this decision.

¹⁴ I note that although the impartial hearing officer's interim pendency order directed the district to fund three 60-minute sessions of 1:1 OT per week pursuant to pendency, she ultimately did not order any OT in her final decision (compare IHO Interim Order on Pendency at p. 3, with IHO Decision at p. 9).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it ordered the district to reimburse the parents for tuition at Barrow for the 2008-09 school year; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision is annulled to the extent that it ordered the district to provide SEIT services at district expense for the remainder of the 2008-09 school year; and

IT IS FURTHER ORDERED, unless the parties otherwise agree, that within seven calendar days after the date of this decision, the CSE shall convene to meet to develop an appropriate program for the student for the remainder of the 2008-09 school year; and

IT IS FURTHER ORDERED, unless the parties otherwise agree, that the student be provided with a 1:1 paraprofessional to provide the student classroom support for the remainder of the 2008-09 school year.

Dated: **Albany, New York**
 May 1, 2009

PAUL F. KELLY
STATE REVIEW OFFICER