



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-032

Application of the BOARD OF EDUCATION OF THE ARLINGTON CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Kuntz, Spagnuolo & Murphy, P.C., attorneys for petitioner, Vanessa M. Gronbach, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that the educational services recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2009-10 school year were not appropriate. The appeal must be sustained in part.

Pursuant to a July 14, 2009 decision of an impartial hearing officer (Hearing Officer 1),¹ the student's pendency placement² is a Board of Cooperative Educational Services (BOCES) 12:1+1 special class located at the district's middle school with the related services of speech-language therapy, occupational therapy (OT), physical therapy (PT), assistive technology consult, counseling, and the services of a shared aide (Dist. Exs. 5 at p. 12; see Dist. Ex. 31 at pp. 1-2). The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute in this appeal (34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

The student has been offered a diagnosis of Opitz Syndrome, which according to the hearing record is associated with cardiac and renal abnormalities, cognitive delays, and swallowing

¹ The hearing record reflects that Hearing Officer 1 recused himself from this matter on August 14, 2009 before the impartial hearing concluded (Dist. Ex. 5).

² For statutory and regulatory provisions pertaining to a student's educational placement during administrative or judicial proceedings, see 20 U.S.C. § 1415(j); Educ. Law § 4404(4)(a); 34 C.F.R. § 300.518; 8 NYCRR 200.5(m).

difficulties (Dist. Ex. 24 at p. 2). The student exhibits significant delays in cognitive, communication, motor and social skills, and his academic skills are significantly below age level (Dist. Ex. 21 at pp. 3-6). The student communicates by using speech, an assistive communication device, and by writing (Tr. p. 241; Dist. Ex. 21 at p. 3).

The hearing record reflects that the student began residing in the district during the summer 2001 (Tr. p. 59). The hearing record also shows that the student attended a 6:1+1 special education class during the 2006-07 school year (Dist. Ex. 42 at p. 2). He has subsequently and continuously attended a BOCES 12:1+1 special class within one of the district's public schools since the 2007-08 school year, the student's sixth grade year (see Tr. pp. 199-200; Dist. Exs. 35; 41; 42).

For the 2007-08 school year, a subcommittee of the CSE recommended placement of the student in a BOCES 12:1+1 special class located in the district's middle school (Tr. p. 59; Dist. Ex. 41 at p. 1). According to the district's supervisor of special education, who also was the CSE chairperson at the student's CSE meetings, the 12:1+1 class was composed of a special education teacher, a teaching assistant, and students exhibiting significant language difficulties and cognitive and academic delays (Tr. p. 59). In sixth grade (2007-08), the student also received one session of individual OT per week, two individual sessions of PT per week, and three individual and two group sessions of speech-language therapy per week; all sessions lasting 30 minutes in length (Dist. Ex. 41 at p. 2). One hour per week of assistive technology consult was also provided to assist the student with the use of his Dynavox, described in the hearing record as a speech generating communication device used by students who are nonverbal (Tr. pp. 200, 243; Dist. Ex. 41 at pp. 1-2).

According to the hearing record, at the beginning of the 2007-08 school year (sixth grade), the student's reading decoding and sight word skills were at a second grade level, and his math skills were at an early second grade level (Tr. p. 236). The student's speech was very difficult for adults and peers to understand, he communicated by mostly using single words, and he did not frequently use his Dynavox (Tr. pp. 200, 241). The special education teacher reflected that the student would become frustrated by his inability to be understood and would get upset (Tr. pp. 236, 241). His spelling skills at that time were at a second grade level, and he on occasion wrote down what he was trying to say (Tr. p. 241). The student's special education teacher believed that initially the student was "overwhelmed" by the transition from his smaller fifth grade class to the sixth grade 12:1+1 class, and he cried during transitions and when asked to complete unfamiliar activities (Tr. p. 237). The student also exhibited difficulty paying attention in large group settings (id.). Socially, the student was observed to stay to himself and he did not show an interest in interacting or becoming friends with peers (Tr. pp. 237-38).

In October 2007, the student's special education teacher requested that the student receive individual aide services due to his struggle to keep up with the pace of the 12:1+1 classroom, his inability to communicate his wants and needs, his need for assistance to use his Dynavox, and his need for "intensive" supervision outside of the classroom because of safety concerns (Dist. Ex. 42). In November 2007, the CSE subcommittee convened and added individual aide services to the student's individualized education program (IEP) (Dist. Ex. 41 at p. 6).

On June 16, 2008, the CSE conducted the student's annual review for the 2008-09 school year (Dist. Ex. 31 at p. 6). According to information contained in the student's IEP, his special education teacher reported that he needed 1:1 support to be successful in the classroom (id.). At that time, it was reported that the student exhibited difficulty working in groups and with transitions between activities (id.). Academically, the student was making progress; his reading skills were "progressing slowly" and his math skills were "improving," although overall he continued to exhibit significant academic delays (id. at pp. 6-7). Reportedly, science and social studies concepts were difficult for the student to grasp without modification (id. at p. 6). The student's speech therapist reported that the student made good progress in his language skills; however, he continued to demonstrate significant language delays (id. at p. 7). The student used his Dynavox at school but preferred to verbalize responses despite his difficulty with articulation and verbal communication (id. at pp. 6-7). The June 2008 CSE recommended that for the 2008-09 school year, the student receive a 12:1+1 special class program and three sessions per week of individual speech-language therapy, twice weekly speech-language therapy in a small group, one session per week of individual OT, two sessions per week of individual PT, and one session of counseling per month in a small group; all sessions lasting 30 minutes (id. at p. 7). The CSE further recommended two one-hour sessions of assistive technology consult per month and the services of a 1:1 aide (id.). Extended school year (ESY) services for summer 2008 were also recommended at that time (id.).

On September 17, 2008, the CSE subcommittee reconvened to review the student's program (Dist. Ex. 31). According to the student's special education teacher, the student had become more independent and participated in class activities without teacher prompting (id. at p. 6). She reported that the student was making "steady" academic progress; he developed ideas for writing independently, his spelling improved, and he used his Dynavox to express himself when he was unable to express himself verbally (id.). It was reported that safety concerns were not as prevalent as in the previous school year (id.). Results of a speech-language evaluation of the student indicated that although he exhibited significant language delays, he had made "a great deal of progress" and his articulation skills were improving (id.). The consultant who provided the student's assistive technology services reported that the student used his voice first, but then used his Dynavox if he was not initially understood (id.). The special education teacher indicated that the student used the Dynavox at school, but could benefit from using it in other settings (id.). The September 2008 CSE subcommittee recommended that for the remainder of the 2008-09 school year, the student receive daily shared aide services, and four 30-minute sessions of individual speech-language therapy and one 30-minute small group session of speech-language therapy per week (id.). The remainder of the student's special education program was maintained from the June 2008 IEP (id.).

In an undated "Related Service Recommendation Form" prepared for the student's March 2009 annual review, the speech therapist indicated that the student's expressive language was "more intelligible and spontaneous" and that he was "very cooperative, trie[d] hard to please," and enjoyed speech-language therapy (Dist. Ex. 23 at p. 1). The speech therapist reported the standard scores (percentiles) of administrations of the Peabody Picture Vocabulary Test, Fourth Edition (PPVT-4): 51 (<.1); EVT-2: 56 (.2); and the Oral and Written Long Scale (OWLS) Listening Comprehension Scale: 64 (1st); and Oral Expression Scale: 40 (<.1) (id.). Her report concluded that the student exhibited "significant delays in semantic, syntactic and pragmatic language" that

affected his academic skills (id.). For the upcoming school year (2009-10), she recommended that the student receive four individual sessions and one group session per week of speech-language therapy, and provided annual goals to address articulation and language skills (Dist. Ex. 23).

In March 2009, the student's physical therapist reported that the student had made "good gains" in PT and displayed increased endurance and improvements in dynamic balance, strength, and coordination (Dist. Ex. 24 at p. 2). Although the student exhibited a tendency to walk on his toes, the physical therapist reported that with verbal cueing he was able to walk with a heel strike, albeit with "an exaggerated gait pattern" (id.). The physical therapist further offered that the student was a pleasure to work with and was motivated during sessions (id.). For the 2009-10 school year, the physical therapist recommended that the student receive one group and one individual session of PT per week, and he provided annual goals to address the student's motor needs (id. at pp. 1, 3).

An undated assistive technology services summary prepared for the student's March 2009 annual review indicated that the student's assistive technology sessions targeted vocabulary programming and system maintenance (Dist. Ex. 25). The speech-language pathologist who provided the student's assistive technology services reported that the student used his communication device at home and school, and he worked on using vocabulary and saving written language assignments to his communication device files (id.). The student's communication device "had a core vocabulary set that [would] meet his needs," and although he may need vocabulary added in the future, the speech-language pathologist believed that could be accomplished within the recommended assistive technology services (id.). She further reported that the student's "school team" was "very invested" in the student's success and, therefore, he needed fewer consult sessions (id.). For the 2009-10 school year, the speech-language pathologist recommended a decrease in assistive technology services to one hour per month (id.).

In mid-March 2009, the student's certified occupational therapy assistant (COTA) and licensed occupational therapist prepared the student's annual review related services recommendations form (Tr. p. 131; Dist. Ex. 27). The report indicated that the student continued to exhibit progress in the areas addressed by his goals, including handwriting, visual motor, keyboarding, and motor planning skills (Dist. Ex. 27 at p. 2). Administration of the Wide Range Assessment of Visual Motor Abilities (WRAVMA) yielded the following subtest scores (percentile): visual motor, 98 (45th); visual spatial, 50 (.07); and fine motor, 55 (.3) (id. at p. 1).³ The therapists concluded that the student would continue to benefit from OT services and for the 2009-10 school year, recommended continuing one session per week of individual OT, and they provided annual goals to address identified areas of need (id. at pp. 1-2).

An undated related services recommendation form prepared by the student's social worker indicated that the student had demonstrated "great strides" during the 2008-09 school year (Dist. Ex. 26). She commented that the student enjoyed his peers and when in small groups he took turns, cooperated, and interacted appropriately (id.). The student reportedly exhibited respect for personal boundaries, appeared to "feel good about himself," and in general displayed "a happy

³ The OT report indicated that the student was "not in a 'good mood' when testing was performed and his scores did not accurately reflect his abilities" (Dist. Ex. 27 at p. 2).

demeanor" (id.). The social worker concluded that the student "would benefit more from the social environment of the classroom rather than being pulled out for intensive intervention" and recommended discontinuing the student's one session per week of counseling (id.).

On March 23, 2009, the student's special education teacher prepared a request to discontinue the student's aide services (Dist. Ex. 22). The request reported that the student had "shown growth in many areas of development" and that he no longer required individual assistance for safety purposes within the school building (id.). According to the special education teacher, the student had demonstrated increasingly independent self-help skills and was able to complete classroom tasks with minimal cueing (id.). She commented that the student enjoyed his independence and benefited from a reduced reliance on adults (id.). The student also reportedly had exhibited improved verbal communication skills and was able to express wants, needs, and frustrations "in a more appropriate manner" with moderate support (id.).

On March 26, 2009, the CSE subcommittee convened for the student's annual review and to develop his IEP for the 2009-10 school year (Dist. Ex. 21). Attendees included the CSE chairperson, a school psychologist, the student's special education teacher, a BOCES coordinator, the student's speech therapist, the student's occupational therapist, the student's social worker, the assistive technology consultant, an administrative intern, and the parents (id. at pp. 6, 13). The CSE chairperson stated that all of the service providers and the special education teacher discussed the student's progress over the school year (Tr. pp. 60-61). According to information contained in the resultant IEP, the special education teacher reported that the student had "settled in well to his current classroom" (Dist. Ex. 21 at p. 6). The student reportedly participated in group activities, worked hard on individual tasks, and transitioned within the building independently (id.). He needed to be provided with verbal information in order to follow directions appropriately (id.). The IEP reflected that the student was beginning to express more of his wants and needs verbally, and that his articulation skills had improved "a great deal" (id.). According to the speech therapist, the student exhibited progress in vocabulary and was beginning to express himself more spontaneously (id.). The special education teacher, social worker, and the speech therapist indicated that the student demonstrated improved turn taking and interacting skills with peers, and when working with peers exhibited "maturity" (id.). The March 2009 IEP reflected comments by the assistive technology consultant indicating that the student appropriately used his Dynavox in situations where he was not able to verbalize a response (id.). It was further noted that the student needed to begin to independently assess the status of the Dynavox (id.). Progress reports were also provided by the student's occupational therapist and physical therapist (id.).

For the 2009-10 school year, the March 26, 2009 CSE subcommittee recommended placement of the student in a BOCES 12:1+1 special education class with related services at one of the district's middle schools (Dist. Ex. 21 at pp. 1-2).⁴ Specifically, the student was offered three sessions per week of individual speech-language therapy, twice weekly speech-language therapy in a small group, one session per week of individual OT, and one session per week of both individual and small group PT; all sessions lasting 30 minutes (id. at p. 2). The CSE further

⁴ According to the CSE chairperson, the March 26, 2009 CSE subcommittee also recommended ESY services for the student, which became the subject of a separate due process complaint notice (Tr. pp. 79-80, 84; Dist. Ex. 21 at p. 2). Those summer 2009 services were not part of the dispute below and are not part of this appeal.

recommended one 60-minute session of assistive technology consult per month (*id.* at p. 1). The CSE chairperson explained that the student's assistive technology consult service was decreased due to the student's increased comfort level using his Dynavox, and because most of the consultant's work was not directly with the student, rather her work was with the student's device (Tr. pp. 63-64). According to the CSE chairperson, the student's counseling service was discontinued due to the social worker's report that the student had exhibited progress and her belief that he could interact appropriately in the classroom with peers and did not need to continue with counseling (Tr. pp. 75-76, 78; Dist. Ex. 21 at p. 6). The student's shared aide service was also discontinued, due to reports that the student was comfortable and independent in the classroom, and because he could navigate within the building independently (Tr. pp. 74-75; *see* Dist. Ex. 21 at p. 6).⁵ The special education teacher who participated in the March 26, 2009 CSE subcommittee meeting, recalled that the parents did not agree with the change in the provision of speech-language therapy services because of the decrease in assistive technology consult services (Tr. pp. 267-68).⁶

By letter dated May 1, 2009, the district mailed the parents the finalized IEP developed for the student during the March 26, 2009 CSE subcommittee meeting (Dist. Ex. 20; *see* Dist. Ex. 21). On May 12, 2009, the parents filed a due process complaint notice requesting an impartial hearing, asserting that they disagreed with the amount of related services their son was offered for the 2009-10 school year (Dist. Ex. 19 at p. 1). The parents asserted that the student required additional OT, PT, speech-language, and assistive technology services (*id.*). The parents noted that if he was not able to communicate with the outside world, all of the "education part of his learning" would be "useless to him" (*id.* at pp. 1, 2). For example, the parents alleged that while the student may be able to identify the fact that he received the incorrect amount of change at a store, he was not able to articulate that he was provided the wrong amount of change (*id.* at p. 2). The parents requested that the student receive: (1) individual OT twice per week, for one hour each session; (2) individual PT twice per week, for one hour each session, and one group session (5:1) of PT once per week for one hour; (3) five individual one hour sessions of speech-language therapy, and three one hour group (5:1) sessions of speech-language therapy per week; and (4) two individual one hour sessions of assistive technology consultation per month (*id.* at p. 1). The parents also asserted that they were never given a choice of which school their son would be placed at, and that it was assumed that he would be placed at BOCES for the 2009-10 school year (*id.* at p. 2). The parents stated that they would like "a list with contact [numbers]" so that they could look at other schools (*id.*). The parents further asserted that the student's grade for the 2009-10 school year was noted on the March 26, 2009 IEP as eighth grade; however, "he [was] not in a grade and not to be classified as any such grade" (*id.*). The parents requested that their son's IEP reflect that he not be classified as an eighth grader (*id.*).

On July 6, 2009, the district made its first motion to dismiss the parents' May 12, 2009 due process complaint notice alleging that the parents' failed to participate in the resolution process

⁵ The parents did not challenge the district's discontinuance of the student's shared aide and counseling services at the impartial hearing below or on appeal (Tr. pp. 78-79).

⁶ The CSE chairperson, COTA, and speech therapist testified that they did not recall the parents objecting to the March 2009 CSE subcommittee's recommendations regarding OT, PT, or speech-language therapy at the CSE subcommittee meeting (Tr. pp. 72-75, 79, 147, 210-11).

(Dist. Ex. 11; see 8 NYCRR 200.5[j][2][vi]; see also 20 U.S.C. § 1415[f][1][B]; C.F.R. § 300.510[a]). On July 13, 2009, the district submitted a request for an interim order on pendency to Hearing Officer 1 (Dist. Ex. 10). The district requested that Hearing Officer 1 find that the program recommended in the student's 2008-09 IEP be the student's pendency placement during the period that the parents' claims regarding the student's 2009-10 school year were decided via the impartial hearing process (id. at pp. 2, 4).

On August 25, 2009, a second impartial hearing officer (Hearing Officer 2) was appointed to continue the impartial hearing process in this dispute (Dist. Ex. 4). On October 2, 2009, the district renewed its motion to dismiss the parents' due process complaint notice for their alleged failure to participate in the August 14, 2009 resolution sessions (Dist. Ex. 3). This motion was subsequently denied (IHO Decision at p. 2).

The impartial hearing convened on November 6, 2009, and ended on December 8, 2009, after two days of proceedings. Hearing Officer 2 rendered her decision on March 1, 2010 (IHO Decision at p. 17). In her decision, Hearing Officer 2 noted that prior to the first hearing date, both parties requested, and she granted, a motion to set aside Hearing Officer 1's order that the district appoint a guardian ad litem for the student (id. at p. 2). She also noted that the district made its third and fourth motions to dismiss the parents' due process complaint notice, and she again denied the district's motions (id.). In denying the district's motions, she noted that the parents had attended one resolution session, and although the parents left after twenty minutes and did not attend any other resolution sessions, they had stated their general objections at the March 26, 2009 CSE meeting and more specifically in their due process complaint notice (id.). Hearing Officer 2 noted that under the discretion afforded her by the State regulations, she declined to penalize the student by denying him an impartial hearing based upon his father's behavior (id.).

Hearing Officer 2 further found that the recommended related services of PT, OT and assistive technology consultation, as well as the recommended 12:1+1 classroom placement in the 2009-10 IEP were all appropriately calculated to confer educational benefits upon the student (IHO Decision at pp. 14, 16-17). Hearing Officer 2 therefore denied the parents' request for additional hours of PT, OT, and assistive technology consultation (id. at p. 17). However, she also determined that the district failed to offer the student a FAPE for the 2009-10 school year because the district did not meet its burden to demonstrate that the March 2009 CSE's modification of speech-language therapy services from four 30 minute individual sessions and one 30 minute group (5:1) session per week to 3 individual 30 minute sessions and two 30 minute group (5:1) sessions per week was designed to allow the student to receive educational benefits (id. at pp. 14-16). Finally, she also determined that the parents' assertion that they were required to receive a list of alternative schools was without merit (id. at p. 16). Hearing Officer 2 ordered the district to provide "at least five 30-minute sessions of speech[-language] therapy sessions per week to [the student]," which was to include no less than four sessions of individual speech-language services and one session of services in a group of no more than five students (id. at p. 17). Hearing Officer 2 further ordered the CSE to change the student's IEP as needed to implement her decision (id.).

The district appeals from a portion of Hearing Officer 2's determination, asserting that she erred when she: (1) denied the district's motions to dismiss the due process complaint notice; and

(2) determined that the district failed to offer the student a FAPE for the 2009-10 school year based on the district's recommended change in speech-language services to the student.

The parents did not file an answer to the district's petition (see 8 NYCRR 279.5). Notwithstanding the parents' failure to answer, I am required to examine the entire hearing record and make an independent decision based on the hearing record (Arlington Cent. Sch. Dist. v. State Review Officer, 293 A.D.2d 671 [2d Dep't 2002]; see 20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514[b][2][i]).

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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 Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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).

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 (see Application of the Bd. of Educ., Appeal No. 08-016).

Initially, I note that Hearing Officer 2's findings that the district's recommended 12:1+1 placement and the student's OT, PT, and assistive technology consult services for the 2009-10 school year were appropriate are not appealed by either party. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Application of the Dep't. of Educ., Appeal No. 09-092; 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).

As to the district's argument that the due process complaint notice should have been dismissed on procedural grounds relating to the resolution process, I find that this need not be

addressed in light of my determination herein pertaining to the substantive appropriateness of the offered program.

The substantive issue on appeal is whether one 30-minute session of speech-language therapy should have been delivered as an individual session (as recommended in 2008-09) or in a group session (5:1) (as recommended in 2009-10), and whether the delivery of that session in a group setting during the 2009-10 school year rose to the level of a denial of a FAPE. I note that the number of speech-language therapy sessions per week remained unchanged from the 2008-09 school year to the 2009-10 school year (compare Dist. Ex. 31, with Dist. Ex. 21).

The hearing record reflects that the program recommended in the March 26, 2009 IEP was similar to the program that the student received during the two previous school years (compare Dist. Ex. 21, with Dist. Ex. 31, and Dist. Ex. 41). The hearing record reveals testimony from the student's special education teacher and related service providers regarding the academic, social, communication, gross and fine motor progress they have observed the student make since sixth grade (2007-08) (Tr. pp. 104, 133-34, 147, 166-67, 171, 174, 200-03, 216-17, 220, 236-42, 253-56, 264-65). The CSE chairperson, the provider of the student's OT services, his speech therapist and his special education teacher, who all attended the March 26, 2009 CSE subcommittee meeting, testified that the program recommended by the March 26, 2009 CSE subcommittee was appropriate for the student (Tr. pp. 88-89, 147-48, 212-12, 274; see Dist. Ex. 21 at p. 6). Hearing Officer 2 found that there was no showing at the impartial hearing that the student's placement in the 12:1+1 special class during the 2009-10 school year was "anything other than appropriate," and further determined that the March 26, 2009 IEP recommendations regarding the student's OT, PT, and assistive technology consult services were also appropriate to meet his special education needs (IHO Decision at pp. 14-16).

The March 26, 2009 CSE subcommittee modified the student's speech-language therapy services from four individual and one group sessions per week, to three individual and two group sessions per week (Dist. Ex. 21 at p. 2). Hearing Officer 2 determined that "in regard to speech, the educational program ha[d] not been designed so the child may benefit from it," and that the district failed to offer the student a FAPE for the 2009-10 school year (IHO Decision at p. 16). In support of her determination, Hearing Officer 2 found that communication was the student's greatest area of need, and that the district did not appropriately rely on the speech therapist's initial speech-language therapy recommendations for the student (id. at p. 14). She further found that the student's speech-language therapy service level was not maintained despite a reduction in assistive technology services (id. at p. 16). However, a review of the hearing record supports the finding that the student's 2009-10 program as a whole, including the student's speech-language therapy recommendations, was reasonably calculated to confer educational benefits upon the student.

The student's speech therapist testified that she provided speech-language therapy services to the student during sixth (2007-08) and seventh grade (2008-09) and at the beginning of eighth grade (2009-10) until a schedule change occurred (Tr. pp. 199-201). During the 2008-09 school year, she provided the student with four individual and one group sessions of speech-language therapy per week (Dist. Ex. 31 at p. 6). Prior to the March 26, 2009 CSE subcommittee meeting, the speech therapist's written recommendation was that the student receive four individual sessions and one group session per week of speech-language therapy (Dist. Ex. 23). The speech therapist,

who attended the March 2009 CSE subcommittee meeting, testified that at the meeting she modified her recommendations after considering the presentations of the other service providers, who indicated that the student benefited from being with peers (Tr. pp. 209, 216-17; Dist. Ex. 26). Comments contained in the March 2009 IEP reflected the student's social skill progress and success working with peers (Dist. Ex. 21 at p. 6). According to the speech therapist, the increase in group speech-language therapy would have benefited the student because "he's learning from the other children instead of just working with me. I think it's more conducive to carry over for social language" (Tr. pp. 216-17). The student's special education teacher testified that the 2009-10 service recommendations were appropriate because he benefited from both individual and group services (Tr. p. 274). Specifically, she stated that the student needed individual sessions to "work on some pretty specific skills," but that he benefited from group sessions due to the need to learn "pragmatics" and "how to respond to other people" (*id.*). The speech therapist testified that as students progress, the delivery of services changes from individual to group sessions, and that the student had been "making great strides, it's a good thing that he's making progress here" (Tr. pp. 216-17). The speech therapist posited that additional sessions of speech-language therapy would not have benefited the student, due to concerns about the frequency with which he would have been pulled out of the classroom and that he might have become frustrated by the amount of speech-language therapy provided (Tr. pp. 218-19, 221-22). The hearing record affords a reasonable basis for the speech therapist's alteration at the CSE subcommittee meeting of her initial recommendations.

Hearing Officer 2's decision reflects testimony from the CSE chairperson who participated in the March 2009 CSE subcommittee meeting that the parents were concerned about the decrease in assistive technology consult services; therefore, the March 2009 CSE subcommittee "look[ed] at giving [the student] a little additional support in speech language rather than with the assistive technology" (Tr. p. 62; IHO Decision at p. 16). Hearing Officer 2 further described in her decision the special education teacher's belief that the students' speech-language service recommendations were maintained due to the decrease in assistive technology services (IHO Decision at p. 16; *see* Tr. pp. 267-68). The hearing record reflects that the assistive technology consultant recommended a decrease in consult services due to her ability to accommodate the student's vocabulary needs in one 60-minute session per month, and because the school team did not require as many consult sessions (Dist. Ex. 25). The special education teacher testified that previously, the student "never used to want to use [the Dynavox] at all," but currently "he's getting faster with it so he's actually using it more this year than he has in the past" (Tr. pp. 243-44). She added that although the student did not frequently use his Dynavox in the classroom, he did use it during journal time, when she struggled to understand what the student was saying, and he took it to speech-language therapy on a daily basis (*id.*). The speech therapist indicated that the student used his Dynavox "occasionally" (Tr. p. 200). The hearing record does not show that the educational professionals working with the student required the provision of additional speech-language therapy services in order to support the student's use of his Dynavox, nor does it reflect a recommendation from the assistive technology consultant that the student receive additional speech-language therapy in response to reduced assistive technology consult services (Dist. Ex. 25). I further note that the speech therapist did not indicate that the student required additional speech-language therapy resulting from the decrease in assistive technology consult services (Tr. pp. 197-232; Dist. Ex. 23). While the March 26, 2009 CSE subcommittee may have considered maintaining or even adding

speech-language therapy services to offset the reduction in assistive technology consult services, the hearing record does not show that its determination not to do so deprived the student of a FAPE.

Even if the hearing record demonstrated that the district should not have decreased the student's level of individual speech-language therapy by one session during the 2009-10 school year, the hearing record does not show that doing so rose to the level of a denial of a FAPE. In determining if a student was offered a FAPE, a student's program, as recommended in an IEP, should be evaluated as a whole (Karl v. Board of Educ. of Geneseo Cent. Sch. Dist., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; see Application of a Child with a Disability, Appeal No. 05-128). In considering the speech-language recommendations and the other components of student's special education program (i.e. 12:1+1 special class, OT, PT and assistive technology services), the latter which the impartial hearing officer found appropriate, I find that the hearing record shows that the IEP as a whole, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefits. Moreover, the hearing record supports a determination that the speech-language services as offered were reasonably calculated to enable the student to receive educational benefits pertaining to his speech-language needs. The student's speech therapist and his special education teacher testified that the student's verbal communication skills had improved since sixth grade (Tr. pp. 201-02, 241-42).⁷ While it is apparent that the student preferred to use verbal communication, the hearing record shows that he was able to functionally communicate by using other means (Tr. pp. 241-44). The March 2009 IEP contained annual goals designed to improve his articulation and expressive language skills to aid communication, and continued to offer five sessions per week of speech-language therapy (Dist. Ex. 21 at pp. 2, 9-10). In addition to daily speech-language therapy, the special education teacher described her 12:1+1 special class as "language-based" and indicated that the speech therapist occasionally "pushed in" to the class to work on the student's annual goals (Tr. pp. 201, 256-57, 272-73). Given the progress that the student has demonstrated since sixth grade in his verbal communication skills, the language-based nature of the 12:1+1 special class and the level of related services recommended, the hearing record shows that the district's recommended 2009-10 special education program, including its speech-language therapy recommendations, offered the student a FAPE.

I have considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated March 1, 2010 is hereby annulled to the extent that it found that the speech-language services the district offered the

⁷ Moreover, while not dispositive, the hearing record shows that the speech therapist testified that although during the 2009-10 school year the student continued to exhibit weak articulation skills, she was able to understand his speech (Tr. p. 202), and the special education teacher stated that during the 2009-10 school year, overall she and the student's classmates were able to understand his speech on a regular basis (Tr. p. 242). At times when the student's speech was not able to be understood, he used his Dynavox or wrote down what he was trying to say (id.).

student for the 2009-10 school year were inappropriate, that the district failed to offer the student a FAPE for the 2009-10 school year, ordered the district to provide additional speech-language therapy to the student, and ordered the CSE to change the student's IEP as needed to implement her decision.

Dated: **Albany, New York**
 May 13, 2010

PAUL F. KELLY
STATE REVIEW OFFICER