



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-010

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Law Offices of Lauren A. Baum, P.C., attorneys for petitioners, Richard A. Liese, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Jessica C. Darpino, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request for direct funding of their daughter's tuition costs at the Communities Acting to Heighten Awareness and Learning (CAHAL) program at the Hebrew Academy of the Five Towns & Rockaway (HAFTR) for the 2009-10 school year. Respondent (the district or district of residence) cross-appeals from the impartial hearing officer's determination that the CAHAL program at HAFTR was an appropriate placement for the student for that school year and that equitable considerations supported an award of tuition. The appeal must be dismissed. The cross-appeal must be dismissed.

During the 2009-10 school year, the student attended a fourth grade, self-contained CAHAL program at HAFTR, which is a private school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see Tr. pp. 212, 238-39; see also 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with an other health impairment is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

Background

The student's mother reported that the student exhibited grand mal seizures at eight months of age and soon after, delays in speaking and motor function (Tr. p. 287). As a result of a referral to the Early Intervention Program, the student received home-based services and later, preschool services through the district, including physical therapy (PT), occupational therapy (OT), speech-language therapy, and special education services (Tr. pp. 288-89). When the student turned five years of age, she continued to receive speech-language therapy and also received resource room services through the district (Tr. p. 289). The hearing record indicates that the student attended a first grade program funded by the district but does not indicate whether the district or a private entity operated that program (see Tr. p. 290).

For second (2007-08) and third grade (2008-09), the student attended a general education class at a nonpublic school located outside the geographic boundaries of the district (Tr. pp. 290-93; Dist. Ex. 7 at p. 5; Parent Ex. B). During third grade, the student's mother referred her to the Committee on Special Education (CSE) of the school district where the nonpublic school was located (the "district of location") for an evaluation due to difficulty in reading fluency and comprehension (Tr. pp. 291-92; Dist. Exs. 10 at p. 1; 11 at p. 1; Parent Ex. E at p. 1). At the time of that referral, the student was receiving building level supports at the nonpublic school (Dist. Ex. 11 at p. 1).

On October 24 and 27, 2008, a school psychologist employed by the district of location conducted a psychological evaluation of the student (Parent Ex. E at pp. 1, 2, 3, 4, 5). In the resultant evaluation report, the school psychologist reported that the student had a diagnosis of an attention deficit hyperactivity disorder (ADHD) for which she took medication and that she had previously been classified by her district of residence as a student with an other health impairment (Parent Ex. E at pp. 1, 5; see also Tr. pp. 293-94; Dist. Exs. 8 at p. 1; 11 at pp. 1-2). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) revealed a full scale IQ of 81, which was in the low average range of functioning (Parent Ex. E at pp. 2, 3, 5). The school psychologist indicated that, among other things, the student had deficits in word knowledge skills (vocabulary) and in her fund of knowledge and that her difficulty attending to and holding information in her head impeded her ability to process complex information and to learn new information (id. at pp. 4, 5). The school psychologist also indicated that the student's graphomotor skills were intact (id. at p. 5). Additionally, the school psychologist indicated that "[e]motionally, a pervasive sense of depression and anxiety [was] present which negatively compromise[d] [the student's] view of herself as well as her ability to positively impact the environment (id.). Based on the classroom teacher's rating form on the Behavior Assessment System for Children - Second Edition (Teacher Report Form) (BASC-2), the school psychologist also indicated that the student had significant difficulty relating to others and in displaying a positive self image (id. at pp. 3, 4, 5).

A speech-language pathologist employed by the district of location conducted a speech-language evaluation of the student in October 2008 (Dist. Ex. 11 at p. 1). In a report dated October 29, 2008, the speech-language pathologist advised that the student's articulation skills, fluency of speech, and vocal quality were within the normal range (id. at p. 2). However, administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) yielded average to low average scores in the areas of vocabulary, recalling information from orally presented

paragraphs and sentence formulation, and revealed delays in the areas of auditory processing, short-term memory, and determining semantic relationships (id. at pp. 2, 3). The speech-language pathologist also indicated that the student's ADHD may have affected her ability to respond to some of the tasks presented (id. at p. 2).

On October 31, 2008 and November 3, 2008, the student underwent an educational evaluation conducted by the district of location (Dist. Ex. 10 at p. 1). Administration of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH) yielded standard scores in the low range on the broad reading, math calculation skills, and academic skills clusters; a standard score in the low average range in oral language skills; and a standard score in the average range on the listening comprehension cluster (id. at pp. 1-2). The November 5, 2008 report indicated that the student's difficulty decoding affected her reading comprehension and that her inability to master grapheme-phoneme correspondence affected both her spelling and her decoding abilities (id. at p. 1).

Although the hearing record does not include an individualized education services program (IESP) for the 2008-09 school year enumerating the services that the student received from the district of location as a result of these evaluations, it appears that the student received resource room support, testing modifications, weekly group counseling, and speech-language therapy once per week (Tr. pp. 291-93, 327; see Dist. Ex. 8; Parent Ex. F).¹ Additionally, the student's mother reported that the student also received weekly counseling services from a private social worker or therapist to address emotional issues stemming from the home environment (Tr. pp. 292-93, 326).

On March 11, 2009, in preparation for the student's annual review by the CSE of the district of location, the student's speech-language pathologist from that district prepared a progress report (Dist. Ex. 8). The speech-language pathologist indicated that the student's speech-language therapy addressed deficits in auditory processing, short term memory, and semantic skills (id.). The student was able to follow one to two-step directions and answer simple "wh" questions related to short paragraphs presented orally (id.). However, the impact of the student's ADHD was again noted with regard to the student's continued difficulty recalling sets of numbers, words, and sentences verbatim, as she tended to become distracted and lose focus during these tasks (id.). The speech-language pathologist indicated that the student's semantic skills had been addressed by intervention focusing on improving the student's general fund of knowledge through the introduction of categories, antonyms, synonyms, word association, compare/contrast and simple analogy worksheets and games and that the student was beginning to carry over these words and concepts into her daily lexicon in the structured speech environment (id.). The speech-language pathologist also indicated that the student was cooperative and worked well in the small group setting; however, she also indicated that the student demonstrated variable motivation and consistently came to sessions with incomplete homework assignments (id.).

On March 9, 2009, the school psychologist who evaluated the student in October 2008 submitted a counseling progress report for the student's annual IESP review (Parent Ex. F). The progress report indicated that the student was receiving weekly group counseling in a group of

¹ The CSE of the school district of location is required to review a timely request for special education services and develop an IESP for a student with a disability "based on the student's individual needs in the same manner and with the same contents as an individualized education program" (Educ. Law § 3602-c[2][b][1]).

two, which focused on assisting the student in developing the skills necessary to initiate and maintain peer relationships and to enhance her self-image (id.). The student was reported to be a willing and open participant, to have formed a positive bond with the other group member, and to be receptive to the concepts discussed (id.). The report indicated that the student was making progress in her ability to give and take when relating to peers and that she related in a friendly manner with school staff (id.). However, although a focus of counseling was to increase the student's ability to cope effectively with situational stressors, school staff had reported that the student had become less productive academically and increasingly depressed (id.). The progress report also indicated that while the student related well to peers, she could be "moody" and irritable (id.).

On March 16, 2009, the CSE of the district of location convened for an annual review of the student and to develop an IESP for the student for the 2009-10 school year (Dist. Ex. 7 at pp. 1, 5). Attendees included the school psychologist who had prepared the October 2008 psychological evaluation report and reviewed the March 2009 counseling progress report, the special education teacher who had conducted the November 2008 educational evaluation, and the parents (Dist. Ex. 7 at p. 5). The student's teacher at the nonpublic school also participated, as did the nonpublic school's director of pupil personnel services, principal, and social worker (id.) Among other things, the resultant March 2009 IESP indicated that the student had significant delays which affected her involvement and progress in the general curriculum and that she was performing below grade level in all academic areas (id. at p. 3). The March 2009 IESP indicated that the results of the current assessment revealed "significantly compromised academic functioning in all areas assessed," with particular difficulty noted in reading comprehension and decoding, math problem solving, and basic calculations skills (id.). The March 2009 IESP further indicated that the student needed additional support in writing, math, and content areas; that the student required reteaching of concepts; that the student needed to develop problem solving skills and calculations; and that the student needed to improve reading skills in fluency and comprehension (id.). With respect to the student's social development, the March 2009 IESP indicated that the student's motivation was "erratic," that she presented as being rather sad and overwhelmed, that self-esteem was seen to be compromised, and that the student had "some problems utilizing social skills" in the school and community (id. at p. 4). According to the March 2009 IESP, the classroom teacher reported that the student could be moody (id.). The March 2009 IESP also reported that "[u]pdated behavioral inventories" filled out by the classroom teacher indicated that the student was seen to be "At risk or within the Clinically Significant Range for difficulty in a wide range of areas including depression, social skills, aggression, withdrawal, and adaptive skills" (id.).² With respect to the student's social development needs, the March 2009 IESP indicated that the student needed to express her feelings appropriately and to develop a positive self-concept; that the student required greater self-reliance; that the student needed to decrease dependency on adults, and that the student needed to improve coping skills (id.).

Based upon the evaluations, teacher reports, classroom functioning, parent information, and committee discussion, the March 2009 CSE of the district of location developed an IESP for

² The March 2009 IESP included the results of the BASC-2 behavioral inventories completed by the student and the student's classroom teacher as a part of the October 2008 psychological evaluation as well as the results of the BASC-2 behavioral inventory which was completed by the student's classroom teacher in March 2009 (Dist. Ex. 7 at pp. 3, 4; see also Parent Ex. E at pp. 2-3).

the student that recommended that the student receive resource room services in a group of five, 36 minutes, five times a week and 30 minutes of counseling in a group of five, once per week, as well as certain program modifications and testing accommodations to address her individual needs (Dist. Ex. 7 at pp. 1-2, 5). The March 2009 IESP included 21 annual goals in the areas of study skills, reading, mathematics, and social/emotional/behavioral skills (id. at pp. 5-9).

During the student's third grade year, the student's mother, the nonpublic school principal and nonpublic school social worker agreed that the general education program at the nonpublic school was no longer meeting the student's needs (Tr. pp. 293-94). According to the student's mother, the principal and social worker suggested that the parents enroll the student in a more specialized program (Tr. p. 294).

By letter to the district of residence dated July 22, 2009, the student's mother requested that the student be evaluated to receive special education services (Parent Ex. B). The district of residence responded to the parent's request by letter dated July 27, 2009, notifying the parents that a meeting had been scheduled for August 4, 2009 to, among other things, determine whether the student continued to have an educational disability that required special education services and for the development of an individualized education program (IEP) (Dist. Ex. 6).

The CSE of the district of residence convened on August 4, 2009 (Dist. Exs. 4 at p. 1; 5 at p. 1). Attendees included a school psychologist; a special education teacher, who was also the district representative; a regular education teacher; an additional parent member; the student's mother; and the student (Dist. Ex. 4 at p. 2). At the August 2009 CSE meeting, the student's mother was advised that additional evaluation of the student was not necessary because the documentation provided by the district of location was sufficient and the testing was recent (Tr. pp. 151-52, 298, 324). The resultant August 2009 IEP reflects that the CSE continued the student's classification as a student with an other health impairment and recommended a 12:1 special class in a community school with related services of one 30-minute group (of 3) counseling session and two 30-minute group (of 3) speech-language therapy sessions per week, in a separate location (Dist. Ex. 4 at pp. 1, 16). The August 2009 IEP also provided for academic and social/emotional management needs, testing accommodations, and included 12 annual goals in the areas of speech-language skills, reading comprehension and decoding, writing, math computation and problem solving skills, and social/emotional skills (id. at pp. 3-5, 8-13, 16).

By letter to the CSE chairperson of the district of residence dated August 19, 2009, the student's mother advised, among other things, that she had not yet received an offer of placement for a 12:1 special class for the student or an IEP setting forth the specific services that the student would receive for the upcoming school year (Parent Ex. C). She further indicated that although she remained willing to consider an appropriate offer of placement, in the interim, she would be sending the student to the CAHAL program at HAFTR and would be seeking tuition reimbursement/funding for that program from the district (id.).

In a Final Notice of Recommendation (FNR) dated August 28, 2009, the district of residence summarized the recommendations made by the August 2009 CSE, and notified the parents of an assigned school and classroom (Dist. Ex. 3). The student's mother visited the assigned school and classroom on September 8, 2009 (Tr. pp. 330-32). Based on her observation and discussion with the classroom teacher, the guidance counselor and the speech-language

therapist, the student's mother concluded that the assigned school and classroom were not appropriate for the student (Tr. pp. 307-08; Parent Ex. D at pp. 1-2).

On September 8, 2009, the student's mother executed a contract for the student to attend the CAHAL program at HAFTR for the 2009-10 school year (Parent Ex. I at p. 1). The hearing record reflects that the student attended fourth grade in a 12:1+2 classroom at the CAHAL program at HAFTR during the 2009-10 school year (Tr. pp. 212, 239, 310; see Parent Exs. K; M; N; O). The student also received related services of speech-language therapy and counseling that were provided through the school district in which the CAHAL program was located (Tr. pp. 220-21; Parent Exs. N; O).

By letter dated October 26, 2009, the parents advised the district that they were rejecting the assigned school and classroom (Parent Ex. D). The parents indicated, among other things, that the physical size of the classroom was too small to provide for the student's needs related to her ADHD diagnosis; the class contained disruptive boys; the level of work was too high for the student; there were no mainstreaming opportunities for subject areas; the program was too restrictive; and the speech-language therapist and the occupational therapist shared a room which would be too distracting for the student (id.). The parents further advised the district that the student would be attending the CAHAL program at HAFTR and that they would be seeking tuition reimbursement for that program for the 2009-10 school year (id. at p. 2).

Due Process Complaint Notice

By due process complaint notice dated May 24, 2010, the parents asserted that the district of residence failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school year and requested that an impartial hearing be scheduled (Parent Ex. A at pp. 1, 4). The parents alleged that the August 2009 IEP was invalid; that a timely, appropriate offer of placement had not been made; that the August 2009 CSE had failed to consider sufficient, appropriate evaluative and documentary material to justify its recommendations; and that the August 2009 CSE failed to provide the parents with a meaningful opportunity to participate in the decision-making process (id. at p. 1). According to the parents, the August 2009 IEP did not adequately reflect the student's current level of performance and needs (id. at p. 2). They further alleged that the August 2009 IEP contained vague goals, that many of the included goals lacked measurable benchmarks; and that there were no goals addressing the student's distractibility, impulsivity, and difficulty following directions (id. at pp. 2-3). Regarding the particular 12:1 special class at the assigned school, the parents contended that the classroom was too small, that the students in the class were not appropriate peer models, that the work being done in the 12:1 special class was too advanced for the student, that the expectations for the student for independent work were above the student's current functional level; that the recommended program was "too restrictive" for the student; that physical education was not "a part of the class schedule;" and that the school building was overcrowded because the speech-language therapist shared a room with the occupational therapist (id. at pp. 3-4). As a proposed resolution, the parents sought payment of the student's tuition at the CAHAL program at HAFTR, as well as the provision of related services and transportation (id. at pp. 4-5).

In a June 3, 2010 response to the parents' due process complaint notice, the district argued that the placement offered by the district was reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 2 at p. 3).

Impartial Hearing Officer Decision

The impartial hearing began on July 23, 2010 and concluded on November 30, 2010, after five days of proceedings (Tr. pp. 1, 7, 14, 139, 274, 352). In a decision dated December 13, 2010, the impartial hearing officer found that the district of residence had offered the student a FAPE (IHO Decision at pp. 14, 16). The impartial hearing officer concluded that the August 2009 CSE properly relied on reports from 2008 and 2009 that were submitted by the student's previous district of location (id. at p. 14). The impartial hearing officer also concluded that the IEP was reasonably calculated to provide meaningful educational benefits and provided special education services tailored to meet the student's unique needs (id. at p. 15). According to the impartial hearing officer, the annual goals and short-term objectives in the August 2009 IEP were formulated with the documentation provided and with the input of all CSE members, including the parent, "who participated in the review" (id.). The impartial hearing officer also found that "the level and the work w[ere] appropriate for [the student]" and that students in the 12:1 special class were mainstreamed for various subjects and had other mainstreaming opportunities during the day, including gym, lunch, and school trips (id.). Additionally, the impartial hearing officer found that the student's unilateral placement at the CAHAL program at HAFTR was appropriate and indicated that the student was making progress (id.). With respect to equitable considerations, the impartial hearing officer concluded that the student's mother had cooperated with the district (id. at pp. 15-16). The impartial hearing officer further indicated that if he had found that the student was not offered a FAPE by the district, he otherwise "would have awarded the non-religious portion of tuition" to the student's family (id. at p. 16).

Appeal for State-Level Review

The parents appeal, requesting an order reversing the impartial hearing officer's determination that the district offered the student a FAPE for the 2009-10 school year and an award of the student's full tuition costs for the CAHAL program at HAFTR. The parents allege that (1) the district failed to respond to their July 2009 letter requesting that the student be evaluated to receive special education services but instead scheduled a "review meeting" on August 4, 2009; (2) the August 2009 CSE meeting was not properly composed; (3) the August 2009 CSE proceeded to make recommendations relating to the 2009-10 school year based on the March 2009 IESP from the student's previous district of location and some of the reports that the district of location had relied on when it developed the March 2009 IESP despite the student's mother's request for an evaluation of the student and testimony at the impartial hearing that the district's school psychologist did not have the student's complete file; (4) the October 2008 psychological evaluation report reviewed by the August 2009 CSE consisted of only the first two of its five pages; consequently, the August 2009 CSE did not have any information about the student's anxiety and depression and therefore did not include this information on her August 2009 IEP; (5) no annual goals were developed to address the student's distractibility, lack of focus, and difficulty following directions; (6) the August 2009 CSE failed to conduct a functional behavioral assessment (FBA) to determine the cause of the student's moodiness; and (7) the August 2009 IEP failed to adequately

identify and address all areas of the student's suspected disability, including the student's anxiety, depression, distractibility, impulsivity, difficulty following directions, and lack of self-esteem.

The parents further allege that the school assigned in the August 2009 FNR was inappropriate for the student. In particular, the parents contend that (1) the classroom was too small; (2) there were too many boys in the 12:1 class; (3) the classroom teacher failed to properly address inappropriate behaviors, (4) the functional math and reading ranges of the students in the 12:1 class were inappropriately wide; (5) the promotional criteria used in the August 2009 IEP indicated that the student had "substantially lower skills and lower expectations" than the other students in the class; and (6) the occupational therapist and speech-language therapist were both assigned to the same room for therapies and therefore the student would not have received the quiet, nondistracting environment that she needed to benefit from speech-language therapy.

With respect to the appropriateness of the student's unilateral placement at the CAHAL program at HAFTR, the parents assert that the placement was appropriate for the student and that the impartial hearing officer erred by stating that he would have only awarded the secular portion of the program's tuition costs had he found that the district failed to offer a FAPE.

The district submitted an answer and cross-appeal to the parents' petition. In its answer, the district contends that it offered the student a FAPE for the 2009-10 school year. Further, it denies that the August 2009 CSE meeting was improper. With respect to the composition of the August 2009 CSE, it asserts that if there were a procedural irregularity, it did not deny the student a FAPE. It also contends that the August 2009 CSE utilized all the evaluative information available to it, including information provided by the parents; and further, that the CSE had sufficient information to make an appropriate recommendation. Additionally, the district alleges that the August 2009 IEP was substantively appropriate. It asserts that an FBA was not necessary; denies that the August 2009 IEP failed to adequately identify and address all areas of the student's disability; denies that the August 2009 IEP's annual goals and/or short-term objectives were inadequate, and further asserts that the August 2009 IEP was appropriate for the student's academic needs and reflected the student's social-emotional needs.

The district further alleges that its assigned school was appropriate and capable of implementing all of the recommendations in the August 2009 IEP, including the provisions for related services. It further contends that the classroom at the assigned school was of adequate size; that the hearing record does not support any claim that the gender composition of the 12:1 special class constituted a denial of a FAPE; denies that the range of reading and math scores of the students in the 12:1 special class at the assigned school were inappropriate; asserts that the student fit squarely within the chronological and academic functional levels of the other students; asserts that appropriate peer modeling opportunities would have been available in the proposed class; denies that the student would not have been able to benefit from the reading instruction in the class; and asserts that the teacher of the proposed 12:1 special class was able to work with students who had difficulties with frustration and that the class had access to after school support and was provided with mainstreaming opportunities. The district further asserts that the impartial hearing officer was correct in stating that had he found the district failed to offer the student a FAPE, he would have only awarded the "non-religious portion" of tuition to the student's family.

The district cross-appeals the impartial hearing officer's finding regarding the appropriateness of the parents' unilateral placement at the CAHAL program at HAFTR and determination that equitable considerations would favor the parents. With respect to the appropriateness of the CAHAL program at HAFTR, the district contends that the student's educational needs require that she be provided with both counseling and speech-language therapy and that the CAHAL program at HAFTR does not provide the student with these related services, but instead relies on providers from the student's district of location for such services. With respect to equitable considerations, the district asserts that the parents failed to provide the district with notice of their unilateral placement of the student as required by the Individuals with Disabilities Education Act (IDEA), in that the parents provided notice in late October 2009, after the student had been attending the CAHAL program at HAFTR for approximately a month and a half.

The parents answered the district's cross-appeal. They assert that the CAHAL program at HAFTR is not inappropriate for the reason that it does not provide the student with counseling and speech-language therapy. They further assert that the IDEA-notice requirements had not yet been triggered because the district did not provide the parents with a placement offer 10 business days prior to the commencement of the 2009-10 school year, that the parents' August 20, 2009 letter to the district fulfilled the purpose of the notice requirement, and that the parents provided the district with notice of their rejection of the district's proposed placement upon receiving notice of and having the opportunity to visit the district's assigned school.

Applicable Standards

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 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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[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]).

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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a 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 (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 burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Issues Raised for the First Time on Appeal

I will first address the parents' allegations that the August 2009 CSE was improperly composed and that the district failed to conduct an FBA. With respect to these contentions, it is well settled that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). The parents' May 2010 due process complaint notice does not challenge the composition of the August 2009 CSE or assert that the district was required to conduct an FBA but did not do so (see Parent Ex. A). Additionally, while the hearing record contains some testimony relating to these issues, the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include these issues. Further, the hearing record does not reflect that the parents submitted, or that the impartial hearing officer authorized, an amendment of the parents' May 2010 due process complaint notice to include these issues. Nor am I persuaded by the language in the parents' due process complaint notice seeking to "reserve" a right to raise "any other procedural or substantive issue that may come to their attention during the pendency of the litigation of this matter, including, but not limited to, ... challenging the composition of the CSE" where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice including the issues of the composition of the August 2009 CSE or the need for an FBA (Parent Ex. A at p. 4). To hold otherwise would render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]). I further note that the impartial hearing officer did not reach these issues. Therefore, these contentions that are raised for the first time on appeal, are outside the scope of my review and therefore, I will not consider them (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Application of a Student with as Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

Adequacy of Evaluative Information before the August 2009 CSE

Next, I turn to the parents' claim that the district did not properly respond to the July 2009 letter requesting that the student be evaluated for special education services but instead scheduled an August 2009 CSE meeting. They also allege that the October 2008 psychological evaluation

report reviewed at the August 2009 CSE meeting was incomplete. I decline to find a denial of a FAPE on this basis and find for the reasons set forth below that the August 2009 CSE had sufficient evaluative information to make recommendations for the student's 2009-10 school year.

Testimony by the district school psychologist who was at the August 4, 2009 CSE meeting indicates that the CSE relied on evaluative data initially obtained by the student's district of location during the 2008-09 school year to develop the student's IEP for the 2009-10 school year (Tr. pp. 150-52). The district school psychologist testified that no new testing of the student was conducted because the testing from the district of location was current, and further testified that she felt that the CSE had enough information to make a recommendation for the student (Tr. pp. 151-52). The hearing record reveals that the CSE had before it a psychological evaluation report, an educational evaluation report, and a speech-language evaluation report which were all completed in October and November 2008, eight to nine months prior to the August 2009 CSE meeting (Tr. pp. 151, 152, 163; Dist. Exs. 10 at p. 1; 11 at p. 2; Parent Ex. E at p. 1). The hearing record also reveals that the CSE had updated information completed in March 2009 which reflected the level at which the student was functioning three months prior to the end of the 2008-09 academic school year: a March 2009 counseling progress report; a March 2009 progress report from the student's speech-language pathologist; and the student's March 2009 IESP which had been developed for the student for the 2009-10 school year by the district of location (Tr. pp. 151-52, 192; Dist. Exs. 7 at pp. 1-9; 8 at p. 1; Parent Ex. F at p. 1).³ The March 2009 IESP contained additional current evaluative information including teacher ratings from both the October 2008 and March 2009 administrations of the BASC-2 and the student's scores from a February 2009 administration of the Kaufman Test of Educational Achievement, Brief Second Edition (KTEA-II Brief Form), as well as information reflected in the academic achievement, functional performance and learning characteristics section of the IESP provided by the student's then-current classroom teacher (Tr. p. 161; Dist. Ex. 7 at pp. 3, 4). Based on the above, the hearing record supports a finding that the CSE had sufficient current evaluative data with which to develop the student's 2009-10 IEP and as such, the CSE did not need to conduct further evaluations (see 8 NYCRR 200.4[b][4]; see also Perricelli, 2007 WL 465211, at * 11).

Additionally, other than with respect to the October 2008 psychological evaluation report, I note that the parents have made no claim that the evaluative data was incomplete, inaccurate or otherwise inadequate, that the student had areas of need that needed to be evaluated but had not been, or that any other existing evaluations should have been, but were not, considered by the August 2009 CSE.

The parents claim that the August 2009 CSE did not have sufficient information about the student's anxiety and depression and that as a result, the subsequent August 2009 IEP did not identify the student's anxiety and depression nor recommend any annual goals or short-term objectives to address these concerns. Contrary to the parents' contention that the absence of a complete October 2008 psychological evaluation report resulted in the August 2009 CSE not having information about the student's social/emotional needs, the March 2009 counseling progress report referenced the student's depression and also indicated that the student could be

³ The district's school psychologist testified that there was an "IEP" from March 2009; however, the hearing record reflects that the document was an "IESP" dated March 2009 (Tr. pp. 151-52; Dist. Ex. 7 at p. 1).

moody and irritable (Parent Ex. F). The March 2009 counseling progress report further indicates that the student's group counseling sessions included a focus on coping effectively with situational stressors (*id.*). I also note that the March 2009 speech-language progress report indicated that during certain tasks, the student became distracted and tended to lose focus (Dist. Ex. 8). Additionally, the resultant August 2009 IEP indicated that the student was "prone to moodiness" and "can be easily overwhelmed in class and may then withdraw or shut down" (Dist. Ex. 4 at p. 5). Further, and as discussed below, the August 2009 IEP included appropriate annual goals to address the student's social/emotional needs. Based on the above, I find that the parents' contention that as a result of insufficient information the CSE did not properly identify and adequately address the student's anxiety and depression in the August 2009 IEP is not persuasive.

With respect to the parents' contentions that the CSE did not have the complete October 2008 psychological evaluation report before it at the August 2009 meeting, specifically that the first two pages of the evaluation report did not include all of the test results from that evaluation, I note that the March 2009 IESP included teacher ratings from both the 2008 BASC-2 and the more current March 2009 BASC-2 with related narrative information (*see* Dist. Ex. 7 at pp. 3-4). With respect to the parents' contention that the first two pages of the October 2008 psychological evaluation report did not contain the examining psychologist's "conclusions and recommendations," a review of the full report shows that the examining psychologist's October 2008 evaluation report did not include any recommendations (*see* Parent Ex. E). Further, the hearing record reflects that the missing pages of the October 2008 psychological evaluation report did not include significant information that was not otherwise reflected in the pages that the CSE had before it or in other documents reviewed by the CSE (*see* Parent E at pp. 1-2, 5; *see also* Dist. Exs. 7 at pp. 3-4; 8 at p. 1; 10 at pp. 1-2; 11 at pp. 1-2; Parent Ex. F at p. 1). The hearing record also reflects that the August 2009 CSE reviewed the March 2009 counseling progress report from the same psychologist who conducted the October 2008 evaluation of the student (*see* Parent Exs. E; F).

I therefore find that the absence of the complete October 2008 psychological evaluation report did not deprive the August 2009 CSE of information necessary to make an appropriate recommendation for the student. Further, based on all of the above, I find that the August 2009 CSE had sufficient current evaluative data with which to develop an adequate and appropriate IEP for the student for the 2009-10 school year and I therefore also find that the August 2009 CSE properly determined that it did not need to conduct any further evaluations as a part of the student's August 2009 reevaluation.

August 2009 IEP

Present Levels of Performance and Needs

The parents contend that the August 2009 IEP failed to adequately identify and address all areas of the student's suspected disability, most notably the student's anxiety, depression, distractibility, impulsivity, difficulty following directions, and lack of self-esteem. The IDEA provides that an IEP must, among other things, include a statement of present levels of academic achievement and functional performance, including a description of how the student's disability affects his or her involvement and progress in the general curriculum (20 U.S.C. § 1414[d][1][A][i][I][aa]; *see* 34 C.F.R. § 300.320[a][1][i]); 8 NYCRR 200.4[d][2][i][a]). An IEP's

present levels of academic performance and functional levels provide the relevant baselines for projecting annual performance and for developing meaningful measurable annual goals and short-term objectives (Application of the Bd. of Educ., Appeal No. 04-026; see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *25 – *26 [S.D.N.Y. Sept. 29, 2009]). For the reasons discussed below, I find that the August 2009 IEP accurately reflected the student's present levels of academic, speech-language, health and physical development, and social/emotional functioning.

The district school psychologist who attended the August 2009 CSE meeting testified that the present level of academic performance and learning characteristics section of the student's August 2009 IEP was based on information provided in reports from the district of location; from discussion with the parent; and from information in the March 2009 IESP provided by the student's then-current classroom teacher (Tr. pp. 159, 161). The school psychologist testified that the reading, writing and math scores included in the August 2009 IEP reflected the scores from the November 2008 educational evaluation report completed by the district of location (Tr. p. 159; see Dist. Ex. 4 at p. 3; see also Dist. Ex. 10 at p. 2). The hearing record demonstrates that information from the November 2008 educational evaluation report regarding the effect of the student's poor decoding skills on her comprehension, her lack of automaticity resulting in poor reading fluency, and her deficit in math calculation skills is consistent with the student's August 2009 IEP (Dist. Exs. 4 at p. 3; 10 at pp. 1-2). According to the school psychologist, the August 2009 IEP was further based on information from the speech-language progress report and the speech-language evaluation report from the district of location (Tr. pp. 162-63). Specifically, with regard to the student's speech-language functioning, information from the October 2008 speech-language evaluation report and the March 2009 speech-language progress report regarding the student's normal fluency of speech, vocal quality and articulation skills; her average to low average abilities in identifying basic vocabulary, answering "wh" questions related to short paragraphs presented orally, and formulating a sentence when provided with a target word; her difficulty focusing on the task at hand when asked to follow directions that increased in linguistic complexity; and her need for repetition of directions, redirection and refocusing as needed, is also consistent with the student's August 2009 IEP (Dist. Exs. 4 at p. 4; 8; 11 at pp. 1-2). I further find that the August 2009 IEP's statements relating to the student's health and physical development are supported by the hearing record (see Tr. pp. 164-65; Dist. Exs. 4 at pp. 6-7; 8; 11 at pp. 1-2; Parent Ex. E at p. 1).

With respect to the student's social/emotional performance, the August 2009 IEP indicated that the student's motivation was erratic and that she was prone to "moodiness" (Dist. Ex. 4 at p. 5). It also reported that the student could become easily overwhelmed in class and that she may then withdraw or shut down (id.). The August 2009 IEP also indicated that the student had poor impulse control and that at times she experienced difficulty with self-control (id.). It further advised that while the student was generally very friendly and sociable, she could be argumentative or bossy with peers and experienced difficulty with self-esteem (id.). Recommendations in the August 2009 IEP included providing the student with praise and encouragement for appropriate on-task behavior and support for academic risk taking (id.). The district's school psychologist testified that the August 2009 IEP reflected information from the March 2009 IESP, the March 2009 counseling progress report, information from the October 2008 psychological evaluation report, a combination of the behavioral observations from the other providers' reports, and information from the parent (Tr. pp. 163-64). The school psychologist also testified that the

social/emotional management needs were based on the descriptive information relating to the student's off-task behavior, irritability, lack of frustration tolerance, and low self-esteem (Tr. p. 164). With respect to the recommended social/emotional management needs, the school psychologist testified that she wanted the student to be provided with positive reinforcement, such as praise and encouragement for on task behavior, and be given support when the student attempted tasks that were difficult for her so that she would "stick to it" rather than become frustrated (*id.*). Upon review of the hearing record, I find that the August 2009 IEP adequately describes the student's social/emotional levels of performance and recommends appropriate social/emotional management needs (*see* Dist. Ex. 4 at p. 5; *see also* Dist. Exs. 7 at p. 4; 8; 10 at p. 1; Parent Exs. E at p. 1; F). Further, as indicated above, contrary to the parents' contention, the hearing record reflects that the evaluations included relevant information about the student's anxiety and depression, which August 2009 IEP adequately described.⁴

Based on the evidence above, I find that the August 2009 IEP accurately reflected the student's present levels of academic, speech-language, health and physical development, and social/emotional functioning needs (*see* Tr. pp. 159, 161-65; Dist. Ex. 4 at pp. 3-7; *see also* Dist. Exs. 7 at pp. 3-4; 8; 10; 11; Parent Exs. E at pp. 1-2; F).

Annual Goals

The parents also allege that no annual goals were developed to address the student's distractibility, difficulty focusing, and difficulty following directions. An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee and when periodic reports on the progress the student is making toward annual goals will be provided to the student's parents (8 NYCRR 200.4[d][2][iii][b], [c]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3][i], [ii]).

As discussed below, a careful review of the hearing record reveals that the annual goals on the student's August 2009 IEP targeted appropriate areas of need; contained sufficient specificity by which to guide instruction and intervention, to evaluate the student's progress or to gauge the need for continuation or revision; contained adequate evaluative criteria; and advised when periodic reports would be provided. I therefore find that the annual goals in the August 2009 IEP are appropriate and address the student's distractibility, difficulty focusing, and difficulty following directions.

⁴As discussed below, the August 2009 IEP also addressed the student's social/emotional needs by recommending that the student be provided with counseling as a related service and by recommending appropriate goals with respect to that related service (*see* Dist. Ex. 4 at pp. 1, 13, 16). I note also that the parent testified that the student had been/was having difficulties at home and that she was receiving private counseling services for these concerns (Tr. pp. 193, 292-93; Dist. Ex. 4 at pp. 13, 16).

The August 2009 IEP contained five annual academic goals in the areas of reading comprehension, decoding/phonics, writing, and mathematics (see Dist. Ex. 4 at pp. 10-12). Each of the annual academic goals addressed skills which were directly linked to the student's present levels of academic performance and needs (see Dist. Ex. 4 at pp. 3, 10-12; see also Dist. Exs. 7 at pp. 3-4; 10). Each of the five academic goals contained specified criteria for mastery, a variety of methods of measurement, a schedule of how often and by whom progress would be measured, and the number of "reports of progress" per year that would be provided (id. at pp. 10-12; see also Tr. pp. 166-67). Additionally, the district's school psychologist testified that the academic goals were based on second grade standards since the student was functioning at a second grade level (Tr. pp. 165-66).

The student's August 2009 IEP also included five annual speech-language goals recommended by the student's speech-language pathologist that were directly linked to the student's identified speech-language deficits (Tr. p. 165; see Dist. Ex. 4 at pp. 4, 8-9; see also Dist. Exs. 8, 11). I note that the speech-language goals also include criteria for mastery, reference applicable methods and frequency of measurement, and provide the number of times that reports of progress would be provided (see Dist. Ex. 4 at p. 4; see also Dist. Ex. 4 at p. 8-9).

With respect to the parents' assertion that the August 2009 IEP did not include annual goals to address the student's distractibility, difficulty focusing and following directions, I first note that the IEP contains a speech-language goal that specifically addresses increasing the student's ability to follow multi-step directions in order to complete a task (see Dist. Ex. 4 at p. 8). Further, I note that this goal not only addresses the student's difficulty following directions; it also addresses the student's attention deficits (id.). The August 2009 IEP also includes recommendations for refocusing and redirection, for clear and consistent directions, for repeated directions, for verbal and visual cues, and for praise and encouragement in response to on task behavior (id. at pp. 3-5). Based on the above, I find that the August 2009 IEP adequately addressed these areas of need (id.).

The August 2009 IEP also included two annual counseling goals which focused on improving the student's socialization and coping skills (see Dist. Ex. 4 at p. 13). The district's school psychologist indicated that these goals were based on information in the reports from the district of location, the March 2009 IESP, and information provided by the parent (Tr. p. 169).⁵ Review of the August 2009 IEP reveals that these goals address skills which are linked to the student's social/emotional needs identified in the August 2009 IEP including difficulty with impulse control and self control, tendency to be argumentative, lack of coping skills, tendency to become overwhelmed, withdraw and shut down, and her low self esteem (see Dist. Ex. 4 at pp. 5, 13; see also Dist. Exs. 7 at pp. 3, 4; 8; Parent Exs. E at p. 1; F).

Assigned School

Turning next to the parties' dispute regarding the assigned school identified in the June 2009 FNR, 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 district must have

⁵ Although the district school psychologist indicated that the social/emotional goals were based in part on the student's "IEP," as indicated above, she was referring to the March 2009 IESP (see Tr. p. 169; see also Tr. pp. 160-61, 163, 179, 182; Dist. Ex. 7 at p. 1).

an IEP in effect at the beginning of each school year for each student with a disability in its jurisdiction (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6; Application of the Bd. of Educ., Appeal No. 10-006; Application of a Student with a Disability, Appeal No. 09-111; Application of a Student with a Disability, Appeal No. 08-157; Application of a Student with a Disability, Appeal No. 08-088).

In addition to challenging the IEP developed by the district, the parents further allege that the 12:1 special class at the assigned district school was inappropriate for the student. In particular, the parents contend that (1) the classroom was too small; (2) there were too many boys in the class; (3) the teacher failed to properly address inappropriate behaviors, (4) the functional math and reading ranges of the students in the class were inappropriately wide; (5) the promotional criteria used in the August 2009 IEP indicated that the student had "substantially lower skills and lower expectations" than the other students in the class; and (6) the occupational therapist and speech-language therapist were both assigned to the same room for therapies and therefore the student would not have received the quiet, nondistracting environment that she needed to benefit from speech-language therapy. Prior to addressing each one of these points, I note that in this case, the parents decided to unilaterally place the student in the CAHAL program at HAFTR prior to the time that the district was required to implement the IEP in September 2009. A meaningful analysis of these claims would require me to determine what might have happened had the district been required to implement the student's IEP. However, I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). Additionally, while statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII], 34 C.F.R. § 320[a][7], 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that the IEP must identify the "bricks and mortar" related to the specific school site (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y., 584 F.3d at 420). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Thus, in this case the issues regarding the gender makeup, the academic and behavioral functioning of the students in the 12:1 special class, the size of the classroom, and the space provided for therapy at the assigned school are in part speculative because the parents enrolled the student in the CAHAL program at HAFTR (Dist. Ex. 8). Insofar as the parents did not accept the recommendations of the CSE or the program offered by the district, I note that the hearing record, in its entirety, does not support the conclusion that, had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a

material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

Functional Grouping

State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a] – [d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073). In order to establish that a student has been properly grouped, it is permissible to demonstrate age ranges or similarity of abilities and needs through the use of a class profile or by the testimony of a witness who is familiar with the children in the classroom in question (see Application of the Bd. of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068).

Even assuming for the sake of argument that the student had attended the district of residence, the evidence in the hearing record nevertheless shows that the 12:1 special class at the assigned district school provided the student with suitable grouping for instructional purposes that was designed to meet the student's needs. The 12:1 special class at the assigned school was a combined fourth and fifth grade class, taught by a New York State certified special education teacher (Tr. pp. 31, 32; District Ex. 3). According to the class profile, in September 2009, there were nine students enrolled in the 12:1 special class; seven boys and two girls (Tr. pp. 32, 35-41; see Dist. Ex. 12). Four of the students were fourth graders; five were fifth graders (Tr. p. 70). Three of the students were students with a speech or language impairment and six of the students

were students with a learning disability (Tr. p. 351; see Dist. Ex. 12). Six of the students received counseling, four of the students received speech-language therapy, one of the students received both physical therapy and occupational therapy (as well as counseling), and two students did not receive any related services (Tr. p. 96; see Dist. Ex. 12).⁶ Three days per week, an additional adult assisted the teacher in the 12:1 class (Tr. pp. 49, 72-73, 74-76). The additional adult served as a "mentor" to the special education teacher and was also a certified special education teacher (id.).⁷ Additional school staff available to the 12:1 special class included safety officers, a full-time dean, a full-time crisis intervention teacher, a full-time behavior intervention teacher, and a full-time guidance counselor (Tr. pp. 48-49, 57, 119).

The certified special education teacher who was responsible for overseeing all of the IEPs in the school unit, including those of the students in the 12:1 special class, and who also provided four or five of the students in the class with Wilson reading instruction testified at the impartial hearing (Tr. pp. 29, 30, 33, 34, 50, 66, 130). The special education teacher, who was familiar with the IEPs of all of the students in the 12:1 special class, testified that, based on the student's August 2009 IEP, the student was appropriate for the program, that the student's needs could be met in the 12:1 class, and that the 12:1 class at the assigned school was appropriate for the student (Tr. pp. 34, 60, 61, 63-65).

Further, the hearing record shows that the district was capable of implementing student's IEP with suitable grouping insofar as the recommended 12:1 special class at the assigned school was appropriate to address the student's academic and social/emotional needs. With respect to reading, based on the results of an assessment, students who needed a strong, phonics-based reading program would be provided with small group, Wilson reading instruction for between 50 to 70 minutes per day by a certified special education teacher who had been trained by the district to provide such instruction and that the student "probably would" have received such instruction (Tr. pp. 50, 67-68, 130; see Dist. Ex. 10 at p. 1). Alternatively if appropriate, the student would have participated in a differentiated, multisensory, balanced literacy reading program that also utilized small group instruction (Tr. pp. 50-51, 78-80, 80, 83-86). The students in the 12:1 special class received writing instruction, which also utilized instruction in small groups, from the special education teacher assigned to the classroom (Tr. pp. 82, 84). With regard to science and social studies, the special education teacher indicated that the classroom teacher provided instruction in these subjects and that she adapted the curricula to the students' independent reading levels (Tr. pp. 56-57). With regard to mathematics, the special education teacher testified that the classroom teacher utilized the comprehensive "Everyday Math" program and followed the workshop approach to learning (Tr. pp. 55-56). She indicated that math instruction was grouped by grade for "whole group" instruction, also utilized instruction in smaller groups; and that instruction involved various workbooks and math games, and was provided using a differentiated, multisensory approach (Tr. pp. 56, 114, 115-16). A math coach provided additional math assistance three times per week and assisted children who tested below a certain threshold; extra

⁶ One of the students who did not receive any related services did receive English as a second language (ESL) services (see Dist. Ex. 12; Tr. pp. 71-72).

⁷ The mentoring teacher was assigned to the class because, while the classroom's special education teacher had taught previously, the 2009-10 school year was the first year the teacher had taught in a district school (Tr. pp. 68-69, 72-74).

help was also offered during 37-minute after school sessions Monday through Thursday (Tr. pp. 57-58, 89-92, 120-21).

With respect to the social/emotional needs of the students in the 12:1 special class, the special education teacher testified that the classroom teacher would break down tasks, differentiate instruction, and utilize small group instruction (Tr. p. 49). This would address the student's tendency to become overwhelmed in class and also her difficulty with frustration tolerance, erratic motivation, off-task behavior, poor impulse control, and low self-esteem, (see Dist. Ex. 4 at p. 5). The special education teacher also testified that the classroom teacher was "very, very strong on positive reinforcement" and that the teacher implemented a class-wide token economy behavior modification plan to elicit appropriate behavior such as on-task behavior and following the rules (Tr. pp. 48, 55).

With respect to the parents' claim that the level of work being done in the 12:1 special class at the assigned school was too advanced for the student and that the functional math and reading ranges of the students were "inappropriately wide" for the teacher to be able to consistently provide the student with the individual attention that the student needed, I disagree. Based on the hearing record, I find that the 12:1 special class at the assigned school would have provided suitable instructional groups for the student in math and reading. The special education teacher testified that the academic functional levels of the students ranged from grade 1.5 to 3.5 in reading and from grade 2.5 to 4.5 in math (Tr. pp. 41-42). She also testified that, based on the student's IEP scores, the student "fit quite nicely" into the 12:1 special class and also that the student was at a high first grade to beginning second grade level in decoding and reading comprehension (Tr. p. 52). The hearing record also reflects that the student would have been suitably grouped for instructional purposes in math as the student's math computation skills were at the beginning second grade instructional level (see Dist. Ex. 4 at p. 3). With respect to the allegation that the 12:1 special class at the assigned school would not provide the student with sufficient individualized services, as indicated above, the hearing record reflects that the students were provided with a significant amount of small group instruction which would have allowed for individualized services as a part of the student's ongoing instruction in content area subjects.

With respect to the parents' assertion that the promotional criteria on the student's IEP was significantly lower than that of the other students in the 12:1 special class and that this suggested that the student possessed substantially lower skills, the hearing record reflects that this is not the case. As indicated above, the student's academic functional levels reflect academic skills that were sufficiently similar to those of the other students in the 12:1 special class to allow appropriate instruction and learning (see Tr. pp. 41-42, 52; see also Dist. Ex. 4 at p. 3). Further, the district's school psychologist explained that the August 2009 IEP's promotional criteria were not viewed as limits to what the students could or should be achieving (see Tr. pp. 200-01).

With respect to the parents' contention that inappropriate behaviors of other students in the 12:1 special class made the assigned classroom inappropriate, I note that the parents' concern is based on a visit to a classroom at the assigned school by the student's mother (Tr. pp. 302-03, 305-06; Parent Exs. A at p. 3; D at p. 1). In light of that, as well as the fact that the special education teacher, who was familiar with the class, testified that the student would fit into the class, that the special education teacher utilized a classroom behavior plan to elicit appropriate behavior and to maintain classroom learning; that there were students in the class to provide the student with peer

role models, and that a student originally assigned to the class was subsequently identified as being appropriate for a 12:1+1 class and that the student changed classes in December of the 2009-10 school year (Tr. pp. 48, 52, 55, 60, 105-08, 113, 124-25, 126-27, 128), I am unable to find that the student would not have been provided an opportunity to receive educational benefits in the 12:1 special class at the assigned school.

Regarding the parents' allegation that the 12:1 special class at the assigned school would have been inappropriate because it included eight boys and "only" two girls, neither federal nor State regulations require that students be grouped by gender (see 200.1[ww][3][i], 200.6[a][3], [h][2], [3]; see also Doyle v. Arlington Co. Sch. Bd., 806 F. Supp. 1253, 1256 [E.D. Va. 1992]; Bales v. Clarke, 523 F. Supp. 1366, 1371 [E.D. Va. 1981]).

Based on the evidence in the hearing record, I am not persuaded that the district was unable to implement the student's IEP within a suitable group for instructional purposes within the recommended 12:1 special class (see M.P.G., 2010 WL 3398256, at *10-*11 [noting that student was not denied a FAPE when the hearing record showed that the student was suitably grouped for instructional purposes]; W.T., 716 F. Supp. 2d at 290-292 [holding that a district did not fail to offer a FAPE where the age range within a student's proposed class exceeded 36 months because the student could have been functionally grouped with other similarly-aged students within the class who had sufficiently similar instructional needs and abilities in both reading and math]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

Conclusion

Having determined, for the reasons discussed above, that the district offered the student a FAPE for the 2009-10 school year, it is not necessary to reach the district's cross-appeal and determine whether the CAHAL program at HAFTR was appropriate for the student for the 2009-10 school year or whether equitable considerations support the parents' claim and I will therefore dismiss the cross-appeal (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
April 13, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER