The University of the State of New York

The State Education Department
State Review Officer
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No. 11-048

Application of a STUDENT WITH A DISABILITY, by her parent, 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:
Advocates for Children, attorneys for petitioner, Kimberly Madden, Esq. and Jeff Miller, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Neha Dewan, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which denied her request for placement of the student in a State-approved nonpublic school for the 2010-11 school year. The appeal must be sustained.

Background

The student attended kindergarten in a district general education class with 25 students for part of the 2009-10 school year (Tr. pp. 82, 94). The student's behavior was reportedly "good" for the first week of school, but after the first week the school called the parent "every single day" to come pick up the student because she had tantrums "every day all day" (Tr. pp. 82-83, 94-95). In April 2010, the student transferred to a "zone" school within the district where she displayed similar behaviors and the district continued to call the parent to pick up the student from school (Tr. pp. 84-85, 95-96).

The Committee on Special Education (CSE) met on August 11, 2010 for an initial review of the student and to develop an individualized education program (IEP) for the student for the

2010-11 school year (Dist. Ex. 1 at pp. 1-2).[1] Meeting attendees included the parent, a district representative who also attended as the district psychologist, a regular education teacher, a special education teacher or service provider, and an additional parent member (id. at p. 2).[2] The CSE determined that the student was eligible for special education programs and related services as a student with an emotional disturbance (id. at p. 1; see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).[3]

The student's academic performance and learning characteristics on her August 2010 IEP described her as functioning within the average range of intelligence, with her verbal and nonverbal abilities in the average range (Dist. Ex. 1 at p. 3). Relative strengths were noted to be shown in the area of visual-spatial processing (id.). Quantitative reasoning was identified as the student's "poorest" area of performance (id.). Overall, the student's academic skills were described as consistent with her cognitive abilities, and she achieved average scores in math, reading, spelling, and listening comprehension (id.). Identified academic management needs included preferential seating and repetition of directions and instructions (id.). Socially, the IEP noted that the student presented with severe and long-standing behavioral difficulties in the school setting, and that anecdotal records and reports reflect that her problems occur on a daily basis (id. at p. 4). The student was described as capable of being violent and of hurting classmates (id.). The IEP further specified that her behavior is "very changeable" as she can be calm and loving and then become very hostile, and she has hit and scratched her teachers (id.). According to the IEP, the student has temper tantrums in which she destroys books, throws chairs and stabs other students with pencils (id.). She was also noted to cry uncontrollably and put her mucus on other children, but her behavior often stopped if she received what she wanted (id.). Identified social/emotional needs included close proximity of adults to assist with impulsive behaviors, a consistent and structured classroom, clear rules and expectations, and small group instruction (id.). Regarding health and physical development, the student did not have any reported medical conditions and had normal vision, hearing, and activities of daily living skills (id. at p. 5). The IEP noted that the parent reported that the student was medicated at home once a day for attention deficit hyperactivity disorder (ADHD) (id.). The student's identified health/physical management needs included "significant management needs" (id.).

The CSE recommended that the student be placed in a special class in a community school with a 12:1+1 staffing ratio for the 2010-11 school year (first grade) (Dist. Ex. 1 at p. 1). Related service recommendations included counseling once per week for 30 minutes individually and counseling once per week for 30 minutes in a group of three (id. at pp. 8, 10). According to the August 2010 IEP, the CSE believed that a 12:1+1 placement would meet the student's behavior needs because it would offer the student classroom support to manage her acting out behaviors (id. at p. 9). The August 2010 IEP reflected that the CSE considered the options of placing the student

[1] The hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and Parent exhibits were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

[2] August 2010 CSE meeting attendees also included one or two additional individuals, whose identities and roles are not clear from the hearing record (see Tr. p. 87; Dist. Ex. 1 at p. 2).

[3] Although the parent testified at the impartial hearing that she does not believe that the student is emotionally disturbed, the student's eligibility or classification is not in dispute in this appeal (see Tr. pp. 112-13, 116-18).

in general education with related services and integrated co-teaching (ICT) services, but rejected these placements as insufficient to meet the student's severe management needs as anecdotals indicated a need for a smaller classroom setting (id.).[4]

The district sent the parent a letter dated August 19, 2010 summarizing the CSE's recommendations in the August 2010 IEP, and identifying the school to which the district assigned the student (Tr. p. 87; Dist. Ex. 4). The parent visited the assigned school and rejected the district's offer (Tr. pp. 87-88).

Approximately one week before the student began attending school in the 2010-11 school year (first grade), a charter school contacted the parent and offered to enroll the student after she had been accepted through a lottery selection system (Tr. pp. 88-89). The student was placed in a collaborative team teaching (CTT) class at the charter school and received counseling services (Tr. pp. 90-91).[5] The student's behaviors remained the same as the previous year while attending the charter school,[6] and the student was referred by the charter school to a private institution for a neuropsychological evaluation (Tr. pp. 91-92, 99-100, 137; Parent Ex. C).

The student underwent a neuropsychological evaluation in October 2010 (Tr. p. 137; Parent Ex. C). The evaluator reviewed several records related to the student,[7] obtained background information from the parent and the student, conducted a behavioral observation, and administered

[4] State regulations incorporate "collaborative team teaching" services within its "Continuum of services" as "integrated co-teaching services," which is defined as the following: "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an "integrated co-teaching class shall minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). In April 2008, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued a guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities" (see http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf). The hearing record contains references to the class at the charter school as both a CTT class and an ICT class (see e.g., Dist. Ex. 2 at p. 3; Pet. at ¶ 6). For purposes of this decision, the term CTT will be used herein for consistency.

[5] The CTT class at the charter school was identified as having a 25:2+1 staffing ratio.

[6] Due to the student's behaviors, she was reportedly removed from the classroom at the charter school for a span of time during the 2010-11 school year and placed with a 1:1 tutor (Tr. pp. 129-32). She was eventually placed back into the classroom with a paraprofessional but still "act[ed] out" (id.).

[7] Records reviewed included a July 23, 2010 psychoeducational evaluation by a district school psychologist, an April/May 2010 classroom observation by a social worker, May 12, 2010 observations of the student, the student's August 2010 IEP, and a June 8, 2010 screening form from a children's evaluation and rehabilitation center (Parent Ex. C at p. 1).

tests with qualitative and quantitative measures (id. at pp. 1-6).[8] As a result of the evaluation, the student received diagnoses of an oppositional defiant disorder (ODD) and an adjustment disorder with mixed disturbance of emotions and conduct (Tr. pp. 140-41; Parent Ex. C at p. 14). The evaluator made multiple recommendations for the student including intensive, individualized support in a structured, full-time environment for children with emotional disorders in order to succeed emotionally and academically (Parent Ex. C at pp. 14-15). The evaluator also opined that the student would benefit most from a classroom setting with a low student-to-teacher ratio and frequent individual attention and support (Tr. pp. 152-53; Parent Ex. C at p. 14). She further recommended that the student be placed in a classroom with children who are of comparable intelligence and academic functioning in order to provide her with the appropriate cognitive and academic stimulation (Tr. pp. 141-43; Parent Ex. C at p. 14).

Due Process Complaint Notice

The parent filed a due process complaint notice dated December 20, 2010 (Dist. Ex. 2). The parent alleged, among other things, that the district failed to provide the student with a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) and section 504 of the Rehabilitation Act (id. at p. 1). The parent stated that the district assigned the student to a school that was both inconsistent with her IEP and inappropriate to meet her needs (id. at p. 2). Specifically, she claimed that the class offered by the district was in a very large school and that the student's emotional needs were best suited for a small school environment, and that the class composition was inappropriate because it contained students that were mostly below the student's grade level (id. at pp. 2-3). The parent stated that she enrolled the student in the first grade CTT class at the charter school because the district's recommendation was inappropriate (id. at p. 3). The parent alleged that the student required intensive support in an environment tailored to the needs of children with emotional disorders and that she should be placed with children of comparable intelligence and academic functioning (id.). The parent identified a specific nonpublic school within the Greenburgh-Graham Union Free School District (Greenburgh-Graham) at which she desired the student be enrolled (id. at p. 4). As for a proposed resolution, the parent requested that the district be ordered to create an IEP mandating the student's placement in a nonpublic school, enroll the student in an appropriate nonpublic school, provide transportation to and from such school, and provide all other relief available (id.).

On December 22, 2011, the parent took the student to Greenburgh-Graham to be interviewed and, in an undated letter, the intake coordinator at Greenburgh-Graham indicated that the student would be accepted (Tr. pp. 94, 109-10, 156-58; Parent Ex. I).

[8] Qualitative measures included a behavioral observation; a clinical interview; a human figure drawing test; Roberts Apperception Test for Children: 2 (Roberts-2); and a sentence completion test (Parent Ex. C at p. 6). Quantitative measures included the Beery-Buktenica Developmental Test of Visual Motor Integration (Beery VMI); Behavior Assessment System for Children, Second Edition (BASC-2) (parent and teacher); Behavior Rating Inventory of Executive Functioning (BRIEF) (parent and teacher); Child Neuropsychology History; Comprehensive Assessment of Spoken Language (CASL); Conners' Continuous Performance Test – II (CPT-II); NESPY-II: A Developmental Neuropsychological Assessment; Pediatric Behavior Rating Scale (PBRS); and Vanderbilt ADHD Diagnostic Parent & Teacher Rating Scales (id.).

Impartial Hearing Officer Decision

An impartial hearing convened on February 23, 2011 and concluded on April 5, 2011, after two days of proceedings (Tr. pp. 1-182). On February 23, 2011, the district requested an adjournment, which the impartial hearing officer granted over the parent's objection (Tr. pp. 7-8). The parties agreed that a new CSE meeting should be held for the student, and the impartial hearing officer stated that they would set another hearing date in case "things . . . did not go well" (Tr. p. 9). The impartial hearing resumed on April 5, 2011, however, as of that date a new CSE meeting still had not been held for the student (Tr. p. 21). At the impartial hearing on April 5, 2011, the parent's counsel requested to proceed with presenting her case and the district's counsel sought an adjournment for further time in which to conduct a CSE meeting for the student, indicating that the district believed that the due process complaint would be resolved through a CSE meeting (Tr. pp. 54-62, 79). The parent's counsel disagreed with the viewpoint of the district's counsel and alleged that the statements by the district regarding the status of the case were inaccurate and that she had been clear in her conversations with the district that the impartial hearing needed to go forward (Tr. pp. 62-64, 81). The impartial hearing officer declined to adjourn the matter and ruled that the impartial hearing must proceed (Tr. pp. 58, 80). The district did not call any witnesses to testify at the impartial hearing (Tr. pp. 1-182). The impartial hearing officer stated that when making a determination she would not enter a "default" against the district for not defending the program it recommended for the student (Tr. pp. 73-75, 78-81). The parent presented four witnesses and entered documentary evidence into the hearing record (Tr. pp. 81, 135, 154, 167; Parent Exs. A-S).

In a decision dated April 6, 2011, the impartial hearing officer determined that it would be unfair to enter a default ruling against the district on the merits (IHO Decision at p. 2). The impartial hearing officer determined that a Burlington/Carter tuition reimbursement analysis did not apply in this case (IHO Decision at p. 1).[9] She found that the issues in the impartial hearing had been narrowed to the student's CSE meeting and consideration of a private school setting (id. at p. 3). She determined that the student exhibited severe behavior that needed to be addressed in the right setting, and that the student did not make progress with respect to her behavior in the 12:1+1 setting, the general education setting, or the CTT setting (id. at p. 4).[10] She found that the student needed a highly structured program to address her behavior and that although evidence indicated that the student had always done well during the first week of school, the student's one day visit at Greenburgh-Graham, while encouraging, was not by itself sufficient to show that Greenburgh-Graham was appropriate (id. at pp. 4-5). The impartial hearing officer strongly recommended that the CSE consider referring the student's case to the district's "CBST" for placement in a nonpublic school setting and urged the CSE to handle the matter as expeditiously

[9] The "Burlington/Carter" analysis refers to decisional law interpreting the IDEA which established that 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]).

[10] The hearing record does not contain evidence showing that the student had received services in a 12:1+1 special class setting.

as possible since the school year was almost over (id. at p. 5).[11] She ordered that the district hold a CSE meeting, indicating three specific dates in April 2011 (id.).

Appeal for State-Level Review

This appeal by the parent ensued. The parent alleges that the impartial hearing officer effectively held that she did not possess the authority to order placement at Greenburg-Graham and erred in her reasoning that she could not "substitute her judgment for that of the [CSE]." The parent contends that the impartial hearing officer erred in ruling that the Burlington/Carter standard does not apply because the parent enrolled her daughter in a charter school. The parent also alleges that the impartial hearing officer erred in presuming that a CSE meeting would fully resolve the parties' claims, erred in ruling that the district responded to the parent's concerns in a timely manner, and erred by not defaulting the district for its failure to come to the impartial hearing prepared to present its case. The parent requests that the impartial hearing officer's findings be reversed and that the district be directed to place the student at Greenburgh-Graham.

In its answer, the district denies many of the parent's allegations. The district specifically alleges that the impartial hearing officer did not err in finding that she lacked the authority to order placement at Greenburgh-Graham. In addition, the district alleges that the impartial hearing officer did not err in presuming that an IEP meeting would fully resolve the parties' claims, ruling that the district responded to the parent's concerns in a timely manner, and resolving the case without defaulting the district. The district requests that the impartial hearing officer's findings regarding the ordering of a CSE meeting be upheld and that the parent's petition be dismissed. The district attached to its answer a copy of an IEP for the student dated April 15, 2011 (see Answer Ex. 1).

Applicable Standards and Discussion

District Recommendation and Placement

Regarding the parent's allegation that the impartial hearing officer failed to enter a default ruling against the district for being unprepared to present its case, 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]). As stated above, on the second day of proceedings in the impartial hearing, the district sought an adjournment of the impartial hearing in order to conduct a CSE meeting for the student (Tr. pp. 54-62, 79). The parent objected, stating that the district's belief that the case would be resolved at a CSE meeting was erroneous and the impartial hearing should proceed (Tr. pp. 62-64, 81), and the impartial hearing officer declined to adjourn the matter (Tr. pp. 58, 80). The impartial hearing proceeded and the district did not call any witnesses to testify (Tr. pp. 1-182). Although the district presented documentary evidence, including the student's August 2010 IEP, a psychoeducational evaluation, a social history, a classroom observation, and a teacher's report, I note that the district, rather than defend its August 2010 IEP and offered program, essentially agreed to conduct new evaluations of the student, but did not attempt to

[11] From the context of the hearing record, "CBST" appears to mean Central Based Support Team, which has the function of assigning a student to an appropriate State-approved nonpublic school (see IHO Decision at p. 5; Application of a Student with a Disability, Appeal No. 10-118).

further argue that the August 2010 offer was appropriate for the student (Tr. pp. 176-79). On appeal, the district adopts the position that the student required a new CSE meeting, that FAPE was not at issue, and that the August 2010 IEP was a "nullity" (Answer ¶¶ 42, 59). Like the impartial hearing officer, I find that the district proceeded in a good faith effort to settle the parent's claims set forth in the due process complaint notice. However, the parties' efforts to reach settlement ultimately failed and the district was left with the burden to establish that it offered the student a FAPE. In this case, rather than attempt to meet that burden, the district has affirmatively abandoned its August 2010 offer and conceded that its August 2010 IEP is a nullity and that a new CSE meeting was required in order to offer the student an educational placement (Answer ¶ 59). As such, I am constrained to find that the district failed to meet its burden to prove that it offered a FAPE to the student for the 2010-11 school year.

Requested Placement at Greenburgh-Graham

I will turn next to the parent's assertion that the impartial hearing officer had the authority to order placement at Greenburg-Graham and that she should have ordered the student's placement there. In general, the IDEA requires parental participation in determining the educational placement of a child (see 34 C.F.R. §§ 300.116, 300.327, 300.501[c]); however, the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]). The United States Department of Education (USDOE) has noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).[12, 13] This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]; Application of a Child with a Disability, Appeal No. 07-049).

As discussed above, the district argues on appeal that the August 2010 IEP is a nullity. Further, at the time of the impartial hearing, it was undisputed by the parties that a new IEP needed

[12] The federal and State continuums of alternative placement options are identified in 34 C.F.R. § 300.115 and 8 NYCRR 200.6.

[13] The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?" (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414[d][1][A][i][VII]; 34 C.F.R. § 300.320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]).

to be developed for the student, and that the student's then-current CTT placement at the charter school was not appropriate for her (see Tr. p. 150; Pet. ¶ 26, n. 5). Since the time of the impartial hearing officer's decision, the district explains that it complied with the impartial hearing officer's directive to reconvene the CSE. Nonetheless, when the CSE met to develop the student's new IEP on April 15, 2011, just nine days after the date of the impartial hearing officer's decision, the CSE recommended that the student be placed in a CTT class (Answer Ex. 1).[14] Under the unique circumstances of this case, this turn of events is somewhat troubling, where as here, the district in its answer appears to agree with the parent that, based on the student's experience during the 2010-11 school year at the charter school, a CTT setting is not appropriate for the student at this time. In view of the facts of this case, where the district declared its August 2010 IEP a nullity and the district's subsequent April 2011 IEP recommends a placement akin to the one that the parties agree on appeal is inappropriate for the student, I cannot conclude that the parent's requested relief to have the student placed in a nonpublic school should remain unexamined.[15] In light of the foregoing, I will consider the appropriateness of Greenburgh-Graham as a placement for the student.

Greenburgh-Graham is a State-approved nonpublic school (see 8 NYCRR 200.1[d], 200.7). Under State law, the Commissioner of Education may approve the provision of "special services or programs" to students with disabilities through a variety of methods, including contracts entered into by boards of education of public schools and "private non-residential schools . . . which are within the state" (Educ. Law §§ 4401[2][e], 4402[2][a]; see 8 NYCRR 200.1[d], 200.7). Although a particular private school may meet the Commissioner's criteria for approval to provide special education programs and services to students with a disability, it is the individualized needs of a student with a disability that will ultimately "determine which of such of services shall be rendered" by an approved private provider (Educ. Law § 4402[2][a]). Thus, while Greenburgh-Graham may be approved to provide special education and related services to students with disabilities, the district may only be directed to contract with Greenburgh-Graham if such direction would be consistent with the student's individualized needs.

Upon review and due consideration, I find that the hearing record supports a finding that Greenburgh-Graham is an appropriate educational placement for the student. The parent testified that she visited Greenburgh-Graham with the student and spent about one hour to one and a half hours at the school (Tr. pp. 109-10). She stated that she was able to talk to various teachers and professionals and saw different classrooms at the school (Tr. pp. 110, 121-23).

The intake coordinator at Greenburgh-Graham, who is also the assistant to the superintendent, testified at the impartial hearing and described the school as a "special needs district" with most of the students having a classification of emotional disturbance on their IEPs

[14] The CTT class recommended on the student's April 2011 IEP is described as having a 12:1 staffing ratio, however, it is assumed that the stated staffing ratio refers to the number of students with disabilities receiving special education services in a class, not the total number of students in the class.

[15] I have considered whether the parent's claim has been rendered moot; however, in this case the exception to the mootness doctrine would clearly apply since the matter was too short in duration to be fully litigated and the evidence clearly shows that the core facts leading to the parties dispute have actually been repeated and the parent has been subjected to the same action again, thus satisfying the "capable of repetition but evading review" standard (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]; Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]).

(Tr. pp. 154, 158). She testified that many of the students are working on "attention . . . issues, being [inattentive], perhaps being a little oppositional, emotional components, behavior management," and that the school utilizes a positive behavior intervention system (Tr. p. 158). The intake coordinator testified that she is the individual at the school who receives referrals for students being placed outside of their district, reviews their paperwork, and determines if the student would appropriately be placed at Greenburgh-Graham (Tr. pp. 154-55). In making her determination as to whether a student would be appropriately placed at Greenburgh-Graham, she reportedly reviews the student's overall cognitive functioning, verbal scores, processing speed, grade level in math and reading, emotional functioning, and behavior management (Tr. p. 155). She testified that academic requirements for students to be admitted to Greenburgh-Graham include that their IQ range be average or higher, their grade level be on or around their grade, and that their reading and math scores be on or around grade level (id.). She further testified that she met the student in December 2010, spent about an hour and a half with her, and had reviewed her IEP, evaluations, diagnoses, and classification prior to meeting her (Tr. pp. 156-57, 163-64). The intake coordinator testified that she was aware of the student's behaviors, and that most of the students at Greenburgh-Graham displayed different behaviors at home than at school (Tr. pp. 165-66). She further testified that she would accept the student into the school based upon her meeting with the student, the student's grade level, the student's IQ, and her belief that the student would respond well to the different incentives and programs at Greenburgh-Graham (Tr. pp. 156-57). The intake coordinator identified the class that the student would be placed in and testified that there is a 12:1+1 staffing ratio in that class with a board certified special education teacher, although at the time of the impartial hearing the class had fewer than 12 students in it (Tr. pp. 159, 162-63).[16] The teaching assistants are described as having their teaching assistant certification or as being "special ed[ucation] certified masters teachers" (Tr. pp. 162-63). Within the class, the student would be grouped with students who read at the same level (Tr. pp. 159-61).

The director of pupil personnel services at Greenburgh-Graham also testified at the impartial hearing (Tr. pp. 166-68). She testified that Greenburgh-Graham accepts students who have been unsuccessful in other educational settings due to a variety of reasons including emotional disturbances, and that the school is equipped to meet the needs of students with emotional disturbances because it has on staff a clinical psychologist (herself) and 13 related service clinicians, has a small structured school program, and has a district-wide system of positive behavior intervention strategies in which all the teachers have been trained (Tr. pp. 168-69). She described the positive behavior intervention system as a system where the district is proactive in behavior intervention strategies in a hope of reducing negative reactive behavior, and testified as to the training received by staff and the manner in which the system is implemented (Tr. pp. 169-71). The director testified that the school has strong communication with parents but does not call parents to come and pick up students based upon their behavior (Tr. pp. 171-72). In addition to the teaching assistant assigned to the classroom, the director testified that there may be additional adults in the classroom as some of the students have a 1:1 paraprofessional assigned to them (Tr. pp. 172-74). She identified the functioning levels of students in the classroom as being between kindergarten and second grade in math and reading, and testified that the students are grouped within a three-year age range (Tr. pp. 174-75).

[16] According to the hearing record, there is one class for each grade at Greenburgh-Graham (Tr. p. 159).

The hearing record shows that Greenburgh-Graham had ample information to determine whether the student could be appropriately placed at the school, and that the intake coordinator from Greenburgh-Graham was sufficiently familiar with the student's needs to render a determination regarding the appropriateness of the school for this student. I am also persuaded that the hearing record shows that Greenburgh-Graham is an appropriate placement for the student based upon a review of the student's individual needs and present levels of performance as indentified by evaluative data and testimony at the impartial hearing, and a review of the testimony specific to the educational program at Greenburgh-Graham. Accordingly, I will direct that, provided Greenburgh-Graham accepts the student into its school, the district arrange for the student to be placed at Greenburgh-Graham at public expense.[17]

Conclusion

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated April 6, 2011 is annulled in its entirety; and

IT IS FURTHER ORDERED that unless the parties agree otherwise and upon acceptance of the student into Greenburgh-Graham, the district shall enter into a contract with Greenburgh-Graham for the provision of special education and related services for the student.

Dated: **Albany, New York**
June 30, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER

[17] Under certain circumstances, the issuance of an order directing placement of a student at a State-approved nonpublic school to ensure that a FAPE is offered is appropriate (see Burlington, 471 U.S. at 369-71 ["In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for a placement in a public school was inappropriate," the United States Supreme Court held, "it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school"]; Application of a Student with a Disability, Appeal No. 11-017; Application of a Student with a Disability, Appeal No. 09-134; Application of a Student with a Disability, Appeal No. 08-103; see also 34 C.F.R. § 300.104; 8 NYCRR 200.6[j]).