



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-073

Application of a STUDENT WITH A DISABILITY, by his 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 Regina Skyer and Associates, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request that respondent (the district) reimburse them for their son's tuition costs at the Aaron School for the 2010-11 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending a first grade class at the Aaron School (Tr. pp. 117-19). The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related 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

According to the student's mother, her son began exhibiting difficulty with sensory integration and attention at approximately three years of age (Tr. pp. 160, 162-63). The student was evaluated and subsequently classified as a preschool student with a disability by the Committee on Preschool Special Education (CPSE), which provided him with occupational therapy (OT), and special education itinerant teacher (SEIT) services at his private preschool to address his attention and sensory needs (Tr. pp. 161-62, 165; Dist. Ex. 9 at p. 4).

On March 12, 2009, the Committee on Special Education (CSE) convened to develop the student's individualized education program (IEP) for the 2009-10 school year (Dist. Ex. 8). The CSE determined that the student was eligible for special education and related services as a student with an other health-impairment, and recommended placement in a 12:1 collaborative team teaching (CTT) class, with one group session of counseling per week, and three individual sessions of OT per week (Dist. Ex. 8 at pp. 1, 13).¹

Due to their belief that the student was not ready to attend kindergarten, for the 2009-10 school year the parents retained the student at the private preschool where he attended a daily four-hour general education "pre-K" program (Tr. pp. 166-67; Dist. Ex. 9 at p. 1; see Tr. pp. 196-97). The student's prekindergarten (pre-K) classroom was composed of 11 students and two teachers, and through the district, the student received 10 hours of SEIT services, three individual sessions of OT, and one group counseling session per week (Dist. Ex. 9 at p. 1).

The parents obtained a private psychoeducational evaluation of the student that took place on seven dates between December 14, 2009 and February 11, 2010 (Dist. Ex. 9). The resultant evaluation report, dated February 15, 2010, provided the student's background, family and educational history, and information from prior evaluation results (id. at pp. 1-5).

With respect to prior evaluations, the February 2010 psychoeducational evaluation report indicated that previous cognitive testing conducted in August 2008 indicated that the student's skills were in the borderline range, which the previous evaluator reported was due to the student's demonstration of "highly distractible, impulsive and oppositional" behaviors (Dist. Ex. 9 at p. 2). Additionally, the previous evaluator reported that the student experienced "trouble adapting to structure and limits," and that he required "much intervention" to follow tasks to completion (id.). Previously administered adaptive functioning measures indicated delayed self-help and socialization skills, with adequate motor and communication skills (id. at p. 3). A previous August 2008 speech-language evaluation advised that the student exhibited impulsive behaviors, and difficulty with consistent conversational turn taking and topic maintenance skills (Dist. Ex. 9 at p. 3). Results of the August 2008 speech-language evaluation indicated "mild delays in both receptive and expressive language skills, with behavioral difficulties impacting negatively upon language use and pragmatics" (id.). A September 2008 OT evaluation revealed the student's "significantly delayed" ability to execute fine motor activities, and significant delays in both sensory processing and self-help skills (id.). During an October 2008 observation of the student in his preschool classroom of 15 students and 2 teachers, the student had demonstrated impulsive behaviors and some difficulty with self-regulation, but was observed to "respond well to 1:1 attention and direction" (id. at p. 4). Subsequent progress reports indicated that he had responded

¹ The term collaborative team teaching (CTT) is also referenced in the hearing record as ICT (integrated co-teaching) (Tr. pp. 188-89; Dist. Exs. 6 at p. 1; 8 at p. 1). Integrated co-teaching services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>). For consistency in this decision, the special education placement the March 2010 CSE recommended will be referred to as a CTT placement.

well to the SEIT and OT services, with "improved behavior toward teachers and peers" noted (id.). Reports also indicated that the student's "defiance and oppositionality both decreased, and he was described as playing well with peers once play activities had been established" (id.). The student reportedly improved his fine motor and motor planning skills, and his "pre-academic literacy and mathematical skills" were described as areas of strength (id.).

The private psychologist who conducted the February 2010 psychoeducational evaluation report also administered cognitive testing to the student, behavior rating scales to his parents and pre-K teacher, and adaptive behavior scales to the parents (Dist. Ex. 9 at pp. 5, 8-14). According to the private psychologist, the student exhibited variable attention throughout the then-current psychoeducational evaluation, which she indicated was likely to have affected the quality of some of his responses (id. at p. 5). Once engaged, the student was observed to put forth "good effort;" however, he "had difficulty remaining focused once his interest waned" (id.). The private psychologist reported that the student "responded well to positive encouragement and was able to be redirected to continue in each instance" (id.). She further reported that the student exhibited similar behaviors when she observed him in his pre-K class, noting that he was "very amenable to gentle redirection and often would try to subsequently focus his attention despite his previous disinterest" (id.). The student was also observed interacting successfully with classmates while completing an activity, and although it was more difficult for him to sustain attention during circle time, he was again responsive to "gentle redirection whenever he became overly distracted" (id. at p. 6). The private psychologist's report indicated that the student was "very matter-of-fact about needing sensory breaks, and having staff to assist him" (id.). The student's SEIT reported to the private psychologist that the student responded very well to prompts, accepted her help and intervention, and accepted the help of other classroom staff (id. at p. 5). The SEIT opined that the student was aware of his difficulty with attention and organization, an awareness that she indicated at times appeared to cause him some anxiety and frustration (id. at pp. 5-6).

The private psychologist reported that "to obtain a more accurate representation of [the student's] current cognitive functioning," she administered "all additional subtests" of the Wechsler Preschool and Primary Scales of Intelligence-Third Edition (WPPSI-III) that had not been administered to the student during an October 2009 evaluation, thereby obtaining a complete administration of the WPPSI-III and a full set of scores (Dist. Ex. 9 at p. 6).² The overall results yielded a verbal IQ of 95 (average), a performance IQ of 93 (average), a processing speed IQ of 102 (average), a general language IQ of 91 (average), and a full scale IQ of 95 (average) (id. at p. 7). The private psychologist reported that "[a]ll scores place[d] [the student] solidly within the [a]verage range of cognitive functioning," and that due to his difficulties with consistently focusing his attention, the results of formal cognitive testing should be considered with caution as they were "likely to underestimate" the student's true intellectual functioning (id.). The private psychologist further reported that improvements in the student's performance from the October 2009 testing were "impressive and likely a reflection of the gains he ha[d] made as a result of intensive OT treatment, as well as the effective support and strategies he ha[d] received from his SEIT" (id. at p. 8). Her report also indicated it was important to note that all of the student's teachers had

² The private psychologist reported that she readministered the picture concepts subtest of the WPPSI-III to the student because the previous evaluator had reported that the student "'faced his greatest challenge with the instructions for the first task, [p]icture [c]oncepts, which may [have been] due to the fact that he had not yet settled into the novel testing environment'" (Dist. Ex. 9 at p. 5).

"incorporated sensory breaks and stimulation into his classroom experience to help him refocus his attention and regulate his emotions" (id.).

Results from the completion of the Conners Early Childhood (Conners EC) parent and teacher rating scales revealed that the parents and the student's pre-K teacher were "independently concerned about [the student's] moods, emotions, restlessness, impulsivity, and attentiveness in general" (Dist. Ex. 9 at p. 10). "Very Elevated" parent and teacher response scores in the areas measuring restless-impulsive and emotional lability indicated that the student "may become distracted, may distract or disrupt others, may become restless, fidgety, impulsive and have trouble finishing projects on his own," adding that he may also "cry or become easily frustrated and angry at times" (id.).³ Both the student's parents and his teacher noted that there had been some improvement in these "behaviors and affects" as the student had responded to the interventions he was receiving (id.). In the areas measuring inattention/hyperactivity, both the parents' and his teacher's responses yielded "Very Elevated" scores, suggesting that the student continued to exhibit difficulties "controlling his attention, behavior, [and] concentration," and that he may be easily distracted (id.). It was also revealed that the student may quickly lose interest in activities, have difficulty finishing tasks, and exhibit high activity levels, fidgeting behavior, and difficulty remaining seated; which reflected behaviors congruent with those indicated in prior evaluation reports, then-current SEIT reports, and the private psychologist's own experience with the student during her assessment (id.). Both the parents' and the teacher's responses yielded "Very Elevated" scores in the areas measuring defiant/aggressive behavior, including the subscale of defiance/temper and mood/affect (id.). These responses indicated to the private psychologist that the student may struggle with being argumentative, defiant, and controlling his temper both at home and school (id.). Regarding the student's moods both at home and school, he appeared to experience some irritability, sadness, and anxiety, which was "not surprising" to the private psychologist, who indicated that the student was "quite aware" that he struggled with behavior and attention more than many of his peers (id. at p. 11). Due to the student's desire to do well, the private psychologist suggested that he may experience feelings of emotional distress if he felt he was "falling short" of his own expectations (id.). She indicated that the teacher and both parents reported that the student's "problems affect[ed] his learning, his interactions with other children and his home life with a frequency ranging from occasionally to often" (id.). According to the private psychologist's report, the parents and the student's teacher noted that the student was "'very bright, very intuitive . . . smart in many ways,'" that he exhibited strong academic and perceptual skills, and when interested, the ability to remain focused and engaged (id.).

The parents' completion of the Vineland Adaptive Behavior Scales-Second Edition (Vineland-II) yielded "[a]dequate" adaptive behavior composite scores (Dist. Ex. 9 at p. 12). Parent responses indicated that the student's daily living skills and motor skills were "significantly greater" than his communication skills, and that his socialization skills were an area of significant strength (id. at p. 14).

The private psychologist concluded that the results of her evaluation indicated that the student met the criteria for a diagnosis of an attention deficit hyperactivity disorder (ADHD) (Dist. Ex. 9 at p. 14). She noted that the student's difficulty maintaining and regulating his attention and

³ According to the private psychologist, Conners EC scores are described as "Average" (typical level of concern), "High Average" (slightly more concerns than are typically reported), "Elevated" (more concerns than are typically reported), and "Very Elevated" (many more concerns than are typically reported) (Dist. Ex. 9 at p. 10).

behavior had been observed from a young age and across the settings of home, school, and her private office (id.). The private psychologist reported that the student had been observed and reported to be "very responsive to support and redirection and it [was] clear he has benefitted greatly from the services he [had] been receiving" (id.). She recommended that the student's academic environment provide a "small supportive classroom with low student to teacher ratio;" classmates with average to high average cognitive skills; clear, explicit, consistent instructions, expectations, and continuous feedback; frequent sensory breaks; and ongoing facilitation of social interactions with classmates (id. at p. 15). The private psychologist also recommended that the student receive four weekly individual sessions of OT in a sensory gym, and twice weekly individual counseling services (id.).

The special education teacher who provided the student's SEIT services during the 2009-10 school year prepared a March 2010 progress report (Tr. p. 169; Dist. Ex. 10 at p. 1). The SEIT reported that the student was "age appropriate academically," and had difficulty demonstrating his above average cognitive skills when he was not interested and engaged in an activity (Dist. Ex. 10 at pp. 1-2). At those times, the student demonstrated difficulty initiating, organizing, and following sequential steps through to the completion of a task (id. at p. 1). The SEIT reported that socially, the student was "loved by his peers" and "in calmer days," exhibited the ability to demonstrate calm verbal communication and conflict resolution skills, follow instructions, take turns, share with peers, and play more complex social games (id.). At the time of the progress report, the student had mastered his fine motor short-term objectives, and exhibited progress in his adaptive behavior skills (id. at pp. 1-2).

According to the SEIT, the student participated in classroom activities more consistently, and more easily accepted support to address sensory needs (Dist. Ex. 10 at p. 2). The SEIT indicated that the student's "ability to participate productively in class activities relie[d] heavily on his emotional state," but that when "calm and at ease in his environment a layer of disruptive behaviors [was] lifted that enabled him to socialize and learn much better" (id.). The student's increased "ease in the classroom environment" enabled him to communicate "much better," and he exhibited the ability to listen and take turns in conversation when calm, and to better verbalize his emotions when frustrated or angry (id.). The student reportedly demonstrated the ability to "tone down" behaviors present at the beginning of the school year, including using a loud voice, moving fast, and urgently explaining his point to immediately get what he wanted; behaviors that were accompanied by shouting, grabbing, running away, difficulty listening to others, and shaking off adult assistance (id. at pp. 1-2). The SEIT reported that the "frequency and intensity of these behaviors" had diminished "considerably," revealing the student's "core difficulties" of "high distractibility, difficulty remaining seated and calming his body when excited, initiating, organizing and completing a task, remaining on topic, and persisting with tasks that [did] not interest him" (id. at p. 2). She opined that the "most contributing factors" to the student's learning success were "a high level of interest while feeling safe and supported in his classroom environment" (id.).

On March 26, 2010, the CSE convened to develop the student's 2010-11 IEP (Dist. Ex. 6). Attendees included the district's school psychologist who also acted as the district representative, a district regular education teacher, a district special education teacher, the student's private pre-K teacher, the student's SEIT, an additional parent member, and the parents (id. at p. 2). For the 2010-11 school year, the March 2010 CSE recommended placement of the student in a 12:1 CTT

classroom, with one individual and one group counseling session per week and four sessions per week of individual OT (id. at p. 13).⁴

By notice dated April 19, 2010, the district summarized the recommendations made by the March 2010 CSE and notified the parents of the school to which the district assigned the student for the remainder of the 2009-10 school year (Parent Ex. C). The parents thereafter visited the assigned school (Tr. pp. 177, 178). The student's mother reported that the parents were told that they needed to make a decision whether to take the student out of his current program and enroll him in the assigned school for the balance of the school year (Tr. p. 178). The student's mother further reported that she spoke to the district's school psychologist regarding the assigned school and that she was advised that a mistake had been made and that the recommendation in the April 2010 letter was meant to be for the 2010-11 school year (id.).

By letter dated May 18, 2010, the parents advised the district that they were rejecting the assigned school identified in the district's April 2010 letter on the basis that it was offered for the balance of the 2009-10 school year rather than for the 2010-11 school year, which they stated was the school year that was discussed at the March 2010 CSE meeting (Parent Ex. D; see also Tr. p. 179). The parents also advised the district that they would accept the offered CTT placement and related services (Parent Ex. D). The parents requested that the district "defer the recommendation and placement" until September 2010, for the 2010-11 school year and provided the district with a list of three "preferred schools" (id.).

By notice dated August 5, 2010, the district summarized the recommendations made by the March 2010 CSE and notified the parents of the school to which it assigned the student for the 2010-11 school year (Dist. Ex. 11).

On August 11 and 16, 2010, the parents signed an enrollment contract for the student to attend the Aaron School for the 2010-11 school year (Parent Ex. F at p. 1).

By letter dated August 24, 2010, the parents advised the CSE that they were placing the student at the Aaron School for the 2010-11 school year and that they intended to seek funding for that placement from the district (Parent Ex. B at p. 1). The parents also advised the district that they were rejecting the March 2010 IEP and placement (id. at pp. 1-2). According to the parents, the district failed to offer the student a free appropriate public education (FAPE) on both procedural and substantive grounds (id. at p. 1). The parents specifically alleged that the district failed to offer a placement that would provide suitable and functional peer grouping (id.). The parents further stated that they had tried to visit the assigned school identified in the August 2010 notice, but were informed that they could not do so until the school reopened in September, and they had not yet received information they had requested regarding the assigned school and a class profile (id. at p. 2). The parents stated that they intended to visit the assigned school when it reopened in September; however, they expressed that they did not believe the recommended placement could provide the student "with the program essential to his educational development" (id.). The parents stated that they had placed the student at the Aaron School "to ensure" that he

⁴ The referenced "12:1" student to teacher ratio indicates that there would be up to 12 special education students as well as a special education teacher in the CTT classroom.

had a school program for the 2010-11 school year (id.). The parents also requested that the student receive transportation services to the Aaron School (id. at p. 2).

The student attended the Aaron School for the 2010-11 school year in a first grade classroom and received instruction in reading, language arts, writing, math, social studies, science, social skills, computer, art, movement, music, and library (Tr. pp. 117-19, 125-27, 135, 140; Parent Ex. I at p. 1). The Aaron School also provided the student with the services of OT and counseling (Tr. p. 146; Parent Ex. I at p. 1).

The parents visited the assigned school and observed the assigned class in the second week of September 2010 and concluded that it was not appropriate for the student (Tr. pp. 183- 85; Dist. Ex. 1 at p. 3).

Due Process Complaint Notice

By due process complaint notice dated January 10, 2011, the parents asserted that the district had failed to offer the student a FAPE on procedural and substantive grounds (Dist. Ex. 1 at p. 1). In particular, the parents alleged that the March 2010 CSE "did not rely on necessary evaluations to properly gauge [the student's] current academic skill levels" in that "'teacher estimates'" were the only assessments noted on the student's IEP to indicate his current academic skill levels (id. at p. 2). The parents also alleged that the March 2010 CSE failed to conduct a "structured classroom observation" prior to the CSE meeting, which they asserted was required as a part of the student's initial evaluation (id.). The parents further alleged that the annual goals and short-term objectives in the March 2010 IEP were generic, vague, and not measurable (id. at pp. 2-3). With respect to the recommended CTT placement, the parents alleged that the assigned classroom and school were inappropriate for the student because they were too large and that the assigned classroom did not offer a suitable and functional peer group for instructional and social/emotional purposes (id. at p. 3). They also alleged with respect to the recommendation of a CTT placement that the March 2010 CSE did not properly evaluate the student's ability to be placed "in such a large and less supportive placement," ignored the input from the student's current teachers and providers, made the recommendation without taking into consideration the student's individual educational needs, and that the CSE's failure to place the student in a smaller, more supportive setting constituted a denial of a FAPE (id.).

The parents also asserted that the placement of the student at the Aaron School was appropriate to address the student's needs and was reasonably calculated to enable the student to receive educational benefits (Dist. Ex. 1 at p. 3). Further, the parents contended that there were no equitable considerations that would bar reimbursement (id.). The parents sought reimbursement for the costs of the student's tuition at the Aaron School for the 2010-11 school year (id. at p. 1).

Impartial Hearing Officer Decision

The impartial hearing began on March 21, 2011 and concluded on April 26, 2011, after two days of proceedings (Tr. pp. 4, 91, 205, 207). In a decision dated May 19, 2011, the impartial hearing officer denied the parents' request for tuition reimbursement of the student's tuition costs at the Aaron School for the 2010-11 school year (IHO Decision at pp. 2, 14). The impartial hearing officer found that the evidence presented at the impartial hearing established that the district offered the student a FAPE, that the Aaron School was not appropriate for the student, and that

equitable considerations did not favor an award of tuition reimbursement for the student (id. at pp. 12-14).

With respect to her finding that the district offered the student a FAPE, the impartial hearing officer concluded that the March 2010 IEP set forth relevant evaluative information describing the student's current levels of performance and identified his special education needs (IHO Decision at p. 11). The impartial hearing officer also found that the March 2010 IEP included annual goals that addressed the student's areas of need and that the annual goals were appropriate for the student (id.). She further determined that the student's annual goals were designed to permit the student to make progress in academic areas (id.). Next, the impartial hearing officer determined that the recommended CTT placement, with two teachers in the classroom, provided "teacher support sufficient for redirection and encouragement to address [the student's] distractibility and to enable him to make meaningful educational progress" (id.). The impartial hearing officer further concluded that a behavioral intervention plan (BIP) was not necessary for the student because the behavioral interventions that he needed, which were redirection and support, could have been provided by the teachers in the CTT class (id.). Finally, the impartial hearing officer concluded that the district offered the student an educational program in the least restrictive environment (LRE) because a CTT class would allow the student to be educated with general education students and participate in a mainstream educational environment with supports that would have enabled him to learn in that environment (id. at p. 12).

The impartial hearing officer also found that the Aaron School was not an appropriate placement for the student because, notwithstanding that the student made progress at the school, it was a self-contained special education school that was overly restrictive for the student given his average cognitive functioning and his special education needs which did not require that he be removed from the general education environment (IHO Decision at p. 13). With respect to equitable considerations, the impartial hearing officer found that while the parents had cooperated with the CSE, the evidence established that they were not prepared to accept a public school placement (id. at pp. 13-14).

Appeal for State-Level Review

The parents appeal, requesting that the decision of the impartial hearing officer be reversed. Specifically, the parents assert that the district failed to offer the student a FAPE for the 2010-11 school year because: (1) the present levels of performance in the March 2010 IEP were inadequate as the IEP listed only "teacher estimates" for decoding and math computation and did not include skill levels for reading comprehension, listening comprehension, writing, and problem solving; (2) the annual goals and short-term objectives in the March 2010 IEP were generic, vague, and did not provide a baseline from which to work; (3) there were no annual goals in the IEP relating to reading, writing, math, or anxiety; (4) the IEP did not identify how progress toward the annual goals would be measured; (5) the IEP did not include a BIP, based on a functional behavioral assessment (FBA); (6) the recommended CTT placement was not appropriate for the student; and (7) the assigned school and classroom were not appropriate for the student.

Next, the parents assert that the Aaron School was an appropriate placement for the student. Contrary to the impartial hearing officer's finding that the school was overly restrictive, the parents contend that the student's placement at the Aaron School was appropriate for the student and was his LRE. Lastly, the parents assert that equitable considerations support their request for tuition

reimbursement and contend that they were prepared to accept a public school placement. The parents attach two documents to their petition for consideration as additional evidence.

In its answer, the district objects to the additional evidence proffered by the parents. The district also asserts that the impartial hearing officer correctly determined that it offered the student a FAPE for the 2010-11 school year because: (1) the March 2010 CSE properly relied upon teacher estimates in developing the student's present levels of performance in his IEP; (2) the annual goals and short-term objectives included in the IEP were specific and appropriate; (3) while there was no goal to address the student's anxiety, the IEP reflected the student's anxiety and recommended strategies to address this area; (4) academic goals were not required in the student's IEP; (5) a BIP was not required for the student; and (6) the recommended CTT placement provided sufficient support for the student. The district also contends that the parents' assertions with respect to the assigned school and classroom are speculative. Additionally, the district contends that the parents' claim that the student would not have been suitably grouped for instructional purposes with other students having similar individual needs is not supported by the hearing record. According to the district, the impartial hearing officer correctly determined that the Aaron School was too restrictive a placement for the student and that equitable considerations precluded an award of tuition reimbursement.

Preliminary Matters

Additional Evidence

As a preliminary matter, I will address the parents' request to submit additional evidence on appeal. The district objects to such evidence, asserting that, among other things, while the proffered evidence was not available at the time of the impartial hearing, the documents are not relevant to whether the district offered the student a FAPE for the 2010-11 school year because they were created after the date of the March 2010 CSE meeting and therefore were not considered by the CSE. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 11-027; Application of the Bd. of Educ., Appeal No. 10-111; Application of a Student with a Disability, Appeal No. 10-062; Application of the Dep't of Educ., Appeal No. 10-047; Application of a Student with a Disability, Appeal No. 10-002; Application of a Student with a Disability, Appeal No. 09-104; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

In this case, I note that the proffered evidence deals with the educational needs of the student subsequent to the date the March 2010 IEP was developed, and is submitted at least in part for the purpose of establishing that the March 2010 IEP is inadequate. I agree with the district that while the proffered evidence was not available at the time of the impartial hearing, the documents are not necessary in order to render a decision in this case (see J.R. v. Bd. of Educ., 345 F. Supp.

2d 386, 395 [S.D.N.Y. 2004] [holding that a determination of whether an IEP is reasonably calculated to enable a student to receive educational benefits is a necessarily prospective approach]; Antonaccio v. Bd. of Educ., 281 F. Supp. 2d 710, 724 [S.D.N.Y. 2003]; see also T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 251 n.1 [2d Cir. 2009]; D.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 598-99 [2d Cir. 2005]). Moreover, although the parents suggest that it is appropriate to use the student's 2011-12 IEP to evaluate the adequacy of the student's 2010-11 IEP, "an IEP postdating the one at issue is of little probative value for evaluating 'appropriateness' in this case" (see M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *11 n.6 [S.D.N.Y. Feb. 16, 2011]). I therefore decline to accept the additional evidence proffered by the parents.

Scope of Review

I now turn to the parents' allegation that the impartial hearing officer erred in concluding that a BIP was not necessary and that the March 2010 IEP was inadequate because it did not include a BIP that was based on an FBA. With respect to this contention, 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. §§ 300.508[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. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]). The parents' January 2011 due process complaint notice does not assert any claims that may be reasonably read to assert that the March 2010 IEP should have included a BIP, whether or not based on an FBA (see Dist. Ex. 1). Additionally, while the hearing record contains some testimony relating to this issue, the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include this issue. Further, the hearing record does not reflect that the parents submitted, or that the impartial hearing officer authorized, an amendment of the parents' January 2011 due process complaint notice to include this issue. Nor am I persuaded that this issue can be properly raised at this point because of 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" where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or file an amended due process complaint notice including the issue of whether the March 2010 IEP should have included a BIP (Dist. Ex. 1 at pp. 3-4; see Application of a Student with a Disability, Appeal No. 11-010). 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. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]). Therefore, under these circumstances, with respect to her conclusion that a BIP was not necessary, I find that the impartial hearing officer erred in determining an issue that was not raised in the parents' due process complaint notice (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5 [i][7][i], [j][1][ii]; see also Application of the Bd. of Educ., Appeal No. 10-067; Application of the Bd. of Educ., Appeal No. 10-020). Accordingly, the parents' allegation that the March 2010 CSE was inadequate as it did not include a BIP which was based on an FBA is outside the scope of this appeal and will not be addressed in this decision.

Applicable Standards

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

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

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

The March 2010 IEP

Present Levels of Performance and Needs

I will first address the parents' claim that the March 2010 IEP was inadequate on the basis that the IEP lists only "teacher estimates" for decoding and math computation and does not include skill levels for reading comprehension, listening comprehension, writing, and problem solving.⁵

⁵ The parents allege for the first time on appeal that the March 2010 IEP failed to include skill levels for the student's academic performance in the areas of reading comprehension, listening comprehension, writing, and problem solving. This issue was not raised in the parents' due process complaint notice (see Dist. Ex. 1). Additionally, while the hearing record contains some testimony relating to this issue, the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include this issue. Therefore, this issue is outside the scope of my review (see Dist. Ex. 1; see also 20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[j][1][ii]).

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]). Although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come from.

In this case, for the reasons discussed below, the evidence reveals that the March 2010 CSE complied with federal and State regulations to accurately and properly report the student's present levels of academic achievement and functional performance by relying, in part, upon information contained in the student's February 2010 private psychoeducational evaluation and March 2010 SEIT progress reports, and from the participation of both the student's then-current teacher at his pre-K program and his SEIT at the March 2010 CSE meeting (8 NYCRR 200.4[d][2]; see 34 C.F.R. § 300.320 [a][1]). Additionally, I note that the parents do not allege that the information reported in the present levels of academic achievement and functional performance in the student's IEP was inaccurate.

Present levels of performance contained in the March 2010 IEP reflected the student's "solidly average" cognitive skills, significant strengths in vocabulary skills, and significant weaknesses in skills involving the analysis and discrimination of essential from nonessential details (Dist. Ex. 6 at p. 3). The IEP included teacher estimates of the student's reading decoding and math computation skills, which at the time the IEP was developed, were at a kindergarten level (id.). The IEP indicated that his teachers reported that when focused, the student demonstrated grade level readiness skills; however, his progress was inconsistent due to high distractibility, disruptive behaviors, and poor organization (id.). According to the IEP, the student did not sustain topic interest of complete assignments without teacher supervision, which interfered with his "learning progress" (id.).

The student's 2009-10 regular education pre-K teacher testified that she attended the March 2010 CSE meeting and provided a description of what occurred in her classroom and what was "effective" (Tr. pp. 196-98). She stated that she informed the CSE that the student was very bright, but that he was easily distracted and required "a lot of redirection and a lot of that one-on-one attention" (Tr. p. 198). According to the pre-K teacher, when provided with extra support the student "did fantastic," but required that degree of redirection to help him be successful (Tr. pp. 198-99). The pre-K teacher stated that she recommended to the CSE that the student receive "a lot of the one-on-one" and that a large class size would "not be good for him" (Tr. p. 199).

The student's mother testified that the SEIT provided information to the March 2010 CSE regarding the student's needs, what skills the SEIT had been addressing with him, and the "kind of individualized attention that he ha[d] been given" (Tr. pp. 172-74; see Dist. Ex. 6 at p. 2). Specifically, the student's mother stated that the SEIT reported to the CSE "how much [the student] had benefited from the kind of extra support that she could give," and provided information about the student's need for sensory breaks, and his social/emotional needs (Tr. pp. 173-74).

While the hearing record shows that the district did not conduct or have available to it standardized academic achievement assessment results to consider at the March 2010 CSE meeting, the SEIT's March 2010 progress report indicated that the student's academic skills were "age appropriate," consistent with the kindergarten-level reading and math abilities noted in the IEP (compare Dist. Ex. 6 at p. 3, with Dist. Ex. 10 at p. 1). Given the facts of this case, where both the student's SEIT and pre-K teacher participated in the CSE meeting and offered information regarding the student's functioning in the classroom, and where there is no dispute regarding the accuracy of the information in the March 2010 IEP, the hearing record does not support a finding that the use of teacher estimates to measure the student's academic skills was inappropriate (Tr. pp. 172-74, 197-99). Accordingly, I find that the fact that the information in the student's March 2010 IEP with respect to the student's decoding and math computation skills came from information provided by one or more of the student's teachers is insufficient to support a finding that the March 10, 2010 IEP inadequately described the student's present levels of academic achievement and functional performance (Application of the Dep't of Educ., Appeal No. 10-099).

Annual Goals and Short-Term Objectives

I now turn to the parents' contentions with respect to the annual goals and short-term objectives. 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 (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]).

In their petition, the parents allege that the annual goals and short-term objectives included in the March 2010 IEP were "generic, vague, and did not provide a baseline from which to work," and that the IEP failed to identify how progress toward the goals would be measured. The school psychologist who participated at the March 2010 CSE meeting testified that she believed the student's SEIT developed the annual goals (Tr. p. 49). I further note that the hearing record indicates that during the March 2010 CSE meeting, both the student's pre-K teacher as well as his SEIT provided the March 2010 CSE with information relevant to the development of the March 2010 IEP (see Tr. pp. 172-74, 197-99). A review of the March 2010 IEP reveals 8 annual goals and 27 short-term objectives relating to the student's need to improve his sensory regulation, attention, transition, fine motor, visual motor, listening and turn taking, verbal expression, organization and task completion, social, conflict resolution, and self-regulation skills; specific deficits identified in the evaluative data and in the IEP's present levels of performance (Tr. pp.

172-74, 197-99; Dist. Exs. 6 at pp. 3-10; 9; 10; see Tr. pp. 27-32).⁶ A review of the IEP's annual goals and short-term objectives shows that reports of progress toward the goals would have been provided twice during the year, and that the majority of short-term objectives included evaluative criteria and an indication that each short-term objective would be considered achieved upon demonstration of the skill according to the criterion for mastery (Dist. Ex. 6 at pp. 7-10).

While a review of the hearing record shows that the annual goals in the March 2010 IEP may be vague when isolated out of context and viewed alone, I find that the 27 short-term objectives included within this IEP comprehensively addressed the student's needs and I further find that the majority of the short-term objectives were both detailed and measurable (see Dist. Ex. 6 at pp. 7-10). As a consequence, I find that the structure and content of the short-term objectives remedied any deficiencies in the annual goals (see Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S., 454 F. Supp. 2d at 146, 147; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096).

With respect to the parents' assertion that the March 2010 IEP did not identify how progress toward the annual goals would be measured because the measurement method box for each goal was left blank (see Dist. Ex. 6 at pp. 7-10), I decline to find that such a procedural violation resulted in a denial of a FAPE, particularly here where I have otherwise determined that the annual goals and short-term objectives were appropriate for the student (see Tarlowe, 2008 WL 2736027, at *9).

Based on the foregoing, a careful review of the hearing record reveals that the annual goals and short-term objectives in the student's March 2010 IEP 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 also find that the annual goals and short-term objectives also targeted appropriate areas of need. Accordingly, I agree with the impartial hearing officer that the annual goals in the March 2010 IEP were appropriate for the student.

CTT Placement

The parents allege that a CTT placement was not appropriate for the student because he required a small structured classroom with substantial 1:1 support throughout the school day. The impartial hearing officer determined that the recommended CTT placement provided "teacher support sufficient for redirection and encouragement to address [the student's] distractibility and to enable him to make meaningful educational progress" (IHO Decision at p. 11). As discussed below, the impartial hearing officer's finding is supported by the hearing record.

⁶ On appeal, the parents assert that the March 2010 IEP should have included annual goals in anxiety, reading, writing, and math and that the impartial hearing officer erred in determining that the student did not require academic goals (see IHO Decision at p. 11). These issues were not raised in the parents' due process complaint notice and although 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. Therefore, the impartial hearing officer erred to the extent that she addressed them (see Dist. Ex. 1; see also 20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]).

The March 2010 CSE recommended placement of the student in a 12:1 CTT class with four individual sessions of OT per week, and one session each of individual and group counseling per week (Dist. Ex. 6 at pp. 1, 13). The hearing record shows that CTT classes are composed of one regular education teacher and one special education teacher, both of whom instruct both general education students and up to 12 students who receive special education services (Tr. pp. 22, 23, 59). The hearing record reflects that the district's CTT classes consist of approximately 24 students in total (Tr. p. 44).

I note also that the district school psychologist, who was a member of the March 2010 CSE and also the district representative, testified that a regular education classroom was not appropriate for the student (see Tr. p. 32). She testified that the student needed "more attention, a smaller class, another teacher in the room to help him to focus and attend to task, and improve his social skills" (id.). In reviewing the March 2010 CSE's recommendation for a CTT placement, she also indicated that this program was "a very good program" for the student (Tr. p. 35).⁷ The school psychologist also testified that the March 2010 CSE "ruled out" recommending the student for a special class placement because, among other things, the student had the cognitive and academic ability to learn with general education students (Tr. p. 33).

Further, as indicated above, while the student has a diagnosis of an ADHD, he also possesses "solidly average" cognitive skills (Dist. Ex. 9 at pp. 7, 14; see also Dist. Exs. 6 at p. 1; 10 at p. 2). Moreover, due to the student's difficulties in consistently focusing his attention, the student's cognitive testing was "likely to underestimate" the student's true intellectual functioning (Dist. Ex. 9 at p. 7). The student's SEIT during the 2009-10 school year reported that the student was "exceptionally bright and imaginative" (Dist. Ex. 10 at p. 2). At the time of the March 2010 CSE meeting, his SEIT reported that the student's academic skills were age appropriate (Dist. Ex. 10 at p. 1; see Dist. Ex. 6 at p. 3). The March 2010 IEP also indicated that the student is "very social and loved by his peers" (Dist. Exs. 6 at p. 4; 10 at p. 2).

The hearing record reflects that although the student consistently exhibited inattentive and disruptive behaviors, he responded well to "positive encouragement," and was "very amenable to gentle redirection;" following which he attempted to focus his attention despite previous disinterest in activities (Dist. Exs. 9 at p. 5; 10 at p. 1). Additionally, the student's SEIT reported that the student responded "very well" to prompts and accepted her assistance and intervention, and the assistance of the other classroom staff (Dist. Exs. 9 at p. 5; 10 at p. 2). In conjunction with the support of both a full-time regular education teacher and a full-time special education teacher, the CSE recommended that the student receive redirection to task, repetition, use of verbal and visual cues, preferential seating, structure, and encouragement and support; strategies that both the private psychologist and the SEIT generally reported had been successfully implemented with the student (Dist. Exs. 6 at pp. 3-4; 9 at pp. 5-6, 14; 10).

The March 2010 IEP also included an annual goal addressing the student's attention difficulties, with corresponding short-term objectives developed to improve the student's ability to remain attentive for 10 minutes with "seating accommodations," and remain attentive during a class discussion for both 10 and 15 minute increments with seating accommodations and "breaks"

⁷ I note that while the witness did not have an independent recollection of the March 2010 CSE meeting, she also testified that prior to the impartial hearing, she had reviewed the district's CSE file with respect to the student (Tr. pp. 18, 42).

(Dist. Ex. 6 at p. 10). The student's seating accommodations included allowing the student to stand leaning on a desk, sit on his knees, and move between multiple assigned seats; accommodations that would have provided the student with breaks to receive sensory input (Dist. Ex. 6 at p. 10; see Dist. Ex. 9 at p. 15). The IEP also included annual goals and short-term objectives specifically addressing the student's need to improve appropriate listening and turn taking skills in conversation, begin nonpreferred tasks without teacher prompting, follow and complete multistep tasks, independently plan and complete three step tasks, directly respond to open-ended questions; and tolerate activity play in both familiar and novel tasks within the classroom routine; abilities directly affecting his performance in the classroom (Dist. Ex. 6 at pp. 7-8).

In response to the student's needs in the areas of behavior, social interaction, conflict resolution, and self-regulation skills, the CSE recommended that the student receive one 30-minute session of individual counseling, and one 30-minute session of group counseling per week (Dist. Ex. 6 at pp. 8-10, 13). In conjunction with counseling services, the IEP included annual goals and short-term objectives developed to improve the student's ability to respond calmly to peers and adults, verbally express his feelings, share and take turns appropriately, verbally address peers when he wants something, exhibit flexibility in choice of activity or goal with a peer, accept and follow adult intervention in conflict situations, apologize when appropriate, calm his body/voice and negotiate conflict with both teacher prompting and independently, calm his body/voice following a physical/exciting activity, and wait for an appropriate time to present thoughts; skills that the student's SEIT identified as areas of need (Dist. Exs. 6 at pp. 8-10; see Dist. Ex. 10).

The March 2010 IEP also recommended that the student receive four individual 30-minute sessions of OT per week, in conjunction with annual goals and short-term objectives designed to improve his ability to follow therapist-initiated directions within a one minute timeframe, attend to a 15-minute table top activity to completion following sensory input, and transition between activities during OT sessions without adverse reaction (Dist. Ex. 6 at pp. 7, 13). OT sessions would have also implemented annual goals and short-term objectives developed to improve the student's ability to copy letters with proper formation, scissor skills, spatial awareness and perceptual skills during graphomotor activities, and ball-throwing skills (id. at p. 7).

Although the parents argue that the student required a small class size and substantial 1:1 support throughout the day, the hearing record supports a finding that placement of the student in a CTT classroom in conjunction with the recommended classroom accommodations, annual goals and short-term objectives set forth in the March 2010 IEP designed to improve classroom functioning, and related services that target the student's specific areas of need, was reasonably calculated to confer meaningful educational benefits in the LRE.

Assigned School and Classroom

The parents assert that the assigned school and CTT class were too large for the student and that the placement of the student in the assigned classroom would put his safety "at risk." They further allege that the student would not have been functionally grouped in the assigned class.

Functional Grouping

State regulations require that students with disabilities placed together for purposes of special education 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]; 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). 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]). 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).

In this case, a meaningful analysis of the parents' claim with regard to functional grouping would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), 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, as it would be neither practical nor appropriate. 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). 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. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). 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]). As indicated above, the sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 14, 2011]). 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 issue of the functional levels of the students in the assigned class is speculative because the parents did not enroll the student in the public school and therefore the district was not required to establish that the student had been grouped appropriately upon the implementation of his IEP in the proposed classroom.

Class and School Size

I now turn to the parents' assertion that the student would have been overwhelmed by the size of the assigned class, which included 22 students and two teachers and that the assigned school itself was too large, which would cause the student to "shut down and become unavailable for learning" (Pet. ¶ 56). For the same reasons discussed above, I find that these allegations are

speculative and therefore, need not be addressed. Nevertheless, upon review, I find that the hearing record, in its entirety, does not support the conclusion that, had the student attended the assigned school and classroom, 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]). Moreover, for the reasons discussed above relating to the appropriateness of a CTT placement for the student, the parents' contention that the student would have been overwhelmed in the assigned class because of its size is not persuasive as a CTT placement with the supports delineated in the March 2010 IEP was designed to address the student's needs.

Conclusion

Having determined, for the reasons discussed above, that the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2010-11 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the Aaron School was appropriate or whether equitable considerations support the parents' claim; therefore, the necessary inquiry is at an end (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 the determinations above.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
August 22, 2011

STEPHANIE DEYOE
STATE REVIEW OFFICER