



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-100

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

#### **Appearances:**

Law Offices of Susan J. Deedy, attorneys for petitioners, Susan J. Deedy, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Lisa R. Khandhar, Esq., of counsel

#### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter'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 the Aaron School (Tr. pp. 250, 276-77; Dist. Ex. 1 at p. 2; Parent Exs. L; M at p. 1), which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). Although the student's eligibility for special education and related services as a student with a disability is not contested by the parties, her classification as a student with a speech or language impairment is in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

#### **Background**

The parents' initial concerns regarding their daughter's development arose when she was in pre-kindergarten (Tr. pp. 307-08). The student was reportedly first evaluated in 2004 and subsequently received supportive services including speech-language therapy, OT, and counseling through various programs (Dist. Ex. 5 at p. 3). The student was evaluated again in June 2006, and, according to the hearing record, was placed in a collaborative team teaching (CTT) kindergarten class for the 2006-07 school year; however, at the recommendation of her special education teacher, the parents removed the student from the class and subsequently placed her in a district

"fast track" kindergarten class, which, according to her mother, "was a disaster.... [The student] was melting down ..." (Tr. pp. 309-10; Dist. Ex. 5 at p. 3). At the recommendation of a private psychologist, the parents removed the student from the fast track class and placed her in a private school (Tr. pp. 310-11).

For the 2007-08 (first grade) and 2008-09 (second grade) school years, the student attended a private general education school which was paid for by her parents (Tr. p. 313). At the private school, the student experienced academic difficulties and engaged in disruptive behavior (Tr. pp. 313-15). While the student's teacher reportedly informed the parents that the school could not provide enough support for the student in classroom, the private school indicated that they would "do the best they could" for the student for the balance of the 2008-09 school year (Tr. p. 314). For the 2009-10 school year (third grade), the student attended a State-approved nonpublic school (NPS) (Tr. pp. 315-16; see Tr. pp. 134, 479, 545).

In February 2010, the parents sought an updated private psychological evaluation for the purposes of assessing the student's cognitive, academic, and adaptive functioning and to assist with educational placement and treatment recommendations (Dist. Ex. 6 at p. 1). The student's cognitive skills were assessed using selected subtests of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) (id. at pp. 1, 4). Based on the student's performance, the psychologist reported that the student's perceptual reasoning abilities fell in the high average range, an improvement from her performance on a previous administration of the test in late 2008 when she scored in the average range (id.). The private psychologist also noted that the student had demonstrated improvement in her abilities to identify the common construct between two seemingly dissimilar objects or concepts and to recall a series of numbers forward and backward (id.). Administration of selected subtests of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) yielded standard scores of 112 (79th percentile, 8.4 grade equivalent) in reading comprehension, 81 (10th percentile, <3.0 grade equivalent) in numerical operations, and 75 (5th percentile, 2.0 grade equivalent) in essay composition (id. at p. 4).

The private psychologist observed growth in the student's ability to read passages of increasing complexity, but noted that although the student possessed at least average to high average intellectual potential and had made some academic gains in reading, she continued to exhibit significant difficulties in expressive writing and mastery of basic mathematics (Dist. Ex. 6 at pp. 1, 4). According to the private psychologist, the student exhibited "extreme" distractibility throughout the evaluation despite being provided with scaffolding, redirection, and praise (id. at p. 1). He observed that the student appeared to have a difficult time controlling her impulses and frequently demonstrated immature behavior during the evaluation, such as making inappropriate sounds, faces, and comments (id.). He characterized the student's motivation with regard to testing as "quite variable," observing that she demonstrated anxiety when asked to engage in activities that she perceived as difficult or with which she was uncomfortable, and noted the consistency between his observations of the student's behavior and her mother's responses in structured parent questionnaires (id. at pp. 1-2).

On the Behavior Assessment System for Children-Second Edition (BASC-2), a measure of the student's adaptive skills, behaviors, and emotions, the student's mother reported that the student had trouble with externalizing problems such as hyperactivity, aggression, and conduct problems, all reaching clinical significance and warranting immediate attention (Dist. Ex. 6 at pp. 2, 4-5).

She also reported that her daughter frequently engaged in "atypical behavior" marked by withdrawal, pessimism, and sadness, that she demonstrated difficulties with social skills, sometimes failing to act in a "tactful and socially acceptable manner," possessed poor expressive and receptive communication skills, and experienced difficulty performing simple daily tasks in a safe and efficient manner (id. at p. 2).

After administering the Personality Inventory for Youth (PIY), the private psychologist opined that the student did not find academic activities personally satisfying and possessed limited motivation to improve her academic achievement, and may have possessed "an outgoing and intrusive style of interpersonal interaction" (Dist. Ex. 6 at p. 2). He further opined that the student's responses indicated that she was frequently restless, had difficulty learning from past mistakes, had difficulty expressing negative emotions in a modulated fashion, believed that her parents were frequently angry at her for her poor behavior, and that she found her thoughts to be atypical and distracting, but also that she was unlikely to seek help for these symptoms (id.). The student acknowledged that she frequently broke rules, tested limits, and manipulated others to avoid consequences, that she felt "different from others," that her peers found her "strange and unusual," and that she felt alienated from others (id.). The private psychologist reported that the student could experience frequent mood changes and become upset over seemingly trivial occurrences, was likely to become anxious in unfamiliar social settings, and consequently, had difficulty establishing and maintaining friendships (id.).

According to the private psychologist, the student's anxiety and emotional and behavioral dysregulation impacted both her academic achievement and social development (Dist. Ex. 6 at p. 2). He recommended that a small, structured, nurturing learning environment would be most appropriate at that time, supplemented by therapeutic intervention focusing on the student's general dysregulation and disorganization in order to assist in the student's progress and prevent any regression (id. at pp. 2-3). He also recommended a neurological consultation, and advised that following his evaluation, he referred the student to a "psychiatric treatment team" (Tr. pp. 230-31; Dist. Ex. 6 at pp. 2-3).<sup>1</sup>

In March 2010, the parents obtained a diagnostic psychiatric evaluation due to their concerns regarding the student's difficulty navigating social situations, inflexibility, and impulsivity (Dist. Ex. 5). The evaluation took place over three non-consecutive days and included a review of the student's history and current functioning, clinical interviews with the student and with her parents, and the completion of behavior rating scales by the student's mother and teacher (id. at pp. 1-4). The parents reported that the student's home behavior significantly interfered with her functioning, described her as "very resistant to any direction," noted that she became aggressive at times with her parents and sister, and observed that she occasionally demonstrated low frustration tolerance, screaming and expressing herself "in very disruptive ways" (id. at p. 1). The parents also expressed concern regarding the student's oppositional behavior, as well as her inattention, impulsivity, and hyperactivity, reporting that she delayed completing homework, had difficulty remembering what was asked of her, fidgeted, and made disruptive noises (id. at p. 2).

Academically, the evaluating psychologist noted that the student's ratings from her third grade teacher at the NPS reflected that she was performing far below grade level across academic

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<sup>1</sup> There is no reference in the hearing record to any treatment received by the student resulting from this referral.

subjects, and the evaluating psychologist further commented that her behavior negatively affected social interactions, alienated her from peers, and were significantly affecting her classroom functioning (Dist. Ex. 5 at p. 2). Socially/emotionally, the parents reported that the student "love[d] people" but also had significant social difficulties, including inflexibility with playmates, difficulty with "perspective taking," attempting to hug peers, and a tendency to speak to unfamiliar people without realizing that her behavior may be perceived as unusual or inappropriate (id.). Her parents expressed concern that the student was being teased and bullied at school (id.). The psychologist concluded that the student's symptoms of hyperactivity and impulsivity, in conjunction with her difficulties interpreting social cues and demonstrating appropriate communication, interfered with her functioning in the social domain and caused the student notable distress (id.).

According to the evaluating psychologist, the student's mother's responses on the Child Behavior Checklist (CBCL) suggested clinically significant elevations on the student's anxious/depressed, social problems, attention problems, rule-breaking behavior, aggressive behavior, and thought problem subscales, and also suggested a borderline clinical elevation on the withdrawn/depressed scale (Dist. Ex. 5 at p. 4). The student's mother reported that her daughter often worried, was often lonely, became easily jealous, was teased by others, was impulsive and inattentive, and that she often disobeyed rules, argued with adults, and lost her temper and screamed (id.).

The evaluating psychologist reported that completion of the Teacher's Report Form (TRF) by the student's third grade teacher at the NPS revealed a pattern of similar elevations that were clinically significant on the social problems, attention problems, and thought problems subscales, with borderline clinical elevations noted on the anxious/depressed, somatic complaints, and aggressive behavior subscales (Dist. Ex. 5 at p. 4). The evaluating psychologist related the third grade teacher's report that the student was often overly dependent on adults during social interactions, exhibited pragmatic language difficulties, was often noisy, acted young for her age, had difficulty following directions, was impulsive, called out, talked excessively, and disrupted class discussions by demanding attention and disobeying class rules (id.). The evaluating psychologist also noted that responses from the student's mother to the Swanson, Nolan, and Pelham Questionnaire (SNAP-IV) suggested elevations for student inattention, hyperactivity, and impulsivity, while the responses of her third grade teacher revealed the elevated levels of hyperactivity/impulsivity (id. at pp. 4-5).

The evaluating psychologist interpreted results of the Kiddie-Schedule for Affective Disorders and Schizophrenia (K-SADS), in conjunction with parent and teacher behavior ratings, to suggest that the student met the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) diagnostic criteria for an ADHD, combined type, adding that the student's impairing, disruptive behavior was consistent with a diagnosis of a disruptive behavior disorder, not otherwise specified (Dist. Ex. 5 at pp. 5, 7). While acknowledging that the student was experiencing pervasive impairments in social communication, the evaluating psychologist stated that it was unclear to what extent her symptoms could be explained by severe ADHD symptoms, which had been present since the student's preschool years, and opined that a diagnosis of pervasive developmental disorder, not otherwise specified (PDD-NOS) should be ruled out as impairment from her ADHD and disruptive behavior disorder diminished (id. at p. 5).

She characterized the student's inattention, hyperactivity, and impulsivity as chronic, dating back to preschool, considered her oppositional and defiant behaviors to also be longstanding, and opined that they presently interfered with her learning, peer interactions at school, and overall classroom functioning (Dist. Ex. 5 at p. 5). Due to the student's persistent disruptive behavior in class, the psychologist recommended that a behavior plan be developed, implemented, and evaluated on a consistent basis, that the parents receive training to address their concerns regarding the student's behavior at home, that the student participate in an evidence-based therapeutic summer day camp focusing on social and athletic building skills using a behavioral approach, and that the parents consult with a child psychiatrist for medication and treatment (id. at p. 6).

In April 2010, the student's third grade teachers and related service providers at the NPS generated progress reports documenting the student's performance in academics, counseling, speech-language therapy, and OT during the 2009-10 school year (Dist. Exs. 7; 8; 9; 10).

Academically, the student's teachers described her as a "friendly, energetic," and hard-working student whose impulsivity and disorganization made both academic and social tasks difficult (Dist. Ex. 7 at p. 1). They reported that it was difficult for the student to accurately perceive and interpret non-verbal language, and noted that misperceptions during social interactions confused her, with her confusion often spiraling out of control, overwhelming and upsetting her (id.). The teachers opined that it was important that the student receive preprogramming, clear, consistent behavioral expectations, consistent routines, replay of events, and immediate, specific positive reinforcement (id.). They also observed that the student's impulsivity caused her to struggle with executing strategies helpful for sensory integration, that she was overwhelmed by large spaces, loud activities, or surprising or exciting events in her personal life, and that her strategies for soothing her body and mind could be inconsistent, thereby necessitating breaks from the classroom in order to calm her and enable her to regain control (id.). They also noted that the student required a daily routine including activities that stimulated left/right brain integration, perceptual gains, puzzles and problem solving opportunities, where she could focus on a task at hand (id.). Although her teachers reported that the student loved to verbally share what she knew or had experienced, they added that she became distracted by external stimuli, and required redirection when digressing off topic; due to her impulsivity and distractibility, the student often missed directions for assignments and became frustrated (id.). They also indicated that to compensate for slow language processing, the student needed to focus exclusively on one receptive message at a time, and that she benefited from visual cues and clear, concise directions (id.).

In reading, the student's third grade teachers at the NPS used the Preventing Academic Failure (PAF) program for reading instruction (Dist. Ex. 7 at p. 2). Her teachers noted that the student often had difficulty comprehending text or missed the main idea of a story due to her distractibility and language processing issues, but that the PAF program helped the student with reading fluency and that her small, quiet, structured reading group with daily repetition and consistency also benefited the student (id.). In writing, her teachers acknowledged improvement in the student's writing skills, but added that while the student benefited from teacher cues and monitoring of her pace of work, when the student was frustrated or anxious to move on to the next activity, she rushed and failed to carry over spelling, punctuation, and capitalization rules (id.). In math, her teachers opined that the student responded best to small pieces of information presented

in a multisensory format, adding that the Stern Structured Mathematics Program<sup>2</sup> materials and visual representations used in class were "vital" because holding onto and using multiple pieces of information, as the student was asked to do in math, were difficult for her (*id.*). Her third grade teachers acknowledged that brainstorming and outlines helped the student to internalize and retain the information she had learned, and that although the student had difficulty following oral directions in larger groups, such as gym, she compensated well by observing peers (*id.*). In summary, her third grade teachers characterized the student as a "determined young girl" and commented that continued support within a small, consistent classroom setting would provide the student "the help to achieve her potential and recognize her success" (*id.* at p. 3).

With regard to counseling, the student's third grade counselor at the NPS described the student as an enthusiastic,<sup>3</sup> friendly and caring student who enjoyed playing with her peers, was often ready to help others, had shown a desire to connect with her peers, and demonstrated a capacity to verbally express her feelings (Dist. Ex. 8). She noted that the student frequently made thoughtful contributions and suggestions when peer related issues were discussed, but continued to struggle with deficits in attention and self-regulation, which impacted her ability to maintain a connection with a group (*id.*). Although acknowledging that the student was responsive to redirection, her counselor commented that continued support and feedback were needed to help the student learn to self-monitor and form appropriate strategies, and she recommended that the student continue to receive counseling service once per week in order to improve the student's social skills, competence with peers, and self-confidence (*id.*).

Relative to the student's speech-language services, the student's third grade speech-language pathologist at the NPS assessed the student's receptive and expressive language skills, including syntax, morphology, pragmatics, and semantics, to be mildly to moderately impaired and influenced by her attention to task and ability to control her impulsivity (Dist. Ex. 9 at p. 1). She also observed that the student performed better in a small speech group, which allowed for more individualized attention from the therapist to refocus the student when necessary, facilitate listening and comprehension skills, encourage appropriate interactions with peers, and elicit the expressive language necessary for her academic and pragmatic needs (*id.*). She indicated that the small group sessions addressed objectives such as determining the meaning of words in chapter books using inferencing strategies and context cues, distinguishing fact from opinion, responding to prediction questions, explaining figurative language statements, providing an oral summary of a story using story grammar elements, and describing a situation with two probable solutions when given a pragmatic situation (*id.*). While acknowledging that the student demonstrated some improvement, she asserted that the student continued to require speech-language therapy to address deficits in auditory processing and comprehension, auditory memory, language formulation, sequencing and organization, and pragmatics, as well as to assist in the challenges of written language and textbook interpretation (*id.*). She recommended that these services take the form of one 30-minute session of speech-language therapy in a group of five students and one 30-minute

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<sup>2</sup> In the hearing record, the Stern Structured Mathematics Program is described as "a visual approach, to math" (Tr. p. 48).

<sup>3</sup> The hearing record reflects that as of April 2010, the student was receiving counseling services once per week in a 4:1 setting (Dist. Ex. 8).

session of speech-language therapy in a group of eight students to further develop her receptive and expressive language skills for academic and pragmatic needs (id. at p. 2).

With regard to OT, the student's third grade occupational therapist at the NPS reported that the student received occupational therapy for two 30-minute sessions per week in a small group (3:1 setting) and one 30-minute session per week in an 8:1 gym class setting, with a focus on improving sensory processing, motor planning, upper body strength, stability and endurance, visual perception, fine motor dexterity, and bilateral coordination skills as required for participation in classroom and self-help activities (Dist. Ex. 10). Her occupational therapist reported that the student enjoyed movement experiences, was eager to attempt novel tasks, and demonstrated improvement in trunk, abdominal, and shoulder girdle strength and control, as well as in motor planning, timing, and sequencing of gross motor tasks (id.). She acknowledged that the student occasionally had difficulties self-regulating and acting socially appropriate when engaging with peers in a larger setting, but when given appropriate cues and clear limits, she remarked that the student was able to demonstrate emerging awareness and the ability to self-regulate during times of decreased sensory modulation (id.). She reported that the student was able to maintain good postural alignment during tabletop activities when cued to do so, but demonstrated "sensory seeking postures" when at the table, adding that while the student continued to have some difficulties with spatial organization and sizing of letters, she benefited from visual cues and demonstrated improvement since the beginning of the 2009-10 school year (id.). She further noted that the student's near point copying of complex shapes was improving in accuracy, but that she still required assistance to tie her shoe laces (id.). The student's third grade occupational therapist recommended that the student's OT be modified to one 30-minute session per week in an 8:1 classroom push-in setting and one 30-minute session per week in an 8:1 gym class setting (id.).

On June 18, 2010, the Committee on Special Education (CSE) convened for the student's annual review to develop her individualized education program (IEP) for the 2010-11 school year (Dist. Exs. 3; 4). On August 11, 2010, the district summarized the recommendations made by the June 2010 CSE and notified the parents of the school to which the district assigned the student (Dist. Ex. 12). By letter to the district dated September 15, 2011,<sup>4</sup> the parents rejected the June 2010 IEP, alleging unspecified procedural and substantive deficiencies, and asserting that the district failed to provide them with "any information regarding the class placement, specifically the emotional, cognitive, and academic functional levels of the other students in the recommended placement" (Parent Ex. C at pp. 1-2). The parents also informed the district of their intention to enroll the student at the Aaron School for the 2010-11 school year, and to seek reimbursement at public expense (id. at p. 2). The parents further stated that "additional information, including a description of their specific reasons for their disagreement with the [June 2010 CSE's] recommendation, and the parents' proposed solution, will be provided under separate cover," and

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<sup>4</sup> On August 18, 2010, the parents forwarded a letter to the district substantively identical to their September 15, 2010 letter, except that it referenced the student's third grade placement from the 2009-10 school year as the student's 2010-11 placement instead of the Aaron School (compare Parent Ex. B at p. 2, with Parent Ex. C at p. 2). Although both letters bear the caption "Notice of Rejection of Recommended Program Placement, Unilateral Placement and Intent to Seek Public Funding for School Year 2010-11," the September 15, 2010 letter, for all purposes, is an amended version of the original August 18, 2010 letter, and is referred to in the exhibit list attached to the impartial hearing officer's decision as an "Amended Notice of Rejection" (IHO Decision at p. 16). For the purposes of this appeal, I refer only to the September 15, 2010 letter.

requested that the CSE arrange for the provision of the student's related services and for transportation services for the student's 2010-11 school year (id.). Two months later, on September 18, 2010, the parent visited the school to which the student had been assigned (Dist. Ex. 1 at p. 4).

On September 22, 2010, the parents paid a non-refundable deposit to the Aaron School and subsequently enrolled the student there for the 2010-11 school year, during which she was placed in a 9:2 special class and received weekly OT and counseling services and speech-language therapy, once per week for 30 minutes per session in a 2:1 setting (Tr. pp. 252, 283-84, 289, 306, 297-98, 363-64; Parent Exs. L; M at p. 1; see Parent Ex. O).

### **Due Process Complaint Notice**

By due process complaint notice dated December 2, 2010, the parents alleged, among other things, that: (1) the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year because the June 2010 CSE: failed to conduct a classroom observation; improperly classified the student as a student with a speech or language impairment; failed to accord private evaluations submitted by the parents due weight during the CSE meeting; failed to include a speech-language service provider, regular education teacher, or additional parent member at the CSE meeting; denied the parents an opportunity to meaningfully participate in the development of their daughter's IEP because the student's father was excluded from the meeting; failed to provide documentation to the two representatives from the NPS, who participated telephonically in the CSE meeting; and ignored the recommendation that the student required placement in a very small and structured class. With regard to the resulting 2010 IEP, the parents claimed it was inappropriate because the annual goals and short-term objectives in the June 2010 IEP were inappropriate and not tailored to the student and the level of speech-language services on the June 2010 IEP was reduced compared to the student's previous IEP.<sup>5</sup> The parents also alleged that the district failed to appropriately group the student by placing her in a reading class with students reading at a significantly lower level; failed to provide the parents with a profile of the assigned class; and it failed to provide transportation services to the student. With regard to the unilateral placement, the parents claimed that the Aaron School was an appropriate placement for the student for the 2010-11 school year and that equitable considerations favored the parents (Dist. Ex. 1 at pp. 2-4). For relief, the parents sought direct funding of tuition at the Aaron School for the 2010-11 school year, transportation services to and from the Aaron School for the balance of the 2010-11 school year, and reimbursement for transportation expenses incurred by the parents (id. at p. 4).

### **Impartial Hearing Officer Decision**

On April 13, 2011, the parties proceeded to an impartial hearing, which concluded on July 12, 2011 after three days of proceedings. On August 17, 2011, the impartial hearing officer issued a decision, finding that the district offered the student a FAPE for the 2010-11 school year (IHO Decision at pp. 10-14). Specifically, the impartial hearing officer concluded that the fact that the student was not assigned to the particular classification that the parents sought did not deny the

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<sup>5</sup> According to the hearing record, the district previously recommended pull-out speech-language therapy four times per week for 30 minutes per session in a 1:1 setting pursuant to an April 2009 Committee on Special Education (CSE) meeting (Parent Ex. P).



student a FAPE (*id.* at p. 13). With regard to the allegations of improper composition of the June 2010 CSE, the impartial hearing officer found that the lack of a regular education teacher was not improper, because there was no evidence suggesting that the district contemplated placing the student in a general education classroom for the 2010-11 school year, and consequently, it was not required to have a regular education teacher present (IHO Decision at pp. 11-12).<sup>6</sup> The impartial hearing officer also determined that the lack of an additional parent member and the absence of the student's father did not render the June 2010 IEP inadequate, as these absences did not interfere with the June 2010 CSE's discussion of the IEP goals or its final recommendation (*id.* at p. 12). She also found that the district's failure to furnish the parents with a profile of the assigned class was not a denial of FAPE (*id.* at p. 13).

The impartial hearing officer concluded that the evidence contained in the hearing record demonstrated that the June 2010 IEP was designed to offer the student meaningful educational benefit (IHO Decision at p. 11). She noted that the annual goals contained in the June 2010 IEP were developed by the student's third grade special education teacher at the NPS and her related service providers, and she relied on evidence that the teacher of the proposed classroom could implement the proposed goals (*id.* at pp. 11, 13-14). She also observed that the reduction of speech-language services contained in the June 2010 IEP was done upon the recommendation of the student's speech-language therapist at the NPS and, even at a reduced level, still exceeded the level of speech-language services that she was currently receiving at the Aaron School (*id.* at pp. 11-12; compare Dist. Ex. 1 at p. 2, with Dist. Ex. 9 at p. 2, and Dist. Ex. 3 at pp. 2, 15, and Parent Ex. M at p. 1).

With regard to the particular classroom to which the student had been assigned, the impartial hearing officer found the district's grouping of the student was appropriate, insofar as the hearing record established that the functional levels of the students in the assigned class were similar to that of the student (IHO Decision at p. 14). Having found that the district's program embodied in the June 2010 IEP offered the student a FAPE for the 2010-11 school year, the impartial hearing officer denied the parents claim for tuition for their daughter's fourth grade school year at the Aaron School (*id.* at pp. 10, 14-15).

### **Appeal for State-Level Review**

The parents appeal from the impartial hearing officer's decision denying their claims, arguing, among other things, that the June 2010 CSE failed to offer the student a FAPE for the 2010-11 school year, that the district's classification of the student was incorrect, that the Aaron School was an appropriate placement for the student for the 2010-11 school year, and that equitable

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<sup>6</sup> Contrary to the impartial hearing officer's determination, the evidence contained in the hearing record indicates that the June 2010 CSE considered placing the student in an integrated co-teaching (ICT) class for the 2010-11 school year, but ultimately rejected this alternative due to the student's attention deficit and behavior issues (Dist. Ex. 3 at p. 14). The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be attending a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 C.F.R. § 300.324[a][3]; 8 NYCRR 200.3[d]).

considerations supported the parents.<sup>7</sup> They seek annulment of the impartial hearing officer's August 17, 2011 decision, reimbursement of the deposit they paid to the Aaron School, and an award of direct funding for the balance of tuition still owing for the student's 2010-11 school year at the Aaron School.

The district answers, countering, among other things, that it offered the student a FAPE for the 2010-11 school year, and that equitable considerations supported the district.<sup>8</sup> It seeks dismissal of the petition in its entirety, or, alternatively, in the event that findings are made in favor of the parents, there should be a reduction in any reimbursement award by the balance outstanding on a loan taken out by the Aaron School to "front" the cost of the student's 2010-11 tuition.<sup>9</sup>

## **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

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<sup>7</sup> In this appeal, the parents are represented by counsel. Upon review, I find that the petition fails to reference the hearing record as required by 8 NYCRR 279.8(b) to support several of the allegations raised by the parents. State regulation directs that "[t]he petition, answer, reply and memorandum of law shall each reference the record on appeal, identifying the page number in the hearing decision and transcript, the exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[b]; see Application of a Student with a Disability, Appeal No. 09-110; Application of a Student with a Disability, Appeal No. 08-130; Application of a Student with a Disability, Appeal No. 08-102; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-022; Application of a Student with a Disability, Appeal No. 08-003 [dismissing a petition that *inter alia* did not reference the hearing record]). State regulations provide that documents that fail to comply with the above-mentioned requirement may be rejected in the sole discretion of a State Review Officer (8 NYCRR 279.8[a]; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 06-065; Application of the Bd. of Educ., Appeal No. 04-080). In this appeal, I will exercise my discretion under 8 NYCRR 279.8(a) and consider the parents' allegations; however, I caution parents' counsel to ensure that future pleadings submitted to the Office of State Review comply with State regulations.

<sup>8</sup> The district does not allege that the educational services obtained by the parent are inappropriate.

<sup>9</sup> According to the head of the Aaron School, the balance of the student's tuition for the 2010-11 school year was funded by the Aaron School through proceeds from a loan agreement between the Aaron School and a charitable organization known as the Aaron Association, which, she explained, existed "solely for the purpose of providing loans to families that can't afford the cash flow of making the [tuition] payments," adding that "[t]he Aaron Association was set up by parents [of presently-enrolled Aaron School students] to help families who can't afford, you know, the tuition, to assist them with loans that eventually get paid back when [the students' parents] get refunded by the [district]" (Tr. pp. 253-56). She clarified that it was the Aaron School itself, and not the parents, which was a party to the loan agreement, but confirmed that "[a]ll parents are responsible for the tuition..." adding "... we expect to be paid back once the determination of the [district] is made as to whether or not the family is going to be refunded or the school is going to be refunded for the current year" (Tr. pp. 253-54, 258-59, 263-66, 390-92, 398, 401-03, 405-07, 411, 413, 419-21, 427). The student's mother also expressed her understanding that "I was responsible for the full tuition" (Tr. p. 445). In the event that the parents did not prevail in their claim for tuition funding, the head of the Aaron School reported that "then we cannot continue to service the child and we cannot renew another year if [the] parents do not find an appropriate placement elsewhere" (Tr. p. 254). She added that in such a scenario, "[t]he school will go after the parent for the tuition ... the child will be dismissed from the school and will not have the opportunity of reenrolling for the next year, and the school as the borrower is not responsible [to the Aaron Association] for repaying the loan" (Tr. pp. 402-03).

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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**

### **Scope of Review**

I note that the parents did not appeal the impartial hearing officer's determinations that the lack of a regular education teacher<sup>10</sup> at the June 2010 CSE annual review meeting and the district's failure to furnish them with a class profile of the assigned class did not constitute deprivations of a FAPE for the 2010-11 school year. Additionally, the parents did not appeal the impartial hearing officer's decision insofar as it did not address the parents' allegations that the June 2010 CSE failed to provide copies of documentation considered by the CSE to the representatives from the NPS, or that it failed to recommend transportation services to the student. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly, I will not address these matters further.

### **Adequacy of Evaluative Information before the August 2009 CSE**

The parents maintain that the district failed to conduct any of its own evaluations of the student prior to the CSE meeting, and suggest that because the CSE recommended a class setting that differed from that recommended in the parentally furnished evaluations, the CSE did not properly consider their evaluations in developing the student's IEP. The parents also argue that the district failed to conduct a classroom observation of the student.<sup>11</sup> An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional,

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<sup>10</sup> Although constituting a technical violation under 20 U.S.C. § 1414[d][1][B][ii], 34 C.F.R. § 300.321[a][2], and 8 NYCRR 200.3[a][1][ii], based upon my careful review of the hearing record, I find that even if the parents had appealed the impartial hearing officer's determination, I would nevertheless uphold her ultimate conclusion because the absence of a regular education teacher at the June 2010 CSE meeting did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]; Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July 11, 2005]; see also E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419).

<sup>11</sup> The impartial hearing officer's decision did not address this allegation.

developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 C.F.R. § 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

However, contrary to the parent's allegation that the CSE failed to conduct its own evaluations, a CSE is not required to use its own evaluations in the preparation of an IEP and in the recommendation of an appropriate program for a student and is not precluded from relying upon privately obtained evaluative information in lieu of conducting its own evaluation (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at \*9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]; Application of the Dep't of Educ., Appeal No. 10-025; Application of a Student with a Disability, Appeal No. 10-004; Application of a Child with a Disability, Appeal No. 02-098; Application of a Child with a Disability, Appeal No. 01-040; Application of a Child with a Disability, Appeal No. 96-87); Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 92-12; see also Application of a Child Suspected of Having a Disability, Appeal No. 98-80). In addition, as part of a CSE's review of a student, a CSE must consider any private evaluation report submitted to it by a parent provided the private evaluation meets the school district's criteria (34 C.F.R. § 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). Although a CSE is required to consider reports from privately retained experts, it is not required to follow their recommendations (see, e.g., Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583 at \*6 [S.D.N.Y. Sept. 29, 1998]; Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child Suspected of Having a Disability, Appeal No. 06-087).

In this case, the hearing record indicates that the June 2010 CSE had before it reports that it had received from the parents and the NPS, including the March 2010 diagnostic psychiatric examination (Dist. Ex. 5), the February 2010 psychological evaluation (Dist. Ex. 6), and the April 2010 school reports addressing her overall educational performance (Dist. Ex. 7), counseling (Dist. Ex. 8), speech-language (Dist. Ex. 9), and OT (Dist. Ex. 10). According to testimony offered by the school psychologist and the student's mother, the CSE reviewed this evaluative information during the June 2010 CSE meeting (Tr. pp. 34, 46-51, 66, 118-19, 127, 135-37, 341; see Dist. Ex.

3 at pp. 3-5, 14). I find that the evidence supports the conclusion that the June 2010 CSE considered the results of the private evaluations and evaluative data provided to it by the parents and then-current placement (see T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]).

With respect to the parent's assertion that the district failed to conduct a classroom observation of the student, the school psychologist confirmed during the impartial hearing that no classroom observation was performed by the district in preparation for the CSE meeting (Tr. p. 81). State regulations at 8 NYCRR 200.4(b)(iv) provide that an initial evaluation must include "an observation of the student in the student's learning environment (including the regular classroom setting) or, in the case of a student of less than school age or out of school, an environment appropriate for a student of that age, to document the student's academic performance and behavior in the areas of difficulty." However, I note that in this case, the hearing record establishes that the student had previously been evaluated for special education and related services, and consequently, a classroom observation was not required (see Tr. pp. 309-10; Dist. Ex. 5 at p. 3; Parent Ex. P). I also note that the June 2010 CSE reviewed April 2010 reports from the NPS during the student's third grade year which included a review of her overall academic performance, including her social/emotional functioning in the classroom environment, as well as her progress with her related services (see Dist. Exs. 7; 8; 9; 10). Furthermore, the hearing record indicates that the June 2010 CSE included the student's third grade teacher, who also provided information regarding the student's classroom functioning telephonically to the other CSE members (see Tr. p. 52). Based on the evidence contained in the hearing record, I find that the April 2010 reports from the NPS and the direct input from the student's third grade teacher during the CSE meeting, provided the CSE with sufficient functional, developmental, and academic information about the student and her individual needs to enable it to develop her IEP and to prevent a denial of a FAPE to the student (Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

### **Classification**

Although the student's eligibility for special education and related services as a student with a disability is not contested by the parties, her classification as a student with a speech or language impairment is in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]). In the petition, the parents maintain that the district erroneously classified the student, and should have classified her as either a student with an emotional disturbance (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]) or a student with an other health impairment (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]), and that the district's erroneous classification denied the student a FAPE for the 2010-11 school year. The district asserts that the allegation of incorrect classification is harmless because the special education programming and services recommended in the June 2010 IEP were based upon the student's unique needs and not the student's disability classification.

The impartial hearing officer correctly noted that the determination to classify the student as a student with a speech or language impairment did not constitute a denial of a FAPE (see IHO Decision at p. 13). As noted previously, a CSE is called upon to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in

which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). The particular disability classification that a student receives "will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs" (Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [internal quotation marks omitted]; Hailey M. v. Matayoshi, 2011 WL 3957206, at \*19-\*20 [D.Hawai'i Sept. 7, 2011]; see Application of a Student with a Disability, Appeal Nos. 11-059 & 11-061; Application of a Student with a Disability, Appeal No. 09-126 ["a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). In the instant case, I find that the hearing record demonstrates that the district fulfilled its obligation under the IDEA and federal and State regulations to identify, locate, and evaluate the student, who was suspected of being a student with a disability, and that the CSE's decision to classify the student as a student with a speech or language impairment did not compromise the student's right to an appropriate education, significantly impede the parents' opportunity to participate in the development of the IEP, or cause a deprivation of educational benefits" (Fort Osage, 641 F.3d at 1004).

Furthermore, the hearing record does not support the parent's contention that the district improperly found the student eligible for special education as a student with a speech or language impairment. Federal and State regulations define a speech or language impairment as "a communication disorder, such as stuttering, impaired articulation, language impairment or a voice impairment that adversely affects a [student's] educational performance (34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]). The student's private psychologist, who conducted the student's February 2010 psychological evaluation and had been working with the student since kindergarten, testified that the student had "always presented with a real myriad of issues, and nothing, unfortunately, that's captured under one specific diagnosis" (Tr. pp. 199, 201). He further commented that the student always had a range of speech and language based academic disorders, and difficulties with attention and regulating her overall emotional functioning, and observed that there had always been a "host of issues that have reared their ugly head at different times depending on her developmental stage" (Tr. pp. 201-02). Although he disagreed with the district's classification of the student as speech or language impaired in terms of the student's academic and emotional functioning, he acknowledged that "some of her issues are based on what she does with language, but at such a higher level" and added that "she exhibits things that someone with a speech and language impairment might also exhibit ... (Tr. pp. 219-20, 229-30). In their April 2010 progress report, the student's third grade teachers reported that the student's language processing difficulties interfered with her ability to follow directions and comprehend text (Dist. Ex. 7 at p. 2). In addition, the student's speech-language pathologist stated that the student continued to require speech-language therapy to address her deficits in auditory processing and comprehension, auditory memory, language formulation, sequencing and organization, and pragmatics, as well as to assist her with the challenges of written language and textbook interpretation (Dist. Ex. 9 at p. 1). The evaluating psychologist who conducted the student's March 2010 diagnostic psychiatric evaluation discussed the student's difficulties with perspective taking and social reciprocity, and observed that she was experiencing pervasive impairments in social communication, but opined that it was unclear to what extent the student's symptoms were related to severe ADHD and her co-occurring disruptive behavior disorder or a distinct autism disorder (Dist. Ex. 5 at pp. 5-6). Additionally, although the parents maintained that her ancillary speech issues were not the basis of the student's adverse academic performance, they acknowledged that their daughter exhibited "mild to moderate speech deficits," and the student's mother acknowledged that she did not object

to the district's classification of the student as speech or language impaired at the CSE meeting (Tr. pp. 340-41; Dist. Ex. 1 at p. 2).

The school psychologist asserted during the impartial hearing that after considering the materials available to the June 2010 CLE at the time of the CSE meeting, he believed that the classification of the student as a student with a speech or language impairment was "appropriate" and "reasonable" (Tr. pp. 35-38). When asked during the impartial hearing whether the diagnoses of an ADHD and a disruptive behavior disorder proffered by the evaluating psychologist in the March 2010 diagnostic psychiatric evaluation impacted the CSE's decision to classify the student as speech or language impaired, the school psychologist advised "I have to consider ... that in light of the ... other material ... I looked at, you know the issue of communication that she raised .... But what she did do was not a lot of substantial assessment of ... speech and language," adding that "... I couldn't rely on ... the totality of the report for the kinds of information that we needed to make a decision. But certainly it was definitely – it was ... considered" (Tr. pp. 128-29). Based upon the foregoing, I find that, notwithstanding the disagreement of the parents, the hearing record demonstrates that the June 2010 CSE classification of the student as a student with a speech or language impairment was reasonable, based upon the CSE's consideration of all of the evaluative material it had available to it as identified in the hearing record, and did not deprive the student of FAPE for the 2010-11 school year (see 34 C.F.R. § 300.305[a][1]).

### **June 2010 CSE Process**

#### **Composition of the June 2010 CSE**

According to the hearing record, the June 2010 CSE was attended by the school psychologist/district representative, special education teacher, and the student's mother; two staff members from the NPS, including one of her third grade teachers, participated telephonically (Dist. Ex. 3 at p. 2; see also Tr. at pp. 31-33, 69-71; Dist. Ex. 4 at p. 1).

The parents argue in the petition that the impartial hearing officer erred because the June 2010 CSE was improperly constituted insofar as it did not include an additional parent member and did not permit the student's father to actively participate in the CSE meeting, and, furthermore, that the impartial hearing officer erroneously found that neither deficiency significantly impeded their opportunity to participate in the decision-making process. The district counters that an additional parent member was not required because the June 2010 annual review meeting did not involve the initial placement of the student in a special class, and that regarding the participation of the student's father, regulations did not require the active participation of more than one parent at a CSE meeting, and that even if the father's active participation was required, the hearing record indicated that the student's father participated to the extent possible. Alternatively, the district asserts that even if the lack of an additional parent member and/or the student's father are deemed to constitute procedural violations, the impartial hearing officer correctly determined that neither violation rose to the level of depriving the student of a FAPE.

#### **Additional Parent Member**

Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.321), in some circumstances New York State law requires the presence of an additional parent member at the CSE meeting that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR



200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July 11, 2005]; Application of a Student with a Disability, Appeal No. 11-042; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-105; Application of the Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (see 8 NYCRR 200.5[c][2][v]). Under New York State law, CSE subcommittees have the authority to perform the same functions as the CSE, with the exception of instances in which a student is considered for initial placement in a special class, or a student is considered for initial placement in a special class outside of the student's school of attendance, or whenever a student is considered for placement in a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4]). State law further provides that when a district is permitted to convene a CSE subcommittee, the subcommittee need not include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]-[5]).

In the instant matter, it is uncontroverted by the parties that the parent did not waive the participation of an additional parent member at the June 2010 CSE annual review meeting (Tr. pp. 84-85, 319-20). Although the documentary evidence characterized the meeting as a "CSE Review" meeting (Dist. Exs. 3 at pp. 1-2; see Dist. Ex. 4 at p. 2), the evidence contained in the hearing record also establishes that the student was not being considered for initial placement in a special class, a school primarily serving students with disabilities, or a school outside of the student's district (see Tr. pp. 322-25; Dist. Exs. 1 at p. 2; 3 at pp. 1-2; 12; Parent Ex. P). Accordingly, the June 2010 CSE could have permissibly proceeded as a CSE subcommittee, and an additional parent member would not have been a required participant (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4][i]-[iii]). In their petition the parents allege no more than a technical violation of the parent member requirement and, upon review, I find no basis in the hearing record upon which to disturb the impartial hearing officer's finding that the lack of an additional parent member on the June 2010 CSE did not deprive the student of a FAPE for the 2010-11 school year.

### **Parent Participation**

The IDEA entitles parents to participate in the substantive formulation of their child's educational program, and requires the CSE to consider any "concerns" parents have for "enhancing the education of their child" when it formulates the IEP (20 U.S.C. § 1414[d][3][A][ii]; Winkelman, 550 U.S. at 516-17, 530). A school district has an affirmative obligation to take steps to ensure that one or both parents of a student are present at each CSE meeting or are afforded the opportunity to participate, and, if neither parent can attend a CSE meeting, to use other methods to ensure participation, including individual or conference telephone calls (34 C.F.R. § 300.322 [a], [c]; Cerra, 427 F.3d at 192-93; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 395 [S.D.N.Y. Jan. 29, 2010]).

According to the impartial hearing testimony of the school psychologist, both of the student's the parents came to the CSE meeting,<sup>12</sup> together with the student's younger sibling, and upon arrival, explained that they were unable to obtain a babysitter, and asked the school

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<sup>12</sup> The hearing record indicates that the student's father "took off work" to attend the meeting (Tr. p. 348).

psychologist "what [the district] could do to help" (Tr. p. 33). The school psychologist explained that the student's younger sibling could not stay alone and unattended in the waiting room and, therefore, for most of the annual review meeting, the student's father stayed with his daughter outside of the CSE meeting room while the student's mother attended the June 2010 CSE meeting (Tr. pp. 33, 116-18). The school psychologist testified that "I felt bad that we couldn't get the father to participate," but recalled that "[m]aybe the mother went out to talk to the father, or tried to, at some point telephone him on the cell phone (Tr. p. 33). That might not have worked. But I have the feeling that the mom did touch base very briefly, towards the end of the meeting, with – with the father" (Tr. p. 33).

According to the student's mother, the student's father "was convinced not to attend the meeting because we had brought our younger daughter with us" (Tr. p. 346). She stated that the school psychologist "pretty much insisted" that the couples' younger child not attend the meeting, indicated that the CSE did not have childcare available, and that the student's father "had to stay in the waiting room with her, or somebody had to" (Tr. p. 347). She advised that when she realized that her husband could have attended via his cell phone and asked the CSE to "conference him in," the CSE was "very unhappy" with her, but "finally did it," at that point, however, the meeting was "pretty much over" and "they really didn't want to go over anything" (*id.*). She confirmed that the student's father did not participate in the CSE's discussions about annual goals or program recommendations (*id.*).

In the present case, I find the evidence contained in the hearing record to be ambiguous with regard to the nature of any discussion held between district personnel and the parents upon their arrival at the annual review meeting, however, it is not sufficient to establish that the district actively excluded the student's father from the proceedings. While the federal and State regulations envision that both parents will receive notice and an opportunity to participate in a CSE meeting for their child (34 C.F.R. § 300.322[a]; 8 NYCRR 200.5[d]), they also contain language recognizing that actual participation of both parents may not be feasible under all circumstances. With regard to actual participation, federal regulations further provides that district must examine whether alternative means of communication are available "if neither parent can attend" a CSE meeting (34 C.F.R. § 300.322[c]). In this instance, both parents were clearly offered the opportunity to attend the meeting and appeared for that purpose. The student's mother was able to actually participate in the CSE meeting, and although not clearly successful, efforts were made to include the student's father through alternative means of communication (Tr. p. 347). This is not an instance in which neither parent was able to attend the CSE meeting.<sup>13</sup> Additionally, there is no indication that the parents objected to proceeding with the meeting with only one parent in the meeting room, and, while there is no evidence demonstrating that the district offered to reschedule the meeting to a different date to enable the parents to secure child care, neither is there any evidence suggesting that the parents themselves sought to reschedule. Furthermore, the hearing record establishes that the student's mother attended and actively participated in the entire annual review meeting, during which she, together with the representatives from the NPS, expressed disagreement with the district's recommended placement and indicated a "preference to continue [the student] in her present school because of concerns over transition, familiarity with [the]

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<sup>13</sup> I note however, that I in no way imply that a district always has carte blanche to proceed with the presence of one parent, and in some circumstances a district may be required to demonstrate its efforts to provide both parents with a reasonable opportunity to participate in a CSE meeting at the same time.

school, and the [continuity] of having the same school setting and [social]-emotional reasons" (Dist. Ex. 3 at p. 14; see Dist. Ex. 4 at p. 2). Nor does the student's mother allege that the issue of her daughter's placement was not discussed with her, or that the CSE was unaware of her preference for the student to continue attend the NPS for the 2010-11 school year. Lastly, I find no evidence in the hearing record or allegation advanced by the parents suggesting that the interests of the student's father were opposed to or were different from those communicated by the student's mother relative to their daughter's educational program.

For the reasons described above, I find that the evidence contained in the hearing record demonstrates that at the June 2010 CSE annual review meeting, the parents were offered the opportunity to meaningfully participate in the development of the student's IEP, and that the lack of actual participation by the student's father for a significant portion of the CSE meeting did not deprive the parents of the opportunity to meaningfully participate in the development of their daughter's IEP (see E.H. v. Bd. of Educ., 2009 WL 3326627 at \*3 [2d Cir. Oct. 16, 2009]; N.C. v. Bedford Cent. Sch. Dist., 2008 WL 4874535 at \*13-\*14 [2d Cir. Nov. 12, 2008]; Cerra, 427 F.3d at 192-93).

### **June 2010 IEP**

To address the student's attending deficits, behavior difficulties, and academic weaknesses, the June 2010 CSE recommended placement of the student in a 12:1 special class in a community school for all areas of instruction (Dist. Ex. 3 at pp. 1, 13). The IEP noted that the student required a highly structured academic setting and redirection to task and provided testing accommodations in the form of extended time (2.0) and a separate location (id. at pp. 3, 5, 15). The June 2010 IEP recommended annual goals and short-term objectives addressing the student's academic deficits, attending weaknesses, and need for self-regulation (id. at pp. 7-9, 12). In addition, to address the student's expressive, receptive, and pragmatic language deficits, the June 2010 CSE recommended that the student receive speech-language therapy, twice per week for 30 minutes per session in a 2:1 setting and developed annual goals and short-term objectives to improve the student's language skills for academic and pragmatic needs (id. at pp. 2, 9, 15). To address the student's deficits in self-regulation and motor skills, the CSE recommended that the student receive OT twice per week for 30 minutes per session in a 1:1 setting and developed annual goals and short-term objectives related to improving the student's self regulation and attention to task and visual and fine motor skills (id. at pp. 2, 12, 15). The June 2010 CSE further recommended that the student receive one 30-minute session of counseling per week in a 2:1 setting to address her social/emotional needs and developed goals aimed at improving the student's self confidence and competence with peers (id. at pp. 2, 10, 15). I also note that the school psychologist testified that the material contained in the social/emotional performance section of the June 2010 IEP "was forwarded to the CSE" from the NPS (Tr. p. 127).

The parents allege that the June 2010 IEP inaccurately described the student's baseline level in reading comprehension, and that this inaccuracy rendered the IEP deficient to the extent that it denied the student a FAPE for the 2010-11 school year, and that the IEP failed to address the student's social/emotional deficits, insofar as the annual goals and short-term objectives contained in the June 2010 IEP were not tailored to meet the student's specific social/emotional needs. For the reasons discussed below, I do not find the requisite support in the hearing record for either of these contentions to warrant overturning the impartial hearing officer's decision.

## Present Levels of Performance

In the instant appeal, the hearing record reflects that the June 2010 CSE considered the March 2010 diagnostic psychiatric examination (Dist. Ex. 5), the February 2010 psychological evaluation (Dist. Ex. 6), and the April 2010 reports from the student's then current private placement addressing her overall educational performance (Dist. Ex. 7), counseling (Dist. Ex. 8), speech-language (Dist. Ex. 9), and OT (Dist. Ex. 10) in the development of the student's IEP for the 2010-11 school year (see Tr. pp. 34, 46-51, 66, 118-19, 127, 135-37, 341; Dist. Ex. 3 at pp. 7-12).

Among other elements an IEP must include a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]).

According to the hearing record, at the time of the June 2010 CSE annual review meeting, academically, the student was judged to have at least average to high average intellectual potential, but she exhibited significant difficulties with expressive writing, mastery of basic mathematics, comprehending texts due to her distractibility, and language processing (Dist. Ex. 6 at p. 1; see Dist. Ex. 7 at p. 2). At the end of third grade, the student's special education teacher from her then-current placement estimated her academic instructional levels to range from an early to mid second grade levels (Dist. Ex. 3 at p. 3). In addition to her diagnoses of an ADHD and a disruptive behavior disorder, the hearing record revealed that the student exhibited problems with language processing, social communication, and the development of graphomotor skills (Dist. Exs. 5; 7; 10 at p. 1; see Dist. Ex. 9).

The June 2010 IEP described the student's reading comprehension skills at the mid second grade level; consequently, the IEP included a goal which referenced the student demonstrating critical thinking skills as she read and responded to written language on a third grade level (Dist. Ex. 3 at pp. 3, 7).<sup>14</sup> The IEP reflected the student's standard score for reading comprehension and its corresponding eighth grade equivalent as reported by the student's private psychologist at the time of his February 2010 psychological evaluation of the student (id. at p. 3; see Dist. Ex. 6 at p. 4).

During the impartial hearing, the student's private psychologist denied that the student's grade equivalent score for reading comprehension was a typographical error, but acknowledged that due to the particulars of the WIAT-II, the grade equivalent "can be very inflated" and confirmed that the student "was not in any way, shape, or form reading at an eighth-grade equivalent" (Tr. pp. 212-13; 234-38). He did, however, opine that the student was reading above the third grade level listed in the student's IEP goals (Tr. p. 216; see Dist. Ex. 3 at p. 7). The private psychologist estimated that at the time of the February 2010 evaluation, her reading comprehension "probably about a fourth-grade level, at least.... [b]ased on her trajectory of when I saw her in [2008] compared to when I saw her [in February 2010]" (Tr. pp. 227, 234-36). He added that the discrepancy between this test score and the teacher estimates contained on the June

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<sup>14</sup> The petition does not otherwise allege that the student's IEP (i.e. reading goals) was deficient with respect to the student's reading.

2010 IEP was "exactly the problem" with the student, because "in a classroom milieu, even a small therapeutic, learning disability environment ... when she's asked to interact within that milieu, her performance is lowered" (Tr. p. 235). He noted that, as reported by the student's teachers, the student's emotional difficulties significantly affected her day to day functioning (id.). He opined that the same student, with the same reading level, would perform "a lot better" in a 1:1 setting with a psychologist who was able to "scaffold, nurture and support" them, adding that the student's actual reading comprehension level resided somewhere in between her test score and the teacher estimate, but that "all the stars have to align [not only] from a learning perspective, but also really from an emotional perspective" (id.). The student's mother testified that neither she nor the student's third grade teacher at the NPS agreed with the district's description of her daughter's reading comprehension level when the issue was discussed at the annual review meeting, and that the student's teacher "said she wanted to be on record as disagreeing with the placement," but it is unclear from the hearing record whether the student's mother actively voiced her own disagreement to the CSE as well (Tr. pp. 326-27).

The school psychologist testified that after reviewing the February 2010 psychological evaluation, he believed that the student's grade equivalent score on reading comprehension was "highly unlikely," given her standard score, and assumed that it was "in error" (Tr. pp. 41-2, 67-8, 131-33). He reported that the instructional level for reading comprehension reflected on the student's IEP was based on a combination of information from the student's third grade teacher and "what we expected the student ... reasonably to be taught at – or towards" (Tr. pp. 43, 131-33).

The hearing record reflects that the mid second grade reading comprehension level attributed to the student by the CSE was the product of its reasonable reliance on discussion with the student's third grade teacher at the NPS, who presumably had worked with the student on a daily basis during the school year, and the CSE's collective experience in assessing the performance levels of other students. Furthermore, as discussed above, the CSE was obligated only to consider the student's WIAT-II scores in its development of the IEP, and was not required to accept them as dispositive (see Watson, 325 F. Supp. 2d at 145). Additionally, the student's private psychologist also noted that the student's performance fluctuated depending on the setting and the student's emotional state (see Tr. p. 235). Lastly, I note that the special education teacher of the recommended placement testified during the impartial hearing that within the first few days of the new school year, he assessed his students in various academic areas, including reading comprehension (Tr. pp. 148-49), during which any inaccuracy could have been addressed. Based upon the evidence contained in the hearing record, I decline to find that the district's description of the student's reading level contained in the June 2010 IEP constituted a deficiency that, by itself, rose to the level of denying the student a FAPE.

## Social/Emotional Goals

With respect to the student's social/emotional goals contained in the June 2010 IEP,<sup>15</sup> 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 and to enable the student to be involved in and make progress in the general education curriculum (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

In the petition, the parents argue that the student's "disruptive" behaviors were not specifically reflected in the annual goals and short-term objectives contained in the June 2010 IEP. However, review of the June 2010 IEP indicates that it included annual goals targeting the student's pragmatic language skills, social skills and competence with peers, and self-regulation and attention to task (Dist. Ex. 3 at pp. 7-12). With respect to her social/emotional functioning, March 2010 diagnostic psychiatric evaluation noted that according to the Teacher Report Form (TRF) completed by the student's third grade teacher, the student was often overly dependent on adults during social interactions, exhibited pragmatic language difficulties, was often noisy, acted young for her age, had difficulty following directions, was impulsive, called out, talked excessively, and disrupted class discussions, often being loud, demanding attention, and disobeying class rules (Dist. Ex. 5 at p. 4; see also Tr. pp. 202-05, 207-09, 279-80; Dist. Exs. 6 at p. 2; 7 at p. 1; 8; 9 at p. 1). The present levels of performance in the student's June 2010 IEP reflected that her "impulsivity and disorganization make both academic and social tasks difficult," and noted that although friendly and willing to initiate conversations on topics of interest to her, the student "may be distant when the conversations do not interest her," was frequently off topic, had difficulty initiating general conversation, and needed "pre-programming and scaffolding by an adult to enter social situations" (Dist. Ex. 3 at pp. 3, 5).

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<sup>15</sup> In its answer, the district contends that the parents should be precluded from raising the issue of the appropriateness of the district's recommended program in addressing the student's social/emotional needs, as it was not raised in the parents' due process complaint notice (see Dist. Ex. 1). 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]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at \*6 [S.D.N.Y. Sept. 16, 2011]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*8 [S.D.N.Y. Aug. 27, 2010]; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; Application of a Student with as Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112). In the instant case, the parents due process complaint notice is less than clear with respect to this issue (see Dist. Ex. 1). However, for the reasons discussed in this decision, I find that assuming, for the sake of argument that the issue had been properly raised, the evidence contained in the hearing record nevertheless demonstrates that the district's recommended program addressed the student's social/emotional needs as described in the materials available to the June 2010 CSE.

The IEP's short-term objectives addressed, among other things, improving the student's body language, eye contact, vocal tones, ability to anticipate consequences, active listening, attention and body control, impulse control, ability to understand how her behavior was perceived by peers, and ability to demonstrate more age-appropriate behaviors (*id.* at pp. 9, 10, 12). Additionally, during the impartial hearing, the school psychologist explained how the student's anxiety and emotional behavior dysregulation were addressed by some of the OT and speech-language goals (Tr. pp. 92-98). Based upon the foregoing, I find that the student's social/emotional needs were adequately reflected in and addressed by the annual goals and short-term objectives contained in the June 2010 IEP.

### **12:1 Special Class Placement**

Next I turn to the parties' dispute regarding the appropriateness of the recommended 12:1 special class placement. The parents argue in the petition that the school psychologist failed to articulate any basis for placing the student in a class larger than the 9:2 class she was already in at the Aaron School, and that the size of the district's 12:1 recommended class conflicted with the recommendations set forth in the reports of the student's private psychologist, third grade teachers, and related service providers.

According to the student's mother, staff from the NPS who participated at the June 18, 2010 CSE meeting "wanted to be on the record as disagreeing with the [recommended 12:1] placement because [the student] was having trouble with two teachers in – among eight children, as it was," and their disagreement was duly noted by the June 2010 CSE (Tr. pp. 73-74, 326-27; Dist. Ex. 3 at p. 14).<sup>16</sup> The student's private psychologist reiterated his recommendation originally advanced in his February 2010 evaluation for a small, structured environment, noting that even in a 1:1 setting, the student "evidenced some difficulties with regulation, learning, with how she interacts and relates," and was "easily overwhelmed," adding that the student "need[ed] a lot of teacher-to-student – a lot of teacher direction, adult direction more one-on-one," opining that a smaller student-teacher ratio "at least [gave] her the opportunity for making some appropriate progress both in the learning, as well as in modulating the emotions and the social situations before they [became] out of hand" (Tr. pp. 209-10; Dist. Ex. 6 at p. 2). The psychologist advised that his definition of "small" was "certainly less than 12 children ... in the classroom" (Tr. pp. 224-25).

The district representative characterized the recommendation to place the student in a 12:1 special class in a community school as "an educational recommendation" based upon the CSE's consideration of documentation submitted by the NPS, as well as information from her third grade teachers developed during the CSE meeting indicating that the student was functioning at a second grade level as she completed third grade (Tr. p. 52). He explained that the CSE considered a setting that would afford the student the most opportunity to interact in a general education setting, and that the CSE considered recommending placement in an integrated co-teaching (ICT) before rejecting it based upon the student's attention and behavior issues, noting that the CSE "took to heart" concerns expressed by her third grade teachers regarding the student's behavior and attention, which prompted its recommendation of the more restrictive 12:1 special class setting in a community school (Tr. pp. 52-53; Dist. Ex. 3 at p. 14). The school psychologist advised that the

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<sup>16</sup> The two staff members from the NPS who participated in the June 2010 CSE annual review meeting did not testify during the impartial hearing.

12:1 special classes "ha[d] a lot of structure built into them" and noted that "the teachers typically developed a classroom management plan, for all students," adding that the recommended program used "strong" curricula tied to the general education program (Tr. p. 53; see Tr. p. 93). He stated that in making a placement recommendation, he needed to carefully weigh taking a student out of a general education setting due to consequences in terms of the student's "education, and self-esteem" (Tr. p. 54).

The school psychologist identified elements of the recommended 12:1 special class that made it "a highly structured academic setting," including a highly qualified special education teacher who developed a curriculum based upon the general education curriculum and implemented it in a sequential way, the organization of students into smaller groups or provide differentiated or 1:1 instruction, the observation of students with respect to "classroom decorum" such as attention to task, assignment completion, and working with peers, and the development and implementation of a classroom management plan where the students were rewarded for desired behaviors and "the rules of ... the classroom [were] emphasized, and that create[d] a structured situation" (Tr. pp. 125-26). He acknowledged that the staff from the NPS disagreed with the 12:1 special class recommendation, believing that her current class ratio of 9:2 was more appropriate (Tr. pp. 73-74; see Tr. p. 327), but noted that their recommendations of a "small register" and "highly structured academic setting" were embodied in the program modifications contained in the June 2010 IEP, but in the context of a 12:1 setting as opposed to a 9:2 setting (Tr. pp. 75-78).

The school psychologist explained that that his belief that the student did not require a 9:2 class ratio was based on the information available to the CSE at the annual review meeting, including documents and input received from the student's third grade teachers, and discussion among the CSE members (Tr. pp. 78-79). He opined that referral of the student to the central based support team (CBST) would have been inappropriate, because she was "achieving fairly well," and he believed that her academic and social/emotional needs could have been addressed in the 12:1 class in community school, which, as the student's LRE,<sup>17</sup> would have avoided isolating the student from the general education population and potentially depriving her of "the opportunity perhaps to get closer to grade level in her area of strength," and left open the possibility of "maybe ... mainstreaming the student at some point" (Tr. pp. 138-39).

Based upon the foregoing, I conclude that the evidence contained in the hearing record established that the district's recommended educational program consisting of a 12:1 special class in a community school and related services was reasonably calculated to enable the student to receive educational benefits for the 2010-11 school year.

## **Conclusion**

In summary, I find that the parents' appeal of the impartial hearing officer's determination that the district offered the student a FAPE must be dismissed. Additionally, the hearing record contains evidence showing that the June 2010 CSE's recommendation of a 12:1 special class in a

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<sup>17</sup> Even if a private school setting has the potential for providing superior services as the parents and NPS staff suggest in this case, a school district is nevertheless mandated to avoid placing a student in an in-state private school if the student may benefit from instruction in a less restrictive public school setting (see 8 NYCRR 200.6[j][1][iii]).



community school with related services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). The hearing record demonstrates that the June 2010 IEP identified the student's multiple areas of need, developed appropriate annual goals and short-term objectives to address those needs, and recommended an appropriate placement in the LRE (see 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]).

Having reached this determination, it is not necessary to address the appropriateness of the student's unilateral placement at the Aaron School, and I need not consider whether equitable considerations support the parents' reimbursement request; thus, the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Dep't of Educ., Appeal No. 11-080; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-094; Application of a Student with 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 that I need not address them in light of my determinations.

**THE APPEAL IS DISMISSED**

**Dated: Albany, New York  
October 21, 2011**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**