



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-123

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

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

Partnership for Children's Rights, attorneys for respondent, Erin McCormack-Herbert, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to directly pay the Cooke Center Academy (CCA) for the costs of the student's tuition for the 2010-11 school year. The parent cross-appeals from that portion of the impartial hearing officer's decision which found that the district relied upon appropriate evaluative data to develop the student's individualized education program (IEP) for the 2010-11 school year, but failed to address the parent's concerns regarding the assigned school. The appeal must be sustained. The cross-appeal must be dismissed.

Background

At the time of the impartial hearing, the student was attending 11th grade at CCA, where he has continuously attended school since 9th grade during the 2008-09 school year (see Tr. pp. 388, 398, 421, 480-81, 483; Parent Exs. B; C at p. 1; see also Tr. pp. 374-75).¹ During the 2010-11 school year at CCA, the student's classroom consisted of 11 students who ranged in age from

¹ During the 2008-09, 2009-10, and 2010-11 school years at CCA, the student participated in the "Learning for Living" program, which focused on integrating adaptive functioning skills into academic course work, such as mathematics, English language arts (ELA), and social studies (see Tr. pp. 133-41, 401, 546; Parent Ex. A at pp. 1-4). The program integrated the provision of related services into the classroom, and addressed the "needs of students with deficits in social communication and adaptive functioning" (Tr. p. 544).

15 to 19 years old, and the student received speech-language therapy, counseling, and occupational therapy (OT) (see Tr. pp. 140-61, 217, 365-70, 372-73, 544-46; Parent Ex. C at p. 1).² The Commissioner of Education has not approved CCA as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

In this case, the Committee on Special Education (CSE) convened on March 4, 2010 to conduct the student's annual review and to develop his IEP for the 2010-11 school year (Tr. pp. 262-63; Dist. Ex. 3 at pp. 1-2). The following individuals attended the CSE meeting: a district special education teacher (who also acted as the district representative) and a district school psychologist; an additional parent member; the student's mother; the student's then-current providers at CCA, including his English language arts teacher, his speech-language pathologist, and his mathematics teacher (via telephone); and the assistant head of CCA (via telephone) (Dist. Exs. 3 at p. 2; 4 at p. 1; see Tr. pp. 274, 277, 386).³ In preparation for the student's annual review, the CSE received a 16-page progress report from CCA, dated November 2009, and the district's special education teacher who attended the March 2010 CSE meeting had conducted a classroom observation of the student at CCA in November 2009 (Dist. Exs. 5 at pp. 1-16; 6; see Tr. pp. 261-62).⁴ The 2009 CCA progress report included information about the student's identified needs and progress in the following areas: language skills (pragmatic language skills, oral/written language skills, and reading/listening comprehension); personal independence skills (social skills); social skills: applied (interpersonal skills); adaptive life skills (process skills, organization, routines and schedules); functional literacy (ELA); community studies (social studies); mathematics for daily living (mathematics communication, representation, problem solving, and connections; linear measures and area); thematic science; health; technology; art; and gym (see Dist. Ex. 5 at pp. 1-16).

To develop the IEP, the CSE relied upon information contained in the 2009 CCA progress report and the classroom observation, as well as input from the student's mother and from the student's then-current teachers and speech-language provider at CCA (Tr. pp. 264-73, 278). The CSE relied upon the student's then-current teachers to determine his present levels of academic achievement, which were documented in the IEP as follows: decoding, 4.5 grade equivalent; reading comprehension, 2.5 grade equivalent; listening comprehension, 2.5 grade equivalent;

² According to documentary evidence submitted by the parent, during the 2010-11 school year at CCA the student received three 45-minute sessions per week of speech-language therapy in a small group, three 45-minute sessions per week of counseling in a small group, three 45-minute sessions per week of OT in a small group, and one 45-minute session per week of individual OT (see Parent Exs. C at p. 1; D at p. 1; E at p. 1).

³ The district's special education teacher who attended the March 2010 CSE meeting had also participated in the student's annual review in 2009 (see Tr. pp. 261-62).

⁴ According to the 2009 CCA progress report, the student received three 45-minute sessions per week of speech-language therapy in a small group and three 45-minute sessions per week of counseling in a small group (Dist. Ex. 5 at p. 5).

mathematics computation, 2.1 grade equivalent; and mathematics problem-solving, 1.0 grade equivalent (Dist. Ex. 3 at p. 3; see Tr. pp. 272-73).⁵

As a result of the information presented indicating that the student's "significant academic and cognitive delays prevent [him] from participating within the general education environment," the CSE recommended a 12-month school year and placing the student in a 12:1+1 special class in a specialized school with related services of three 45-minute sessions per week of speech-language therapy in a small group and three 45-minute sessions per week of counseling in a small group for the 2010-11 school year (Dist. Exs. 3 at pp. 1-2, 11-13; 4 at pp. 1-2; 5 at pp. 1-16; 6; see Tr. pp. 273, 281-85, 301, 569).⁶ Upon the request of the CCA participants, the CSE modified the ratios in which the student would receive counseling—from individual counseling to counseling in a small group of three—and speech-language therapy—from a small group of two to a small group of three (Dist. Ex. 3 at pp. 2, 13; see Tr. pp. 269-70, 299, 517-18; Dist. Ex. 5 at p. 5). To address the student's identified academic management needs, the CSE recommended small group instruction, scaffolding, directions repeated and rephrased as needed, visual and auditory cues, teacher modeling and redirection to task, a multisensory approach, and the use of graphic organizers/graphs/charts/graph paper/highlighter (Dist. Ex. 3 at p. 3). To address the student's identified social/emotional management needs, the CSE recommended small group instruction, positive reinforcement for on-task behaviors, and counseling (id. at p. 4). The CSE also reviewed, discussed, and generated annual goals and short-term objectives targeting the student's identified needs in the following areas: decoding, reading comprehension, listening comprehension, mathematics computation, mathematics problem-solving, vocabulary, written expression, pragmatic language skills, expressive language skills, speech-language skills, transition, and social/emotional needs (Dist. Exs. 3 at pp. 6-10; 4 at pp. 1-2; see Tr. pp. 278-79, 281-99, 318-19).⁷ In addition, the CSE reviewed and discussed the student's transition and vocational needs, and incorporated a transition plan into the IEP (Dist. Exs. 3 at pp. 4, 10, 14; 4 at p. 2; see Tr. pp. 266-67, 298-99, 519-21).

By notice to the parent dated June 14, 2010, the district summarized the special education programs and related services recommendations for the student for the 2010-11 school year, and

⁵ The grade equivalents used to describe the student's present levels of academic achievement resulted primarily from the administration of three assessments: the "GRADE" (Group Reading Assessment and Diagnostic Evaluation), the "GMADE" (Group Mathematics Assessment and Diagnostic Evaluation), and the "STAR" (compare Dist. Ex. 3 at p. 3, with Tr. pp. 172-73; see generally Parent Exs. F-I; Application of the Dep't of Educ., Appeal No. 10-115 n.8 [describing the "STAR" evaluation as a standardized test or assessment used to determine reading and mathematics skill levels]).

⁶ The district's special education teacher testified that none of the CSE participants expressed objections or disagreements with the recommendations (see Tr. pp. 300-301). In addition, the CCA speech-language pathologist who provided services to the student during the 2009-10 school year and who attended the March 2010 CSE meeting testified that none of the CSE participants expressed objections or disagreements with the level of speech-language therapy services that she recommended for the student for the 2010-11 school year, which were incorporated into the student's 2010-11 IEP (see Tr. pp. 547, 566-69). The parent also testified that she did not object to the speech-language therapy recommendations made at the March 2010 CSE meeting and that the CSE reviewed and discussed the transition plan and supports set forth in the IEP (see Tr. pp. 517-21; Dist. Ex. 3 at p. 14).

⁷ According to the district special education teacher's testimony, the annual goals and short-term objectives were drafted with the direct participation of the student's CCA providers, and at the CSE meeting, none of the participants expressed any objections or disagreements with the annual goals or short-term objectives (see Tr. pp. 281-84, 286-99).

identified the school to which the district assigned the student (Dist. Ex. 8). By letter dated June 25, 2010, the parent wrote to the district, indicating that although she "appreciate[d] the CSE's offer of 12-month services," the student would "not return to school until September," and he would not "attend school during July and August 2010" (Parent Ex. V at p. 1).⁸ In addition, the parent expressed "concerns" about the "appropriateness" of the assigned school based upon her visit to the assigned school on June 18, 2010 (*id.*). The parent indicated that she had scheduled a second visit to the assigned school on July 13, 2010, to observe the "proposed class and speak with additional staff members" (*id.*).⁹ After her second visit to the assigned school on July 13, 2010, the parent wrote to the district by letter dated July 20, 2010 (Parent Ex. W at p. 1). In her July 2010 letter, the parent indicated that upon her arrival, she learned that most of the students in the school "had gone swimming," and the guidance counselor could only show her a class with "three students, one teacher, and three paraprofessionals," which the parent noted was not appropriate in light of the CSE's recommendation to place the student in a 12:1+1 special class (*id.*). The parent also indicated that after this second visit, she spoke with the assistant principal of the assigned school who "could not answer [her] questions," and the parent further indicated that she would call the assistant principal in the beginning of August for more information (*id.*).¹⁰

By letter dated August 24, 2010, the parent rejected the student's 2010-11 IEP and the particular school to which the district assigned the student, and notified the district of her intention to unilaterally place the student at CCA for the 2010-11 school year and to seek public funding for the student's placement (Parent Ex. Y at pp. 2-3). With respect to the student's 2010-11 IEP, the parent alleged that the district did not "adequately evaluate" the student prior to the March 2010 CSE meeting to assess his "psychoeducational and speech/language functioning, as well as his adaptive life skills and transition skills" (*id.* at p. 2). She further noted that the 2010-11 IEP failed to adequately describe the student's "transition needs, and contain[ed] a vague and inadequate list of transition services" (*id.*). The parent explained in the letter that based upon her visits to the assigned school on June 18 and July 13, 2010, she determined that the assigned school was not appropriate to meet the student's special education needs because the students she observed were "significantly lower functioning" than the student, "both socially and academically" (*id.*). In addition, the parent indicated that the assigned school was not "reasonably calculated" to meet the student's speech-language needs (*id.* at p. 3).

Next, the parent wrote to the district by letter dated September 23, 2010 (Parent Ex. Z at p. 1).¹¹ After summarizing her previous two letters to the district, the parent described a third visit to the assigned school on September 17, 2010, where she observed a 6:1+1 special class with five students, two of whom were "nonverbal" (*id.* at p. 2). Based upon her observations, the parent

⁸ The parent testified that the student did not attend school during summer 2010 because they traveled to see relatives and she liked to spend time with the student during the summer (see Tr. pp. 483-84). The parent had made plans for summer 2010 in January 2010 (see Tr. p. 514).

⁹ The parent's June 25, 2010 letter did not express any concerns, objections, or disagreements with the student's 2010-11 IEP, either procedurally or substantively (see Parent Ex. V at p. 1).

¹⁰ The parent's July 13, 2010 letter did not express any concerns, objections, or disagreements with the student's 2010-11 IEP, either procedurally or substantively (see Parent Ex. W at pp. 1-2).

¹¹ The parent testified that her attorney assisted her in writing the June 25, July 20, and September 23, 2010 letters to the district (Tr. pp. 505-07). The parent's September 23, 2010 letter did not express any concerns, objections, or disagreements with the student's 2010-11 IEP, either procedurally or substantively (see Parent Ex. Z at pp. 1-2).

noted her belief that the classroom was not appropriate because the students were "significantly lower functioning" than the student and further, that the 6:1+1 special class was not consistent with the CSE's recommendation to place the student in a 12:1+1 special class (*id.*). The parent rejected the assigned school, and advised that she would seek public funding for the student's unilateral placement at CCA for the 2010-11 school year (*id.*).

Due Process Complaint Notice

By due process complaint notice, dated April 12, 2011, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year by failing to adequately evaluate the student, failing to develop an appropriate IEP, and failing to offer an appropriate school placement (Dist. Ex. 1 at p. 1). More specifically, the parent alleged that the 2010-11 IEP was "not based upon adequate evaluations" and did not meet the student's special education needs (*id.* at p. 2). The parent complained that the student's last psychoeducational evaluation in January 2008 did not include an "analysis of the nature of [the student's] disability or his special education needs" and similarly, the student's last adaptive skills evaluation in 2008 only provided a "general categorization of [the student's] functional levels," but did not determine whether the student met the "diagnostic criteria for mental retardation" (*id.* at p. 3). In addition, the parent maintained that the district did not "remedy the deficiencies in its January 2008 evaluation prior to recommending [the student's] educational program for the 2010-11 school year" (*id.*). As a result of the alleged deficiencies in the January 2008 evaluation reports, the parent asserted that the student's 2010-11 IEP did not adequately describe the student's individual needs, and the IEP did not include descriptions of the student's "activities of daily living, level of intellectual functioning, adaptive behavior, [and] expected rate of progress in acquiring skills and information" consistent with State regulations (*id.*).

Next, the parent complained that the 2010-11 IEP failed to adequately address the student's speech-language needs (Dist. Ex. 1 at p. 3). In particular, the parent alleged that the district failed to evaluate the student's speech-language needs since 2005 and that the recommended speech-language therapy services were not consistent with State regulations governing the provision of services for students with autism (*id.*). The parent noted that although the IEP recommended three 45-minute sessions per week of speech-language therapy in a group of three, the IEP did not provide for the student to receive "individualized language instruction in a group of six or less" (*id.*). The parent also alleged that the student's 2010-11 IEP did not adequately address the student's transition needs (*id.* at p. 4). The parent specifically asserted that the district failed to conduct a transition or vocational assessment "despite the [district's] explicit agreement to do so as part of the resolution of [the parent's] May 2008 due process complaint" (*id.*). As a result, the parent asserted that the student's IEP did not adequately describe his transition needs, or include appropriate transition goals or transition services (*id.*).

Turning to the issue of the particular school to which the district assigned the student, the parent alleged that the district's offer was not reasonably calculated to meet the student's special education needs (Dist. Ex. 1 at p. 4). The parent asserted that after three visits to the assigned school, speaking with the guidance counselor and the assistant principal, and observing a 6:1+1 special class—as opposed to the recommended 12:1+1 special class—she determined that the students were much lower functioning than the student, "both socially and academically," and the assigned school was not "prepared to implement" the student's IEP or offer the student an appropriate class placement (*id.* at pp. 4-5). The parent also alleged that the assigned school could not provide the student with the recommended speech-language therapy services mandated in his

IEP, the staff lacked adequate training to deal with students with autism, and the assigned school lacked an adequate curriculum and materials to address the student's functional levels (id. at p. 5). As relief, the parent requested an order directing the district to directly pay CCA for the costs of the student's tuition for the 2010-11 school year (id. at pp. 5-6).

Impartial Hearing Officer Decision

On June 14, 2011, the parties proceeded to an impartial hearing, which concluded on July 12, 2011, after three nonconsecutive days (Tr. pp. 1, 251, 475). By decision dated August 23, 2011, the impartial hearing officer concluded that although the district developed an appropriate IEP for the student, the district failed to sustain its burden to establish that the assigned school was appropriate because the evidence did not demonstrate that an appropriate special class was available for the student as of September 2010 (see IHO Decision at pp. 7-13). The impartial hearing officer found that the CSE drafted an IEP that documented the student's present levels of performance in the areas of decoding, reading comprehension, listening comprehension, mathematics computation, and mathematics problem-solving; the IEP indicated that the student performed "significantly below grade and age expectations in all academic areas;" and the IEP included recommendations, such as "small group instruction, directions repeated and rephrased, auditory and visual cues, a multisensory approach, graphic organizers, and scaffolding," to address the student's identified needs (id. at p. 8). In addition, he indicated that the IEP included recommendations for speech-language therapy and counseling services, as well as annual goals, short-term objectives, and transition services (id.).

Contrary to the parent's assertions, the impartial hearing officer concluded that the CSE had sufficient information about the student to accurately assess the student's special education needs and to develop an appropriate IEP to address those needs (see IHO Decision at pp. 8-9). Initially, the impartial hearing officer noted that he found the January 2008 psychoeducational evaluation report and 2008 adaptive functioning evaluation report to be "less than satisfactory" because the reports "simply reported scores, without any characterization of the Student's learning, behavioral or other characteristics," and failed to provide "little, if any, information regarding [the] Student's vocational interest or abilities" (id.). Notwithstanding this finding, however, the impartial hearing officer concluded that the CSE had "more than ample information regarding [the] Student's present levels of performance, his vocational needs and services and his social, emotional and behavioral levels" to develop an appropriate and sufficient IEP from the participation of CSE members familiar with the student's needs, the information provided in the 16-page progress report from CCA, and the active participation of the student's then-current CCA teachers, speech-language pathologist, and the assistant head of CCA (id. at pp. 9, 11).

Turning to the parent's allegations regarding the recommended speech-language therapy services, the impartial hearing officer determined that although the district had not reevaluated the student since 2005, the student's speech-language pathologist from CCA attended the CSE meeting and was "clearly familiar" with the student's "present levels and current needs" in this area (IHO Decision at p. 9). Having provided speech-language therapy to the student during the 2009-10 school year, the impartial hearing officer noted that the CCA speech-language pathologist "would appear to be in a far better position to assess [the] Student's abilities and deficits and recommend needed services than a therapist who might conduct a one-time assessment" of the student (id. at pp. 9-10). Consequently, the impartial hearing officer determined that the CSE had sufficient evaluative data to "prepare" the annual goals and services contained in the IEP with respect to speech-language therapy (id. at p. 10). Similarly, the impartial hearing officer determined that

although the district had "no appropriate vocational assessment/evaluation report," the CSE received "information from the attendees from CCA as to the significant vocational program afforded [to the] Student" at CCA, and thus, he found the transition services in the IEP sufficient (id.). Next, although the impartial hearing officer agreed with the parent's contention that the frequency and amount of the speech-language therapy services recommended in the IEP did not conform to State regulations, he found that this procedural violation, nonetheless, did not rise to the level of a denial of a FAPE (see id. at pp. 10-11). Based upon the foregoing, the impartial hearing officer concluded that the district developed an IEP sufficient to meet the student's special education needs (id. at p. 11).

However, the impartial hearing officer ultimately concluded that the district failed to offer the student a FAPE because it did not sustain its burden to establish that the assigned school had an appropriate classroom available for the student at the beginning of the school year in September 2010 (see IHO Decision at pp. 11-13).¹² To support this conclusion, the impartial hearing officer relied upon the information reported by the parent about her three visits to the assigned school, as well as the testimony of the special education teacher of the recommended 12:1+1 special class, which indicated that the student—as an 11th grade student—would not have been placed in his 12:1+1 special class in September 2010 because the class was composed only of only 9th and 10th grade students, and in September, the 12:1+1 special class "had a full complement" of 12 students (id. at pp. 11-12). In addition, the impartial hearing officer discredited, without explanation, the testimony provided by the assistant principal of the assigned school, which indicated that the student would have remained in the 12:1+1 special class in September 2010 if he had attended the 12:1+1 special class during July and August 2010 (id. at p. 12). Having concluded that the district failed to offer the student a FAPE for the 2010-11 school year, the impartial hearing officer decided in the parent's favor that CCA was appropriate to meet the student's special education and related services' needs and that equitable considerations did not preclude an award of direct payments to CCA for the costs of the student's tuition for the 2010-11 school year (id. at pp. 13-16). The impartial hearing officer, therefore, directed the district to directly pay CCA (id. at p. 16).

Appeal for State-Level Review

The district appeals, arguing that the impartial hearing officer erred in concluding that it failed to offer the student a FAPE for the 2010-11 school year because it did not sustain its burden to establish that the assigned school had an appropriate classroom available for the student at the beginning of the school year in September 2010. The district affirmatively argues that it offered the student a FAPE for the 2010-11 school year. Next, the district asserts that equitable considerations preclude relief, either in whole or in part, because the parent's testimony related to her financial resources and her ability to meet her contractual obligation to pay the tuition costs at CCA strains credulity. The district argues that although the parent's requested relief—payment of tuition costs directly to CCA—is an available remedy, she is not entitled to such relief because the parent is not legally obligated to pay CCA, and therefore, CCA is the only real party in interest in the outcome of this proceeding. Consequently, the district seeks to annul those portions of the impartial hearing officer's decision which found that the district failed to offer the student a FAPE

¹² The impartial hearing officer noted in the decision that although the special education teacher of the recommended 12:1+1 special class who testified on the district's behalf provided "much detail regarding the operation of his classroom and the methods that he would be able to employ in meeting the requirements of [the] Student's proposed I.E.P.," such information was "irrelevant," and therefore, he found it "unnecessary to review or evaluate" (IHO Decision at p. 12).

for the 2010-11 school year, that equitable considerations do not preclude relief, and that the district is liable for the costs of the student's tuition at CCA for the 2010-11 school year.

In an answer, the parent responds to the district's allegations with general admissions and denials. In addition, the parent cross-appeals from the impartial hearing officer's determination, alleging that he failed to address the parent's claim that the assigned school was not reasonably calculated to fulfill the student's speech-language therapy services as mandated in the IEP. The parent also cross-appeals those portions of the impartial hearing officer's decision which found that the CSE had sufficient evaluative data to develop a substantively appropriate IEP, that the parent bore the burden of proof with regard to equitable considerations, and that CCA was the only true party in interest in the outcome of the proceeding. As relief, the parent seeks to uphold the impartial hearing officer's decision in its entirety.

The district filed an answer to the parent's cross-appeal. The district generally asserts admissions and denials in response to the parent's allegations, and affirmatively reargues that the district offered the student a FAPE for the 2010-11 school year, that equitable considerations preclude relief, either in whole or in part, and finally, that the parent is not "actually (or potentially) liable" for the student's tuition costs at CCA.

Applicable Standards

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

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

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C.

§ 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding

the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Turning first to the parent's cross-appeal, the parent challenges the impartial hearing officer's determination that the CSE had sufficient evaluative data to develop a substantively appropriate IEP. Specifically, the parent argues that the district's failure to conduct timely, adequate evaluations of the student prior to the March 2010 CSE meeting in the areas of cognitive functioning, adaptive functioning, speech-language functioning, and transition constituted a procedural violation that impeded the student's right to receive a FAPE, impaired the parent's opportunity to participate in the decision-making process in developing the student's IEP, and deprived the student of educational benefits. Upon independent review and due consideration of the evidence, however, the impartial hearing officer properly concluded that the CSE had sufficient information about the student to accurately assess his special education needs and to develop an appropriate IEP to address those needs (see IHO Decision at pp. 8-9). Therefore, as discussed below, I find that the parent's claims are without merit and must be dismissed.

Psychoeducational (Cognitive) and Adaptive Behavior Evaluations

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 and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[b][1]-[2]). 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]).

Although it is undisputed that the district's most recent psychoeducational evaluation and adaptive behavior assessment of the student occurred in January 2008, the hearing record does not contain any evidence that the district was obligated under the regulations to conduct either a psychoeducational reevaluation or an adaptive behavior reevaluation of the student prior to the March 2010 CSE meeting (see Tr. pp. 311-13, 320, 330-32; 8 NYCRR 200.4[b][4] [noting that the CSE "shall arrange for an appropriate reevaluation . . . if the school district determines that the educational or related services needs, including improved academic achievement and functional performance of the student, warrant a reevaluation or if the student's parent or teacher requests a reevaluation" and providing guidance about the frequency of reevaluations, as noted above]; see also 34 C.F.R. § 300.303[b][1]-[2] [same]; Answer ¶ 51 [acknowledging that the student's most recent "triennial" evaluation occurred in January 2008]; see generally S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]). There is little if any evidence suggesting that the CSE was required in this instance to arrange for appropriate reevaluations more frequently than at least once every three years—such as improved academic achievement or functional performance of the student, that such reevaluations were otherwise warranted, or that the parent requested reevaluations.¹³ Moreover, the district's special education teacher who

¹³ The January 2008 psychoeducational evaluation of the student included the administration of the Wechsler Intelligence Scale for Children—Fourth Edition; the Wechsler Individual Achievement Test, Second Edition; and the Sentence Completion assessment (see Dist. Ex. 7 at p. 9). The January 2008 adaptive behavior assessment relied upon the results reported in the Vineland-II Parent/Caregiver Rating Report form (see id. at p. 1).

attended the March 2010 CSE meeting testified that even if an updated psychoeducational evaluation had been conducted, she did not believe that "any change in [the student's] cognitive abilities" would have been discovered, the student's classification would not have changed, and further, that the annual goals contained in the student's 2010-11 IEP were based upon the student's "deficits, his level of performance," and the student's needs, and were not based upon the student's classification (Tr. pp. 330-32). Therefore, to the extent that the parent claims that the district failed to conduct timely reevaluations of the student's cognitive and adaptive functioning, the argument is without merit and must be dismissed.

Adequacy of January 2008 Evaluation Reports

Next, the parent argues that although the impartial hearing officer properly found that the January 2008 psychoeducational evaluation report was "less than satisfactory" and similarly, that the January 2008 adaptive behavior evaluation report provided the CSE with "little meaningful information" about the student, he nonetheless erred by "excus[ing] the inadequacy of these evaluations" based upon his finding that the March 2010 CSE did not have the January 2008 evaluation reports "'in front of it'" when developing the student's 2010-11 IEP (Answer ¶¶ 53-54; see IHO Decision at pp. 8-9). Upon independent review and due consideration of the evidence, the parent's argument must be dismissed because the impartial hearing officer's determination is supported by the weight of the evidence.

In this case, a review of the evidence indicates that—as the impartial hearing officer correctly found, and moreover, as the parent affirmatively argues in her cross-appeal—the March 2010 CSE did not have the January 2008 evaluation reports "in front of it when it prepared" the student's 2010-11 IEP, but instead relied upon the 2009 classroom observation report, the 16-page CCA progress report, and input from the CSE participants to develop the student's IEP (see Tr. pp. 262, 311, 330-31, 485-87; IHO Decision at pp. 8-9; see also Answer ¶ 55 [asserting that the district committed an "additional" procedural violation by failing to consider the January 2008 evaluation reports as the student's most recent evaluations and as required by regulations at the March 2010 CSE meeting]).¹⁴ Thus, given that the March 2010 CSE did not rely upon these reports to generate the student's 2010-11 IEP, an analysis of the sufficiency of the January 2008 evaluation reports is unnecessary and wholly irrelevant to whether the student's 2010-11 IEP was reasonably calculated to enable the student to receive educational benefits and offered the student a FAPE.

Failure to Consider January 2008 Evaluation Reports

To the extent that the parent alleges in the cross-appeal that the district committed a procedural violation because the March 2010 CSE failed to consider the January 2008 evaluation reports in the development of the student's 2010-11 IEP, I note that the parent did not raise this claim in her April 2011 due process complaint notice (compare Dist. Ex. 1 at pp. 1-6, with Answer

¹⁴ At the impartial hearing, the parent testified that at the March 2010 CSE meeting, she expressed concern about the length of the classroom observation, and she questioned "how [the special education teacher] would know anything about [the student] in . . . forty-some minutes" (Tr. pp. 485-86). The parent also testified that she made the same objection about the length of the classroom observations in previous school years, and she did not believe that "they would give adequate reflection on my child" (Tr. pp. 516-17). However, the parent did not express an opinion about what she considered to be an adequate length of time to conduct a classroom observation (Tr. p. 517). The parent's testimony does not reveal, however, that she expressed any concerns at the March 2010 CSE meeting about the sufficiency of either of the January 2008 evaluations or evaluation reports (see Tr. pp. 478-535).

¶ 55). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Upon review of the parent's due process complaint notice, I find that it cannot be reasonably read to raise the issue of the district's failure to consider the January 2008 evaluation reports as a basis upon which to predicate a finding that the district failed to offer the student a FAPE for the 2010-11 school year (see Dist. Ex. 1 at pp. 1-6). In addition, a review of the hearing record does not demonstrate that the district agreed to expand the scope of the impartial hearing to include this issue, or that the parent submitted, or that the impartial hearing officer authorized, an amendment of the parent's April 2011 due process complaint notice to include this issue.

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include this issues or file an amended due process complaint notice, I decline to review the issue. To hold otherwise inhibits the development of the hearing record for the impartial hearing officer's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F.Supp. 14, 19 [E.D.N.Y. 1995] and Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D. and R.D. v. Bedford Cent. Sch. Dist., 2011 U.S. Dist. LEXIS 107381, at *33 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

I further note that the impartial hearing officer properly did not reach this issue and find that this contention is raised for the first time on appeal and is outside the scope of my review and therefore, I will not consider it (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; 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).

Speech-Language Evaluation

Next, the parent argues that the impartial hearing officer erred in concluding that an updated speech-language evaluation of the student was not required "absent an explicit request for such an evaluation" from the parent, and that he erred in concluding that the district's violation of State regulations governing the provision of services to students with autism constituted a

procedural violation. As a result of the failure to conduct an updated speech-language evaluation, the parent contends that the student's IEP was substantively deficient in the area of language instruction. In addition, the parent contends that the district's violation of State regulations resulted in the failure to recommend appropriate language instruction in a group of six or less, and therefore, contrary to the impartial hearing officer's decision, constituted a substantive violation. Upon review of the hearing record, however, the evidence does not support the parent's contention, and thus, the claim must be dismissed.

First, although the impartial hearing officer noted that the parent had not requested an updated speech-language evaluation of the student, it is undisputed that the district has not conducted a speech-language reevaluation of the student since 2005. The district's failure to conduct a speech-language reevaluation at least once every three years, as noted above, is not consistent with State and federal regulations (see 8 NYCRR 200.4[b][4]; see also 34 C.F.R. § 300.303[b][1]-[2]). As noted above, it is settled law that not all procedural errors render an IEP legally inadequate under the IDEA, and an administrative officer may only find that a student did not receive a FAPE if the procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]; see, e.g., Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 09-024). In the cross-appeal, the parent asserts—without explanation—that as a "corollary" to the district's failure to timely conduct a speech-language reevaluation of the student, the 2010-11 IEP was "substantively deficient" in the area of language instruction. Thus, to the extent that the parent's argument may be broadly interpreted to assert that the district's procedural error rendered the IEP legally inadequate under the IDEA because the failure to timely reevaluate the student either impeded the student's right to a FAPE or deprived him of educational benefits, the parent's argument must fail.

Here, the hearing record supports the impartial hearing officer's conclusion that although the district had not reevaluated the student since 2005, the student's speech-language pathologist—who participated at the March 2010 CSE meeting—was "clearly familiar" with the student's "present levels and current needs" in the area of speech-language, and that she was in the unique position to "assess [the] Student's abilities and deficits and recommend needed services than a therapist who might conduct a one-time assessment" of the student (IHO Decision at pp. 9-10). The CCA speech-language pathologist testified at the impartial hearing that prior to the March 2010 CSE meeting, she had provided speech-language therapy services to the student during the 2008-09 and 2009-10 school years for a "minimum of three times per week, in a group of three students, for 45 minutes" (Tr. pp. 547, 566-67). According to her testimony, she relied upon informal assessments of the student to determine the ratio within which to provide the student with his speech-language therapy services (Tr. p. 567). At the March 2010 CSE meeting, the CCA speech-language pathologist gave her recommendations for the student's speech-language therapy services based upon her "initial informal assessments of [the student], as well as the therapy—the time [she] spent with him in therapy, and in the classroom" (Tr. p. 568). She testified that she discussed the student's needs with the CSE, and she recommended that the student receive three 45-minute sessions per week of speech-language therapy in a group of three students, which the CSE directly incorporated into the student's 2010-11 IEP (Tr. pp. 568-69). The CCA speech-language pathologist further noted that none of the CSE participants expressed any objections to her recommended services (Tr. p. 569).

In addition, the hearing record indicates that the parent did not object to CCA speech-language pathologist's recommended speech-language therapy services (Tr. pp. 517-18). The parent also specifically acknowledged in her testimony that the CCA speech-language pathologist discussed her "observations of [the student]" and "progress that [the student] was making" with the entire CSE (Tr. p. 518). Contrary to the impartial hearing officer's finding, however, the parent also testified that she did "voice an objection" at the March 2010 CSE meeting regarding the need for an "updated speech and language evaluation" (*id.*). The parent testified that she was told in a "very vague" way that the district "had done what they were going to do" (*id.*). The parent also testified, however, that the CCA speech-language pathologist did not voice an opinion regarding whether the district needed to conduct any further evaluations of the student (Tr. pp. 518-19).

Based upon the weight of the evidence, therefore, I cannot conclude that the district's failure to evaluate the student's speech-language needs since 2005 denied the student a FAPE for the 2010-11 school year in this instance, especially when updated information was available to the CSE. However, to the extent that the parent's objection at the March 2010 CSE meeting could be interpreted as a request for a speech-language reevaluation of the student, and since the district has not reevaluated the student's needs in this area since 2005, the district will be ordered to conduct a speech-language reevaluation of the student if it has not already done so in connection with the student's upcoming annual review for the 2012-13 school year.

I now turn to the parent's contention that contrary to the impartial hearing officer's determination, the district's violation of State regulations governing the provision of services to students with autism constituted a substantive violation, and resulted in the failure to recommend appropriate language instruction in a group of six or less for the student. Here, although the impartial hearing officer agreed with the parent's contention that the frequency and amount of the speech-language therapy services recommended in the IEP did not conform to State regulations, he found this procedural violation, nonetheless, did not rise to the level of a denial of a FAPE (IHO Decision at pp. 10-11). Based upon a review of the hearing record, I decline to disturb the impartial hearing officer's conclusion and the parent's argument must be dismissed.

State regulations provide that "instructional services shall be provided to meet the individual language needs of a student with autism for a minimum of 30 minutes daily in groups not to exceed two, or 60 minutes daily in groups not to exceed six" (8 NYCRR 200.13[a][4]). The hearing record reflects that the March 2010 CSE recommended that the student receive three 45-minute sessions per week of speech-language therapy in a group of three (Dist. Ex. 3 at pp. 1-2, 13). In this case, it is undisputed that the student is eligible for services as a student with autism and that he exhibits delays in the areas of pragmatic language, expressive language, and written expression (Dist. Exs. 3 at pp. 6-10; 4 at pp. 1-2; 5 at pp. 1-2; *see* Tr. pp. 278-79, 281-99, 318-19). However, it is also undisputed that although the CSE's recommendation is not consistent with State regulation, the hearing record indicates—as discussed above—that the ratio of the group within which to provide the student's speech-language therapy services was modified from a small group of two to a small group of three based upon the request of the student's then-current CCA teachers and speech-language pathologist (Dist. Ex. 3 at pp. 2, 13; *see* Tr. pp. 276-80, 299, 517-18; Dist. Ex. 5 at p. 5). The hearing record also demonstrates that for the past two school years at CCA, the student received speech-language therapy services in the same frequency and ratio as recommended by the March 2010 CSE, that the student made progress, and further, that none of the CSE participants—including the parent—expressed objections to the recommended frequency or ratio of the student's speech-language therapy services (*see* Dist. Ex. 5 at p. 5; *see also* Tr. pp. 518, 547, 566-69). In addition, the hearing record indicates that the March 2010 CSE—based

upon the input from the CCA teachers and speech-language pathologist and the information contained within the 16-page 2009 CCA progress report—identified the student's needs in the areas of language skills, pragmatic language, expressive language, and written expression, and generated annual goals and short-term objectives to address these needs (Dist. Exs. 3 at pp. 3, 6-10; 4 at pp. 1-2; see Tr. pp. 278-79, 281-99, 318-19). Therefore, based upon the same rationale discussed above, although I agree that the district's failure to comply with State regulation constituted a procedural violation, I cannot find that this procedural error rendered the student's 2010-11 IEP legally inadequate under the IDEA and denied the student a FAPE for the 2010-11 school year.

Transition or Vocational Assessment

Finally, the parent contends in her cross-appeal that the district's failure to conduct a transition or vocational assessment of the student resulted in an IEP that failed to set forth adequate transition goals, and failed to adequately describe the student's transition needs or transition services to be provided.¹⁵ The parent asserts that contrary to the impartial hearing officer's determination, the CSE's discussion of the student's transition needs at the March 2010 CSE meeting did not absolve the district of its obligation to conduct a transition or vocational assessment.

State regulations require that an IEP—beginning in the IEP "to be in effect when the student is age 15"—shall include in the present levels of performance a "statement of the student's needs, taking into account the student's strengths, preferences and interests, as they relate to transition from school to post-school activities as defined in section 200.1(fff) of this Part" (8 NYCRR 200.4[d][2][ix]). For such students, State regulations also require the IEP to include appropriate measurable postsecondary goals based upon appropriate transition assessments; a statement of the transition service needs of the student; needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives; as well as a statement of the responsibilities of the school district and, when applicable, participating agencies for the provision of such transition services (8 NYCRR 200.4[d][2][ix]; see Application of a Student with a Disability, Appeal No. 10-037; Application of the Dep't. of Educ., Appeal No. 08-080).

Upon review of the hearing record, the weight of the evidence supports the impartial hearing officer's finding that the March 2010 CSE created a sufficient transition plan based upon input from the student's then-current CCA providers, such that the failure to conduct a transition or vocational assessment did not, alone, deny the student a FAPE for the 2010-11 school year (see IHO Decision at p. 10). The hearing record indicates—and the parent agreed in her testimony—that the March 2010 CSE discussed the transition plan set forth in the 2010-11 IEP (Tr. pp. 519-21; Dist. Ex. 3 at p. 14). The district's special education teacher who attended the March 2010

¹⁵ In the due process complaint notice, the parent asserted that the district failed to conduct a transition or vocational assessment of the student "despite [the district's] explicit agreement to do so as part of the resolution of [the parent's] May 2008 due process complaint" notice (Dist. Ex. 1 at p. 4). To the extent that the parent seeks to enforce the district's obligation to conduct a transition or vocational assessment of the student pursuant to an agreement resolving a previous due process complaint notice, I note that settlement agreements reached through mediation or the resolution process are enforced by courts (see Letter to Chamberlain, 111 LRP 74144 [OSEP 2011] [declining to interpret an unsigned settlement agreement]; H.C. v. Colton-Pierrepoint Cent. Sch. Dist., 2009 WL 2144016 [2d Cir. 2009] [holding that a due process hearing was "not the proper vehicle to enforce a settlement agreement"]).

CSE meeting testified that although the district had not conducted a transition or vocational assessment, the CSE relied upon information provided by the CCA participants and the information about the student's "vocational areas [contained] within [the 2009 CCA] progress report" (Tr. p. 266). Specifically, the March 2010 CSE discussed—and the 2010-11 IEP described—the student's diploma objective, instructional activities, future community integration, post-secondary placement, independent living, and employment (Tr. pp. 519-21; Dist. Ex. 3 at p. 14). The CSE also generated an annual goal and short-term objective to address the student's transition needs (Dist. Ex. 3 at p. 10). According to the CSE meeting minutes, the parent expressed that the student could independently go to the store and that he would like "to travel independently to school" (Dist. Ex. 4 at p. 2). A review of the student's 2010-11 IEP indicates that the March 2010 CSE documented the student's increasing independence and self-reliance, as well as his desire to travel independently, with in the section of the IEP reporting his present levels of social/emotional performance (Dist. Ex. 3 at p. 4). Thus, I find that the transition plan included in the 2010-11 IEP provided sufficient detail to the extent that it did not result in a denial of a FAPE to the student (see D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *9 [S.D.N.Y. Oct. 12, 2011]; Antonaccio v. Bd. of Educ., 281 F. Supp. 2d 710, 720 [S.D.N.Y. 2003]; K.C. v. Mansfield Indep. Sch. Dist., 618 F. Supp. 2d 568, 582 [N.D.Tex. 2009]). For the benefit the student's next annual review, however, I encourage the parties to examine a recently issued guidance document from the Office of Special Education regarding transition services and the development of transition plans for future planning purposes ("Transition Planning and Services for Students with Disabilities" November 2011, located at <http://www.p12.nysed.gov/specialed/publications/transitionplanning-nov11.pdf>).

Assigned School and Availability of Classroom

With respect to this issue, the district asserts on appeal that the impartial hearing officer erred in concluding that it failed to offer the student a FAPE because it did not sustain its burden to establish that the assigned school had an appropriate classroom available for the student at the beginning of the school year in September 2010. In particular, the district argues that contrary to the impartial hearing officer's decision, the evidence indicates the student would have been appropriately placed in a 12:1+1 special class. In addition, the district contends that the issue of whether a seat existed for the student in a 12:1+1 special class in September 2010 is entirely speculative, as the student did not attend the assigned school, and further, the parent rejected the IEP and the assigned school by letter dated August 24, 2010, when she notified the district of her intention to unilaterally place the student at CCA for the 2010-11 school year. For reasons discussed below, the impartial hearing officer's determination must be annulled.

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe v. New York City Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [stating that an "education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"].¹⁶ However, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y. v. Dep't of Educ., 584 F.3d 412,

¹⁶ In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]).

419-20 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-074; Application of a Student with a Disability, Appeal No. 09-063).

The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see A.L. v. New York City Dep't of Educ., 2011 WL 4001074, at *11 [S.D.N.Y. Aug. 19, 2011]; R.K. v. Dep't of Educ., 2011 WL 1131492, at *15-*17 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 C.F.R. § 320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20; A.L., 2011 WL 4001074, at *11).

In this case, the district developed the student's 2010-11 IEP in March 2010, prior to the beginning of the recommended 12-month school year (Dist. Ex. 3 at pp. 1-14). In June 2010, the district notified the parent of the school with the recommended 12:1+1 special class to which the district assigned the student, and informed the parent that she had the option to visit the assigned school (Dist. Ex. 8).¹⁷ The parent visited the assigned school on June 18th, prior to the start of the 12-month school year recommended on the student's IEP, and again on July 17, 2010, during the summer portion of the 12-month school year recommended on the students' IEP (Parent Exs. V; W). According to the evidence, the parent notified the district in two letters that she did not have the opportunity to observe a classroom similar to the 12:1+1 special class recommended on the student's IEP during either the June or July visit (see Parent Exs. V at p. 1; W at p. 1). However, the parent did not express any concerns or objections to the student's 2010-11 IEP, or the recommendations contained in the IEP when she wrote to the district in June and July 2010 about her two visits to the assigned school (see id.). By letter dated August 24, 2010, the parent rejected both the assigned school and the student's 2010-11 IEP, and notified the district of her intention to unilaterally place the student at CCA and to seek public funding for the tuition costs (Parent Ex. Y at pp. 2-3).

At the impartial hearing, the district presented the special education teacher of the recommended 12:1+1 special class from the assigned school, as well as the assistant principal of the assigned school, as witnesses (Tr. pp. 32-129, 438-470). In his decision, the impartial hearing

¹⁷ Although the district offered the parent the opportunity to visit the assigned school, neither the IDEA nor State regulations confer upon parents the right to visit a recommended school and classroom. In general, the IDEA requires parental participation in determining the educational placement of a student (see 34 C.F.R. §§ 300.116, 300.327, 300.501[c]). The U.S. Department of Education's Office of Special Education (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-097; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-013).

officer concluded that because the parent had notified the district that the student would not be attending the July and August portion of the 12-month school year as recommended on the IEP, the special education teacher's testimony concerning the implementation of the student's IEP during July and August in his 12:1+1 special class was "moot" (IHO Decision at p. 12). He also found that although the special education teacher testified that he would have continued to teach the same 12:1+1 special class during the "regular school year," the student would not have been appropriately placed in his 12:1+1 special class because the "class would be composed of only [n]inth and [t]enth [g]rade students," and the student "was to be placed in an [e]leventh [g]rade classroom" (*id.*; *see* Tr. pp. 105-06).

At the impartial hearing, the assistant principal testified that she held that position at the assigned school for the past six years and that one of her responsibilities included placing students in their classes (*see* Tr. pp. 439-42). To assign a student to a classroom, the assistant principal reviews the student's IEP to determine the classroom ratio required—such as a 12:1+1 special class—and then she looks at the student's age (Tr. pp. 442-44). For students recommended to attend a 12-month school year, the assistant principal testified that since all of the students do not usually attend during the summer the teachers are assigned "certain age ranges . . . the equivalent of freshmen, sophomore, junior, senior, and within any three-year range, a teacher is able to take that student" (Tr. p. 444). Thereafter, as students continue to arrive for the summer portion of the 12-month school year, the students are then "fit into those classes" (*id.*). The assistant principal also reviewed a student's "functional level when placing" a student in a classroom, and explained that "if a student has a 12:1+1 ratio, [the assigned school has] a variety of ranges academically"—from kindergarten to fourth grade—and the student's functional level academically "would determine [the student's] eligibility to be in the school" (Tr. pp. 444-45). The assistant principal further explained in testimony that the teachers in the assigned school "have been instructed to differentiate for instruction" and "when [the teachers] group for instruction, the students will be grouped within their functional level" (*id.*). In addition, the assistant principal testified that although the student's IEP in this case characterized him as an 11th grade student for the 2010-11 school year, the assigned school was "ungraded" and the student's grade level was not "utilized" for purposes of placing the student in a particular classroom (Tr. pp. 445-46). Had the student attended the assigned school in July 2010, the assistant principal testified unequivocally with respect to the 12:1+1 special class the student would have attended; and she further explained that he would have continued to remain within that same 12:1+1 special class if he continued at the assigned school in September 2010 (Tr. pp. 446-47).¹⁸ The assistant principal testified specifically that the student "would have continued with that teacher unless there was some issue for any other reason during the summer that I could not predict" (Tr. p. 477). She explained that "especially" for a new student entering the school, the student would have remained in the same class with the same teacher for purposes of continuity, and because "assessments would have been done, [and] that teacher would have been familiar with the student, and so he would have continued with him" (*id.*).

Without any explanation, however, the impartial hearing officer noted in the decision that he "discredit[ed] the contrary testimony provided" by the assistant principal of the assigned school, and went on to conclude that the district failed to sustain its burden to establish that the assigned

¹⁸ The assistant principal specifically testified that if the student had attended the July and August portion of the 12-month school year, he would have been placed in the 12:1+1 special class taught by the special education teacher who testified on behalf of the district (*compare* Tr. pp. 446-47, *with* Tr. pp. 32-129).

school had an appropriate special class available as of September 2010 based upon the special education teacher's testimony and the information reported by the parent about her three visits to the assigned school (IHO Decision at pp. 11-12). Reviewing the hearing record, the weight of the evidence does not support the impartial hearing officer's conclusion because although the special education teacher's testimony was, at best, equivocal regarding whether the student would have been placed in his classroom as of September 2010, the assistant principal's testimony evidenced no equivocation whatsoever on this issue, and she had the direct responsibility for placing incoming students into classrooms—not the special education teacher—moreover, the hearing record does not contain any evidence that would call into question the assistant principal's testimony regarding the procedures she followed to place students. In fact, her testimony is entirely consistent with State regulations regarding the composition of special classes, which group students according to age ranges and not particular grade levels or ranges of functional academic levels (see 8 NYCRR 200.6[h][5], [h][7]).

Moreover, the impartial hearing officer ignored the fact that the parent—as of April 2010, had executed a reenrollment contract with CCA for the student's attendance during the 2010-11 school year—and as of August 24, 2010, had rejected both the student's 2010-11 IEP and the assigned school, and notified the district of her intention to unilaterally place the student at CCA for the 2010-11 school year and to seek public funding for the tuition costs (Parent Ex. Y at pp. 2-3). Therefore, since neither the IDEA nor State regulations require a district to maintain a particular classroom opening for a student while the student is enrolled elsewhere in a private school, the district was no longer obligated to maintain an opening in the 12:1+1 special class recommended in the student's IEP (see Application of the Dep't of Educ., Appeal No. 11-015; Application of a Student with a Disability, Appeal No. 11-008 [noting that districts may modify class assignments in light of changing circumstances]).¹⁹

Thus, given the evidence and the impartial hearing officer's failure to explain why he "discredit[ed]" the testimony provided by the assistant principal of the assigned school, I find that the district sustained its burden to establish that the assigned school had an available special class for the student as of September 2010, and therefore, contrary to the impartial hearing officer's decision, the district sustained its burden to establish that it offered the student a FAPE for the 2010-11 school year.

Mandated Speech-Language Therapy Services

Notwithstanding the above findings, I will address the parent's argument in her cross-appeal that the impartial hearing officer failed to address her claim that the assigned school was not reasonably calculated to fulfill the student's speech-language therapy services as mandated in the IEP. Specifically, the parent argues that the assigned school did not have a sufficient number of speech-language therapy providers to provide in-school services to the students and that the district's issuance of related services authorizations (RSAs) improperly delegates the district's obligation to provide special education services. As discussed below, the parent's claim is without merit and must be dismissed.

¹⁹ In addition, I note that while the parent's third visit to the assigned school on September 17, 2010—after she had rejected both the student's 2010-11 IEP and the assigned school by letter dated August 24, 2010—exhibits a spirit of continued cooperation and collaboration that may be relevant to an analysis of equitable considerations, it is not relevant to whether the district's recommended 2010-11 IEP offered the student a FAPE.

The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct, through veto, a district's efforts to implement each student's IEP (see T.Y., 584 F.3d at 420). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11, aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011], but see C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8 [S.D.N.Y. Oct. 28, 2011]). Furthermore, I note that the hearing record in its entirety does not support the conclusion that had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

In this case, a meaningful analysis of the parent's claim with regard to implementation of the recommended speech-language therapy services at the assigned school would require me to determine what might have happened had the district been required to implement the student's 2010-11 IEP, which is in part speculative because in August 2010, it became clear that the parent would not accept the placement recommended by the district in the 2010-11 IEP and that she intended to enroll the student at CCA.

Moreover, even assuming for the sake of argument that the student had attended the district's recommended program, the hearing record does not support the conclusion that had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P., 2010 WL 1049297; Cerra, 427 F.3d at 192; see Van Duyn, 502 F.3d 811; Bobby R., 200 F.3d at 349; see also Catalan, 478 F. Supp. 2d 73). Notwithstanding the speculative nature of this argument, I find that the hearing record contains sufficient evidence that the district would have been able to provide the student with speech-language therapy services consistent with the recommendations in his 2010-11 IEP, and therefore, I decline to find a denial of a FAPE based on a material failure to implement the student's IEP.

First, the hearing record demonstrates that speech-language therapy services and speech-language therapy providers were available at the district's assigned school at the beginning of the school year (see Tr. pp. 448-49). The assistant principal testified that although the assigned school had speech-language providers on staff, caseloads sometimes became full, and a "parent [was] given an RSA letter, which would allow them to get a provider outside of the school without a fee . . . so that the student c[ould] obtain the service if it's not able to be provided in the school" (Tr. p. 448). According to a June 2, 2010 "Q and A document" issued by the State Education

Department to district superintendents, it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. In relevant part, the document indicates the following:

[S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

(<http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html>, Question 5; see <http://www.p12.nysed.gov/resources/contractsforinstruction/>).

Thus, I decline to find that had the student attended the assigned school and had the student required the issuance of RSAs to obtain his speech-language therapy services as mandated on his IEP, that such would have denied the student a FAPE (see Application of the Dep't of Educ., Appeal No. 10-104; Application of a Student with a Disability, Appeal No. 10-055).

Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2010-11 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the impartial hearing officer improperly placed the burden of proof on the parent with respect to equitable considerations, whether the impartial hearing officer improperly stated that CCA was the only true party in interest in the outcome of the proceeding, or whether the parent's unilateral placement of the student at CCA for the 2010-11 school year was an appropriate placement (Burlington, 471 U.S. at 370).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's decision, dated August 23, 2011, concluding that the district failed to offer the student a FAPE for the 2010-11 school year is hereby annulled; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision, dated August 23, 2011, ordering the district to reimburse the parent for the costs of the student's tuition at CCA for the 2010-11 school year is hereby annulled; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall conduct a speech-language reevaluation and a vocational assessment of the student in preparation for the student's annual review for the 2012-13 school year if it has not already done so.

Dated: **Albany, New York**
 January 5, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER