



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-125

### **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, attorney for petitioner, Neha Dewan, Esq., of counsel

Law Offices of Regina Skyer and Associates, LLP, attorneys for respondents, Jesse Cole Cutler, 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 respondents' (the parents') son and ordered it to reimburse them for the costs of the student's tuition at the Aaron School for the 2010-11 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending the Aaron School, where he was also receiving two 30-minute sessions of speech-language therapy per week, two 30-minute sessions of occupational therapy (OT) per week, and participating in a social skills training group led by a speech-language therapist (Tr. pp. 14-15, 251-52; Parent Ex. C at p. 1). The hearing record describes the Aaron School as a school for children who demonstrate average to above average cognitive abilities, but exhibit delays in social skills, speech-language skills, auditory processing, attention, and sensory regulation (Tr. p. 307). The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (Tr. p. 333; see 8 NYCRR 200.1[d], 200.7).

The student reportedly exhibits weaknesses in expressive, receptive, and pragmatic language skills, in addition to difficulties with sensory processing, fine motor skills, distractibility, and attention (Tr. pp. 23-24, 31-32, 353, 356; Dist. Exs. 3 at pp. 3-5; 4). He also exhibits average to superior cognitive abilities and age appropriate academic skills (Tr. pp. 21-22; see Tr. p. 28; Dist. Exs. 3 at p. 3; 15 at p. 6). The student's eligibility for special education and related services

as a student with a speech or language impairment is not in dispute in this appeal (Tr. pp. 4-5; Dist. Ex. 3 at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

## **Background**

The hearing record reflects that the student received home-based speech-language therapy, OT, and special instruction through an early intervention program (EIP) (Tr. pp. 179-80). In September 2007, the Committee on Preschool Special Education (CPSE) recommended that the student attend a self-contained nonpublic preschool class due to his global developmental delays in attention, receptive language, expressive language, social/emotional functioning, play and motor skills (Tr. pp. 182-83; Dist. Exs. 14 at p. 1; 15 at p. 2). Additionally, the student received after-school services comprised of two 30-minute sessions of speech-language therapy, two 30-minute sessions of individual OT, two 30-minute sessions of individual counseling, and special education itinerant teacher (SEIT) services (Tr. pp. 182-83; Dist. Exs. 14 at p. 1; 15 at p. 2). The student attended the self-contained preschool class for two years prior to his transition to the Committee on Special Education (CSE) in 2009 (Tr. pp. 183-84; Dist. Ex. 15 at p. 2).

Over four non-consecutive sessions in November and December 2008, in preparation for his transition from the CPSE to the CSE, the parents obtained a private psychological evaluation of the student (Tr. pp. 184-85; Dist. Ex. 15). According to the private psychologist, behaviorally the student demonstrated an interest in social interaction; however, he was somewhat self-directed and his task persistence, motivation, attention and concentration were described as "variable" (Dist. Ex. 15 at p. 2). Regarding the student's speech-language skills, the psychologist reported that he demonstrated variable difficulties responding to open-ended questions and at times, had greater difficulties processing complex language and instruction (id.). The psychologist further described the student's pencil grip as "immature," and that he had resultant variable difficulties executing graphomotor tasks (id.). In general, the psychologist remarked that the student continued to demonstrate developmental and cognitive gains which translated into improved language skills, social abilities and average test scores; however, he needed repetition of oral instruction and test breaks to ensure appropriate completion of the evaluation process (id.).

Administration of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) to the student yielded a verbal IQ composite score (percentile rank) of 95 (37), a performance IQ composite score of 127 (96), a general language composite score of 113 (81), and a full scale IQ composite score of 113 (81) (Dist. Ex. 15 at pp. 3, 8). The psychologist noted that the significant difference between the student's verbal and performance composite scores as well as the inter-test and intra-test subtest scatter rendered the full scale IQ "an invalid indicator of his cognitive potential" (id. at p. 3). According to the psychologist, the student's ability to categorize and general fund of information were areas of strength; however, he demonstrated difficulty with tasks that assessed knowledge of social norms and mores (id.). Overall, the student's single word vocabulary skills were average, with slightly better developed receptive language skills compared to his expressive language skills (id.). With respect to the student's visual motor and visual perceptual skills, as assessed by his performance on the subtests within the performance scale, he exhibited high average to superior skills (id. at p. 4). The psychologist also described the student's visual-spatial skills, reasoning skills, and problem solving abilities as "extremely well-developed" (id.).

In addition, the psychologist administered the NEPSY-Second Edition (NEPSY-2), a neuropsychological assessment, to further assess the student's language skills (Dist. Ex. 15 at p. 4). The NEPSY-2 results were also variable as the student scored in the above average range on a rapid naming task, but exhibited impaired to low average abilities regarding language tasks that involved memory skills (id.). The psychologist indicated that the student demonstrated difficulties with following directions, answering complex questions, expounding on his answers, grammar, syntax, and language pragmatics (id.). According to the report, the student's difficulties with receptive, expressive and pragmatic language negatively affected his social reciprocity and interactions despite his interest in peer interactions (id.).

Administration of selected subtests of the Woodcock Johnson-III Tests of Achievement (WJ-III ACH) yielded age equivalent scores (grade equivalent) of 5-8 (K.4) in letter word identification, 4-9 (<K.O) in spelling, 6-2 (1.0) in applied problems, and 6-3 (1.0) in word attack (Dist. Ex. 15 at pp. 5, 8). The psychologist reported that the student's performance on the spelling subtest was negatively affected by his slight difficulties with graphomotor abilities (id. at p. 5). Overall, the psychologist opined that the student demonstrated developing and age appropriate preacademic skills and basic academic skills; however, his deficits in expressive language and pragmatics in addition to his language processing delays negatively affected his social and academic progress (id.). The psychologist also used the Behavior Assessment System for Children-Second Edition (BASC-II) and the Adaptive Behavior Assessment System-Second Edition (ABAS-II), with the parents serving as informants, to assess the student's social/emotional functioning and adaptive behavior that revealed the absence of any "significant psychopathology or behavioral issues" (id. at pp. 5, 9-10).

The psychologist recommended that the student attend a small, structured, language-based special education class with students who have average to above average cognitive abilities and do not have behavioral concerns (Dist. Ex. 15 at p. 6). Among the other recommendations were: (1) that the student's teachers speak in a clear, animated, and audible tone of voice; (2) preferential seating; (3) provision of broken down instructions; (4) provision of visual aids; (5) encouragement to participate in class discussions; and (6) involvement in structured group activities to afford the student to benefit from peer modeling (id. at pp. 6-7). The psychologist also suggested the continued provision of speech-language therapy, OT, and that the student would benefit from counseling (id.).

On December 7, 2008, the student's preschool teacher completed an educational progress report of the student (Dist. Ex. 14). The teacher used the Brigance Preschool Screen-II and a classroom observation to assess the student (id. at p. 1). According to the report, the student had demonstrated significant progress since the beginning of the school year and was "interested in the classroom environment" (id. at p. 2). His teacher further characterized him as an active participant (id.). The student's teacher remarked that the student's cognitive skills were an area of strength, and that he had mastered many age appropriate skills (id.). With respect to academic skills he sorted, matched and labeled by color, object, size and shape (id.). The report also indicated that the student could write the letters found in his name and demonstrated an emerging ability to control his hand movements while doing so (id.). Additionally, the teacher noted that the student demonstrated 1:1 correspondence and rote counted to 100 (id.). The student achieved an age equivalent of 5-3 on the academic subtest that measured his knowledge of personal data, color recognition, picture vocabulary, rote counting, following verbal directions, and identification of body parts (id.). The teacher also commented that the student was able to use language for a variety

of functions such as greeting, making his needs known, commenting on his activities, and having simple verbal exchanges with peers (id. at p. 3). The student also demonstrated a relative strength in receptive language and had increased his spontaneous verbalizations (id.). The teacher further noted that the student exhibited good articulation and followed two and three-step directions (id.).

With respect to social/emotional functioning, his teacher remarked that the student enjoyed school and easily made transitions (Dist. Ex. 14 at p. 4). According to the teacher, the student related to his peers best when in structured play scenarios, but with adult support and direction he would engage in cooperative play for brief periods of time (id.). Overall, the student exhibited average gross motor skills, but poor motor planning skills (id. at p. 5). Despite improvements, the teacher also indicated that the student presented with sensory processing weaknesses that negatively affected his ability to maintain eye contact and attention (id.). The teacher further explained that the student's fine motor skills were improving and that he enjoyed several fine motor activities such as painting (id.). The student also exhibited mastery of many self-help skills related to managing school belongings, eating, and dressing (id.). Overall, the teacher concluded that while the student continued to exhibit delays in expressive and pragmatic language, sensory processing, and social skills, all of which negatively affected his social interactions with peers, he benefitted from the language-based therapeutic environment in his classroom (id.). The teacher recommended a 12-month small structured educational setting with "bright, non aggressive peers" as well as related services of speech-language therapy, OT, and counseling (id. at p. 6).

On January 9, 2009, the student's SEITs completed an educational progress report (Dist. Ex. 10). The SEITs utilized observations, parent/teacher interviews, and formal testing to assess the student (id. at p. 1). According to the SEIT providers, the student demonstrated steady progress in all areas of development (id.). Administration of the Developmental Assessment of Young Children (DAYC) yielded ratings of high average in cognitive development, low average in communication, low in social/emotional, average in physical development, and low average in adaptive behavior (id. at p. 2). The student demonstrated strong visual perception skills, could easily match and sort, and could complete jigsaw puzzles up to 24 pieces through trial and error (id.). However, the SEITs reported that the student exhibited difficulty with understanding abstract concepts and sequencing of pictures (id.). Furthermore, according to the SEITs, the student required verbal/physical prompts to hold a crayon with an age appropriate grasp, but once he correctly held the crayon, he wrote his name and drew pictures (id.). The SEITs also noted that the student demonstrated strong pre-mathematical and pre-reading skills (id.). With respect to the student's cognitive skills, the SEITs recommended the provision of the following modifications: (1) adult modeling; (2) visual prompts and verbal reminders; and (3) age appropriate games, puzzles, and educational toys (id. at p. 3).

Although the SEITs commented that the student's communication and language skills had improved tremendously since the commencement of SEIT services, they added that this remained a continual area of struggle for him (Dist. Ex. 10 at p. 3). With regard to the student's language skills, the SEITs recommended several modifications including speech-language therapy, specific and varied language modeling, prompting, visual cues, books, photos, and age appropriate toys (id.).

In the area of social/emotional development, the SEITs stated that the student presented with limited social skills due to his difficulties with interpreting social cues and maintaining his attention (Dist. Ex. 10 at p. 3). They also reported that the student enjoyed playing with peers at

home, but during play dates he required consistent redirection, modeling and prompting to initiate conversations, play with peers, and maintain his attention (id.). The SEITs added that the student also required prompts and redirection from an adult to assist him to self-regulate as he tended to "self-stimulate and persevere" (id.). They further noted that the student transitioned well and exhibited the ability to discuss his feelings (id. at p. 4). The SEITs recommended that the student required SEIT support to increase his ability to interpret social cues, initiate play and conversation with peers, and increase cooperative play (id.). The SEITs recommended several modifications including peer modeling, prompting, and redirection (id.).

With respect to motor skills, the SEITs reported that the student demonstrated several age appropriate gross motor skills; however, his accuracy was inconsistent due to difficulties with motor planning, body awareness, and decreased muscle tone and strength, all of which negatively affected his balance and coordination (Dist. Ex. 10 at p. 4). The SEITs further noted that the student exhibited delays in fine motor skills (id.). With respect to the student's gross and fine motor development, the SEITs recommended the provision of OT, modeling, prompting, praise, and encouragement in addition to movement activities and sensory-based materials and activities (id.). Regarding the student's self-help skills, the SEITs indicated that the student had the potential to make significant improvements in adaptive behavior skills with the proper direction paired with motivation and modeling (id.). Overall, the SEITs recommended a small, structured, language-based kindergarten classroom for the student where he would receive small group instruction with the use of frequent repetition to increase his attention and reinforce language development (id. at p. 5). In addition, they recommended the provision of support to assist in the generalization of learned skills and reinforce language including the use of spontaneous language (id.).

In a January 9, 2009 speech and language progress report, the student's home-based speech-language pathologist described the student's attendance and motivation for therapy as "excellent" (Dist. Ex. 11 at p. 1). According to his therapist, the student enjoyed a variety of activities including pretend play, joint book reading and song singing (id.). Although his therapist reported that the student had made significant progress since September 2008, he continued to exhibit deficits with respect to the development of his receptive, expressive and pragmatic language skills in addition to his speech production (id.). According to the progress report, the student could carry out two-step unrelated commands and his ability to carry out unrelated three-step commands was emerging (id.). The therapist further reported that although the student did not consistently use the pronouns "he/she" correctly, with verbal cues, he was able to self-correct (id.). Additionally, the therapist noted that the student used language for a variety of communicative function; however, he frequently required cueing to make polite requests (id.). According to the therapist, the student's overall speech intelligibility was good (id. at p. 3). She recommended the continuation of speech-language therapy at the current mandate of two 60-minute sessions per week (id. at pp. 1, 3).

On January 9, 2009, the student's occupational therapist provided a related service progress report of the student (Dist. Ex. 12). The report revealed that while the student was easily distracted by visual and auditory stimuli within the environment, he transitioned easily to therapy sessions (id. at p. 1). In addition, the therapist stated that the student required intense vestibular and proprioceptive input to self-regulate and maintain attention to table-top activities (id.). She further indicated that the student engaged in self-stimulatory behaviors such as hand flapping and humming, which negatively affected his attention and acquisition of new skills (id.). The therapist also described the student's language as rote and scripted and she indicated that he exhibited

echolalic speech (id.). The therapist also reported that the student had demonstrated steady progress toward meeting his OT short-term goals (id.). According to the report, the student's therapy sessions addressed prewriting skills including refinement of letter formation, size, directionality, spacing, and legibility (id.). The therapist stated that the student independently wrote his first name, but continued to exhibit a deficient grasp while writing (id.). In addition, although the student copied simple block designs, he exhibited difficulty with copying complex patterns (id. at p. 2). Regarding self-help skills, the therapist reported that the student independently used buttons, pulled apart snaps, and pulled zippers up/down; however, he required assistance placing snaps together and placing the zipper within the shank (id.). Recommendations included the continued provision of OT to address prewriting skills, self-help skills, sensory processing, and bilateral coordination (id.).

On February 18, 2009, the parents obtained a private neurodevelopmental evaluation of the student (Dist. Ex. 13). The student completed most of the tasks related to the assessment (id. at p. 3). According to the evaluator, the student readily engaged in the activities and exhibited good eye contact with her (id.). With respect to communication, the student spoke in sentences, his "articulation was generally understandable," and he could request, reply, direct and comment (id.). During free play time, the evaluator noted that the student played with the toys within a "simple play scheme" and engaged in self-stimulatory behavior, such as shaking his wrists and humming (id.). The private evaluator also reported that the student exhibited oral motor and verbal apraxia, sensory integration dysfunction, repetitive behaviors, delayed social skills, and immature play skills (id. at p. 1). According to the report, the student had previously received a diagnosis of a pervasive developmental disorder-not otherwise specified (PDD-NOS) (id.). The report also indicated that the parents described the student as "bright and generally compliant," but they also noted that despite his continual progress last year, his progress had "plateaued" over the last month in part due to the increase in his self-stimulatory behaviors (id.). The evaluator noted that although the student engaged in self-stimulatory behaviors, he typically could be redirected (id.). According to the evaluator, the student exhibited varied behaviors including being engaged, inquisitive, talkative, and interactive; however, at other times, he demonstrated rigidity, variable eye contact, increased self-direction, and self-talking (id.). In the area of communication, the student followed two-step and sometimes three-step directions, asked some wh- questions, and exhibited improved articulation (id.). Regarding his social/emotional skills, the report further revealed that the student responded well to structure and planned activities (id.). Although the evaluator noted that the student exhibited an interest in other children, he required support to engage in cooperative play (id.).

The student's performance on a portion of the Pediatric Examination of Educational Readiness (PEER), a neurodevelopmental evaluation, revealed that he demonstrated progress in the areas of balance, visual motor skills, and block design copying (Dist. Ex. 13 at p. 5). Administration of the PEER further revealed that the student demonstrated average skills regarding the identification of body parts, heel walking, spatial directions, temporal directions, and visual matching (id. at p. 4). However, the student's performance was advanced in the areas of toe walking, standing on one foot, manipulation of sticks, block construction, and word span (id.). Additionally, the evaluator found that the student exhibited delayed skills or skills typical of a younger child with regard to visual tracking, imitative finger movements, copying figures, and drawing from memory (id.).

Based on the evaluator's observation and by parent report, the Childhood Autism Rating Scale (CARS) was completed of the student (Dist. Ex. 13 at p. 5).<sup>1</sup> In February 2009, the student's total score was a 25.5 (id.). With respect to previous assessments, the student's CARS total scores were as follows: 26 in July 2008; 28 in November 2007; 32 in November 2006; 32 in June 2006; 27 in October 2005; and 25 in August 2005 (id.). Despite improvement in the area of imitation skills, the student's self-stimulatory behaviors continued as his most "abnormal" characteristic (id.). Based on the CARS criteria, the evaluator determined that the student no longer met the criteria for a diagnosis of PDD-NOS (id.). The evaluator further noted that the student had exhibited progress over the past seven months in the areas of receptive language, expressive language, balance, coordination, drawing, and prewriting skills (id. at pp. 5-6). Additionally, the evaluator opined that the student exhibited the "cognitive abilities to excel in kindergarten," but that his abilities were negatively affected by his receptive and expressive language delays (id. at p. 6). The report also included observations from the student's teachers and therapists who reported that he exhibited difficulties with attention particularly in large groups, but responded to redirection (id.). The report further revealed that the student continued to exhibit difficulties with sensory regulation; however, he responded well to intervention including the use of sensory regulation techniques (id.). Recommendations included placement in a small, structured, language-based classroom with peers who demonstrated at least average cognitive abilities and did not exhibit behavioral concerns (id.). She further suggested the provision of in-school speech-language therapy, OT, and counseling as well as extended day services of OT in a sensory gym setting, speech-language therapy, and SEIT services to promote generalization of skills to community settings (id.).

On April 7, 2009, in a social history update prepared by a social worker from the student's nonpublic preschool, the student was described as having a "gentle and sweet demeanor" (Tr. p. 192; Dist. Ex. 9). According to the report, the student's receptive language skills were significantly stronger than his expressive language skills (Dist. Ex. 9). The social worker further noted that the student responded positively to the structure, supports and routines of the classroom and that he continued to make progress (id.). The social worker also reported that the student was demonstrating growth with respect to his language delays, particularly his delays with respect to expressive language, sensory integration, and social/emotional functioning (id.). She described the student's distractibility as variable, depending upon the quality of his environment and the number of transitions he had throughout the school day (id.). According to the social worker, the student thrived in a predictable and organized school environment where he received ample attention (id.). Regarding his activities of daily living (ADL) skills, the social worker reported that the student was toilet trained, fed himself with a fork and spoon, and could put on and remove his jacket (id.). The social worker recommended the continuation of his "current services" for the upcoming school year (id.). In addition, the social worker also proposed placement in a small, structured therapeutic class in a small, calm, special education school setting (id.).

Over a three-day period starting on June 9, 2009 and ending on June 23, 2009, the parents obtained a private OT evaluation from the student's therapist to determine his functioning with respect to his gross and fine motor skills, visual motor integration, and sensory processing skills

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<sup>1</sup> The evaluator noted that the CARS was an evaluation tool that evaluates 15 areas of behavior and scores from a range of 1 (age appropriate behavior) to 4 (severely abnormal behavior) (Dist. Ex. 13 at p. 5). The range of the total scores on the CARS was 15 through 60 with a score of 30 being the "cutoff" score between non-autistic and mildly autistic (id.).

(Dist. Ex. 16). The therapist described the student as a friendly and sweet child who was interested in evaluation activities (id. at p. 1). She further noted that he benefitted from a visual schedule and verbal cues to remain on task, and that he easily transitioned from task to task and from active motor tasks to seated tabletop tasks (id.). Although the therapist noted that the student occasionally engaged in stereotypical behaviors, he could be redirected quickly (id.). While the therapist further noted that at times the student could be self-directed, he could also self-prompt to "be flexible"(id.). In the area of gross motor skills, the therapist stated that the student demonstrated active and passive range of motion within normal limits, and that his gross motor skills had improved with significant practice, but gross motor eye-hand coordination was an area of challenge for the student (id. at p. 2). She also stated that despite specific graphomotor delays, the student's overall fine motor skills had improved (id.). According to the therapist, the student wrote his name slowly but legibly, and was able to imitate most uppercase letter (id.). The occupational therapist also administered the Beery Buktenica Developmental Test of Visual-Motor Integration (VMI) to the student (id. at p. 3). VMI results indicated that the student performed within the average range with respect to visual motor integration skills and within the above average range in the area of visual-perceptual abilities (id.).

Administration of the Sensory Profile Caregiver Questionnaire, with the student's mother serving as informant, yielded ratings of a definite difference in auditory processing, a typical difference in visual processing, a definite difference in vestibular processing, and a probable difference in touch processing (Dist. Ex. 16 at p. 3). Results indicated, among other things, that the student demonstrated difficulties with shifting his attention and frequently sought out movement which negatively affected his educational performance, but that he benefited from vestibular input prior to "quiet, focused work" (id. at p. 6). In addition, per the sensory profile, the student frequently did not hear what was said to him and had trouble functioning if there was a lot of environmental noise (id.). The therapist also reported that the student did not notice when people entered the room, and did not perceive body language or facial expressions, which she opined was due to his struggle to focus his attention on a particular task and his difficulty to shift attention (id.). Although the therapist noted that the student was able to focus nicely when there was less conflicting visual and auditory stimuli, he became overwhelmed when the sensory processing demands became too great (id.). Among the recommendations made by the therapist was the continued provision of OT and a sensory diet (id. at pp. 6-7).

On January 25, 2010, the parents entered into a reenrollment contract with the Aaron School enrolling the student for the 2010-11 school year (Parent Ex. F).

In February 2010, the Aaron School completed a midyear report of the student for the 2009-10 school year (Dist. Ex. 6). According to the report, the student attended a class with eight students and received small group instruction in subjects such as reading and math (id. at pp. 1-2). The midyear report described the student's curriculum in the areas of reading, language arts, writing, math, social studies, science, social skills, computer, art, music, and library (id. at pp. 1-7). The report reflected that the student continued to work on alphabet letter-sound association and to recall with consistency (id. at p. 2). The report further revealed that the student required sensory breaks and verbal reminders to assist him to maintain his attention and self-regulate (id.). According to report, he also benefited from multisensory instruction, verbal reminders, adaptive seating, and use of an FM system (id.). His teacher also noted that in writing the student benefited from prompts and modeling of language (id. at p. 3). Overall, the report reflected that the student participated in classroom conversations and followed the classroom rules and routines



independently; however, it also characterized him as highly distractible and noted his difficulties with attention (id. at pp. 3-4). Additionally, the report revealed that the student was well-liked by his peers, and as his interest in peers increased, his willingness to interact with them increased; however, at times, he required teacher facilitation to initiate social interactions and to answer a question from a peer (id.).

In May 2010, the Aaron School completed a spring 2009-10 report of the student (Dist. Ex. 6). The report revealed that the student enjoyed assisting teachers in the classroom and participated in group activities (id. at p. 13). Additionally, the report reflected improvement in the student's ability to maintain attention; however, he continued to require frequent sensory breaks to maintain his participation in activities (id.). Next, although the report showed that the student was better able to use his words to express his feelings and employed strategies to self-regulate, he displayed rigidity and frustration during changes in routine or not receiving his preferred choice (id.). Finally, the report indicated that the student continued to require the academic and social/emotional supports as described in the February 2010 Aaron School report (id.).

In a May 2010 speech and language therapy progress report, the student's speech-language pathologist indicated that he demonstrated progress (Dist. Ex. 7 at p. 1). The therapist noted that the student's ability to maintain his attention had improved, especially within small group settings (id.). However, his ability to maintain his attention decreased in large less structured groups and when the auditory/language component of the activity was complex and lengthy (id.). Therefore, the report indicated that the student's therapists and teachers used sensory activities and strategies to help him maintain attention (id.). The speech-language pathologist recommended the continued provision of speech-language therapy to address the student's delays in receptive, expressive, and pragmatic language (id. at p. 4). The report also included goals to address pragmatic language skills, symbolic play skills, social skills, eye contact, cognitive flexibility, problem solving, attention, auditory processing, language processing, and following directions in addition to goals that targeted phonological awareness, use of pronouns/verb tense, and reasoning skills (id. at p. 5).

In May 2010, the student's occupational therapist from the Aaron School developed an OT progress report (Dist. Ex. 7 at p. 6). The therapist noted that the student exhibited improved arousal, attention, and affect during therapeutic and academic tasks when engaged in "sensory rich activities" (id.). The report further reflected that the student sometimes felt overwhelmed and disorganized with new and unexpected challenges, but he exhibited improved frustration tolerance and responded well to structured expectations, humor, and verbal praise (id.). According to the report, the student demonstrated difficulties with sensory processing resulting in fluctuations in self-regulation, poor frustration tolerance, and occasional emotional over-reactivity (id. at p. 7). In addition, the therapist noted that the student was under-responsive to tactile and movement experiences and as a result, demonstrated sensory seeking behaviors (id.). Further, the therapist stated that the student demonstrated improvement with respect to transitions, changes in schedule, and unexpected/novel events, but he would frequently engage in sensory seeking behavior during these time periods and she explained that he benefited from learning coping strategies (id.). The therapist went on to describe the student's sensory breaks throughout the day as "an essential portion" of his school experience (id.). The therapist also listed goals related to fine motor skills, grasping, graphomotor skills, motor planning, body awareness, sensory regulation, strength, endurance, postural control, and self-help skills (id. at pp. 8-10).

On May 18, 2010, a district special education teacher conducted a classroom observation of the student in his 8:1+2 classroom at the Aaron School (Dist. Ex. 8). The observer reported that the student was able to follow directions and academic instruction during gym and reading class (id. at pp. 1, 3). Although the observer noted that the student exhibited some self-stimulatory behaviors, she reported that the student's behaviors were not disruptive (id. at pp. 2-3). She further reported that the student was able to answer questions with prompting (id. at p. 2). The student also followed his teacher's directive to pick out a book to read and when the observer left the classroom, he was reading his book (id. at p. 3).

On June 9, 2010, the CSE convened for the student's annual review and to develop his individualized education program (IEP) for the 2010-11 school year (first grade) (Dist. Ex. 3 at p. 1). Meeting attendees included a district special education teacher (who also acted as district representative) and who had conducted the May 2010 observation of the student, a district school psychologist, the parents, an additional parent member, and by telephone, the student's special education teacher from the Aaron School (id. at p. 2; see Dist. Ex. 8). The June 2010 CSE deemed the student eligible for special education and related services as a student with a speech or language impairment and recommended placement in a 12:1+1 special class in a community school combined with related services consisting of two 30-minute sessions of speech-language therapy per week in a group of three, one 30-minute sessions of individual speech-language therapy per week, one 30-minute session of individual OT, and one 30-minute session of OT per week in a group of two (Dist. Ex. 3 at pp. 1, 13).

In a letter dated August 10, 2010, the district summarized the recommendations of the June 2010 CSE and notified the parents of the particular school to which the student was assigned for the 2010-11 school year (Dist. Ex. 5).

By letter dated August 20, 2010, the parents requested information regarding the 12:1+1 classroom at the assigned school (Tr. p. 241; Parent Ex. A at p. 3). They requested, among other things, information regarding the cognitive levels of the other students in the classroom and the levels of interaction that students had with typically developing peers (Parent Ex. A at p. 3). The parents further advised that until they were "permitted" to visit the assigned school and without the information they were requesting, they could not "blindly" place the student in the assigned school and planned to reenroll him at the Aaron School on September 7, 2010 and seek tuition reimbursement (id.).

On September 13, 2010, the parents visited the assigned school (Tr. p. 219). By letter dated September 30, 2010 to the CSE, the parents advised that they had visited a 12:1+1 classroom in the assigned school (Dist. Ex. 17). Based on their observation of the class and discussion with the classroom teacher, the parents asserted that the 12:1+1 class in the assigned school was not appropriate for the student because: (1) it was not appropriate for the student to be placed in a "mixed grade" class with first, second, and third graders "given the vast differences in social and emotional maturity" between the three grades; (2) the student should not be in a classroom with students who had "significant behavioral problems;" (3) during lunch and recess it was not appropriate for the student "to be expected to integrate with approximately 80 other students," most of whom were "neurotypical," with "only three or four supervising adults" (id. at pp. 1-2). In light of the foregoing, the parents asserted that the particular 12:1+1 classroom at the assigned school was not appropriate for the student (id.).

## Due Process Complaint Notice

By due process complaint notice dated January 27, 2011, the parents commenced an impartial hearing alleging, among other things, that the district denied the student a free appropriate public education (FAPE) during the 2010-11 school year (Dist. Ex. 1). As relief, the parents requested tuition reimbursement for the student's tuition costs at the Aaron School for the 2010-11 school year (*id.* at p. 1). Specifically, the parents claimed, among other things, that: (1) the June 2010 CSE was improperly composed due to the lack of a regular education teacher; (2) the district's special education teacher in attendance was not properly qualified to serve in that capacity on the CSE; (3) the June 2010 CSE failed to adhere to guidelines governing teleconferencing because the evaluations and reports reviewed by the CSE were not provided to the staff from the Aaron School who participated by telephone; (4) the June 2010 CSE did not rely on current or sufficient evaluative data, relying instead on "Teacher Observation," which was particularly egregious in light of the CSE's change in program recommendation for the student; (5) the annual goals listed in the June 2010 IEP were generic, vague and did not provide a baseline from which to work; (6) the IEP did not contain academic goals nor did it contain short-term objectives; (7) the June 2010 CSE failed to recommend adapted physical education; (8) the June 2010 CSE recommended placement in a 12:1+1 class without properly evaluating the student's ability to be placed in such a large and less supportive setting; and (9) the June 2010 CSE failed to consider other programs along the continuum of services prescribed by State regulation (*id.* at pp. 2-6). In addition, the parent asserted that the assigned school was not appropriate (*id.* at pp. 6-7).

The parents further asserted that the Aaron School constituted an appropriate placement for the student because it addressed his academic, speech-language, fine motor and social/emotional needs (Dist. Ex. 1 at p. 7). Finally, the parents contended that equitable considerations favored their request for relief (*id.*).

## Impartial Hearing Officer Decision

On April 7, 2011, the parties proceeded to an impartial hearing which, after five days of testimony, concluded on July 18, 2011 (Tr. pp. 1-423).<sup>2</sup> On September 15, 2011, the impartial

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<sup>2</sup> Upon the district's receipt of the parents' due process complaint notice, State regulations provide that the district shall, within 15 days of receipt of the due process complaint convene a resolution meeting, which may be waived in writing by the parties (34 CFR § 300.510; 8 NYCRR 200.5[j][2][iii]; see Questions and Answers on Procedural Safeguards and Due Process Procedures For Parents and Children with Disabilities, 52 IDELR 266 [OSERS 2009]). The impartial hearing shall commence within the first 14 days after the expiration of the 30-day resolution period or upon written agreement of the parties to continue mediation at the end of the 30-day resolution period, in which case the impartial hearing shall commence within the first 14 days after the impartial hearing officer is notified that either party withdrew from mediation (34 CFR § 300.510; 8 NYCRR 200.5[j][3][iii][b]). In this case, the hearing record does not indicate whether the parties waived the resolution period or whether they attempted to mediate the parents' claims. In any event, the hearing record reflects that it took over two months from the date of the parents' due process complaint notice for the impartial hearing to begin (compare Dist. Ex. 1, with IHO Decision). Although the impartial hearing officer's decision indicates that "decision deadlines were extended at the parties' requests" (IHO Decision at p. 3), the hearing record shows that twice during the impartial hearing, the impartial hearing officer solicited requests for an extension of the compliance date from both parties (Tr. pp. 291, 414). Such solicitations on the part of the impartial hearing officer violate federal and State regulations governing impartial hearings, which provide that requests for extensions be initiated by a party, and that the impartial hearing officer's written response regarding each extension request be included in the hearing record, even if granted orally (34 C.F.R. § 300.515; 8 NYCRR 200.5[j][5] [emphasis added]). While the parties may not complain or may even agree that an extension of time is warranted, such agreements are not a basis for granting an extension and the impartial hearing officer has an independent obligation to comply with the timelines set forth in the federal

hearing officer rendered his decision in which he awarded tuition reimbursement to the parents for the Aaron School for the 2010-11 school year (IHO Decision at p. 14). Specifically, notwithstanding his ultimate conclusion that the district denied the student a FAPE, the impartial hearing officer found that the CSE was properly composed (id. at p. 12). However, he proceeded to find that the district should have evaluated the student prior to recommending a change in the student's placement from a special class in a self-contained special education program to a special class in a community school (id. at p. 13). The impartial hearing officer further determined that the June 2010 CSE should have obtained a full psychological evaluation of the student to determine his level of need after completing one year at the Aaron School, and how to address those needs in a large community school setting, which the impartial hearing officer deemed particularly important given the student's extreme distractibility and noise sensitivity (id.). The impartial hearing officer also noted that the June 2010 CSE failed to provide the student with transitional support services to ease his transition to a less restrictive placement (id.).

The impartial hearing officer found that the Aaron School was an appropriate placement for the student because it offered him, among other things, a supportive, small class setting combined with individual and small group instruction, which the student required to make progress (IHO Decision at p. 14). Furthermore, the impartial hearing officer determined that the Aaron School addressed the student's particular learning problems, and used his strengths in developing strategies (id.). He also found that the Aaron School had related services on a pull-out and a push-in basis, combined with therapeutic and social skills components, which were necessary to address the student's sensory and social/emotional needs (id.). Additionally, the impartial hearing officer concluded that the student had made progress (id.). Finally, with respect to equitable considerations, the impartial hearing officer concluded that the parents fully cooperated with the district, submitted a timely request for an impartial hearing, and sought a reasonable amount of reimbursement (id.). Accordingly, the impartial hearing officer found that the equities favored the parents' request for relief (id.). Based on the above, the impartial hearing officer ordered the district to reimburse the parents' for the student's tuition costs at the Aaron School for the 2010-11 school year (id.).

### **Appeal for State-level Review**

The district appeals, alleging in pertinent part, that it offered the student a FAPE during the 2010-11 school year. Although the district does not appeal the impartial hearing officer's finding that the June 2010 CSE was properly composed, it argues that he erred in finding that the district should have conducted a "independent" evaluations before the CSE recommended a special class in a community school. The district further maintains that the evaluations upon which the June 2010 IEP was based were current, and that it had sufficient evaluative data upon which to make

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and State regulations (see 34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][3][iii], [5]) and regulatory provisions dictating that extensions of the 45-day timeline may only be granted consistent with regulatory constraints and that he must ensure the hearing record includes documentation setting forth the reason for each extension (8 NYCRR200.5[j][5]). The impartial hearing officer is reminded that it is his obligation, regardless of the parties' positions, to ensure compliance with the 45-day timeline for issuing a decision (see Application of the Dep't of Educ., Appeal No. 11-037; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-064). I also caution the impartial hearing officer to comply with the extension documentation requirements for impartial hearings in State regulations that shows how the impartial hearing officer weighed the regulatory factors for each extension of the impartial hearing timeline (8 NYCRR 200.5[j][5][ii]-[iv]).

an appropriate recommendation. Additionally, the district claims that the impartial hearing officer erred to extent that he based his conclusion that the district denied the student a FAPE on issues that were not raised in the due process complaint notice, namely, the lack of a transition plan in the challenged IEP. The district also asserts that the recommended 12:1+1 special class was appropriate for the student because it provided the same staffing ratio that he received at the Aaron School, the student would have received all of the related services mandated on his IEP, and he would have benefitted from exposure to typically developing peers. The district also maintains that the assigned school would have been able to implement the student's IEP.

Next, the district argues that the Aaron School was not an appropriate placement for the student because in part, he would not have received the related services mandated on his IEP, particularly, speech-language therapy. Moreover, the district alleges that the Aaron School was overly restrictive because did not offer the student the opportunity to interact with typically developing peers. The district also contends that equitable considerations precluded the parents' request for relief because they had no intention of enrolling the student in the Aaron School and they failed to comply with the Individuals with Disabilities Education Act's (IDEA's) notice requirements. The district requests that the impartial hearing officer's decision be reversed.

In their answer, the parents request that the petition be dismissed in its entirety. The parents note that because they were not aggrieved by the impartial hearing officer's decision to award tuition reimbursement, they do not cross-appeal from any matters not decided in their favor, namely, his conclusion that the June 2010 CSE was properly composed.<sup>3</sup> The parents allege, among other things, that without conducting any updated evaluations, the district significantly changed the student's placement recommendation from the previous year from a nonpublic school to a public school. Regarding the assigned school, the parents argue that the proposed class failed to offer the student an appropriate peer group for instructional purposes which, in turn, would have denied the student of a FAPE. Next, the parents contend that the impartial hearing officer correctly determined that the parents met their burden of establishing that the Aaron School was appropriate for the student. They further assert that they are not held as strictly to the standard of placement of the student in the least restrictive environment (LRE) as the district. With respect to equitable

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<sup>3</sup> The parents' statement that they are not permitted to cross-appeal an adverse finding once the district has opened the door by initiating an appeal is incorrect because it falls under the exception. State Review Officers have consistently held that

"[a]s a general rule, a party who has successfully obtained the full relief sought is not aggrieved and may not appeal "even where that party disagrees with the particular findings, rationale or the opinion supporting the judgment or order below in his favor" (Parochial Bus Sys. Inc. v. Board of Educ., 60 N.Y.2d 539, 545 [1983]; Application of the Dep't of Educ., Appeal No. 09-019). However, where, as here, the responding party has no right to appeal, an exception provides that the responding party may nevertheless cross-appeal to seek "review of a determination incorrectly rendered below where, otherwise, he [or she] might suffer a reversal of the final judgment or order upon some other ground"

(Application of a Student Suspected of Having a Disability, Appeal No. 09-063 [emphasis added and citation omitted]; Application of the Dep't of Educ., Appeal No. 09-051; see Application of the Bd. of Educ., Appeal No. 11-050 [explaining that raising additional issues in a respondent's answer without cross-appeal is not authorized by State Regulations and, in effect, deprives the petitioner of the opportunity to file responsive papers on the merits because State regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer"])). In this case, it was the parents' option whether or not to cross-appeal and they have elected not to do so.

considerations, the parents contend that they cooperated with the district, and acted reasonably and in good faith. Additionally, the parents maintain that they provided the district with timely notice of their intention to return the student to the Aaron School, and further allege that the district failed to respond to their communications, or otherwise address their concerns.

### **Applicable Standards**

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

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

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably

calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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]).

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

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 will first address the claim that the impartial hearing officer erred by addressing an issue that was not raised in the parents' due process complaint notice. It is well settled that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Moreover, under the IDEA, a complaining party is not entitled to proceed to an impartial hearing unless the

challenged due process complaint notice meets minimal pleading requirements to be legally sufficient, including a description of the nature of the problem of the student "relating to the proposed or refused initiation or change, including facts relating to the problem" (20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]).

Here, the impartial hearing officer found that the district did not offer the student a FAPE, in part, because the June 2010 CSE did not provide transitional support services to the student to ease his transition to a less restrictive placement (compare Dist. Ex. 1, with IHO Decision at p. 13).<sup>4</sup> However, the issue of transition support services may not be reasonably read as included within the due process complaint and there is no indication that the parties agreed that the issue should be decided by the impartial hearing officer. Accordingly, the issue was not properly before the impartial hearing officer, and he should have confined his determination to only those claims that were raised in the parents' due process complaint notice (see 20 U.S.C. § 1415[c][1],[c][2][E],[f][3][B]; 34 C.F.R. §§ 300.508[b],[d][3], 300.511[d]; 8 NYCRR 200.5 [i][1][iv],[i][7],[j][1][ii]; C.F. v. Dep't of Educ., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-7 [S.D.N.Y. Sept. 16, 2011]; M.H. v. New York City Dep't of Educ., 712 F. Supp. 2d 125, 159 [S.D.N.Y. 2010]; Application of the Bd. of Educ., Appeal No. 11-129; Application of the Bd. of Educ., Appeal No. 11-096; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 99-060). Therefore, I will annul this portion of the impartial hearing officer's decision.

## **June 2010 IEP**

### **Sufficiency of Evaluative Data**

The district claims that the June 2010 CSE had sufficient evaluative data to formulate an appropriate educational program for the student. An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, 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

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<sup>4</sup> Although not referenced in the decision and not raised in the due process complaint notice, presumably, in making this finding, the impartial hearing officer was referring to a State regulation that provides, in pertinent part, that where a student with autism has been placed in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special educational needs are being met (8 NYCRR 200.13[a][6]). In this case, while this regulation pertains to the special education teacher responsible for implementing the IEP, this regulation is inapplicable here, because at the time of the impartial hearing, the student no longer qualified for a diagnosis of PDD-NOS (Dist. Ex. 13 at p. 5).



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]). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]).

In this case, the hearing record reflects that the June 2010 CSE relied on a variety of sources of information, including input from the student's teacher at the Aaron School and reports from the school in order to create an accurate portrait of the student's needs and to develop appropriate educational program recommendations for him. The hearing record further illustrates that the June 2010 IEP was developed with meaningful parental participation and that all of the CSE members, including the parents, provided input with respect to developing the student's IEP (Tr. pp. 19, 45-46).

Notwithstanding the impartial hearing officer's conclusion that the CSE should have conducted evaluations of the student prior to recommending a change in the student's placement, the evidence contained in the hearing record shows that the June 2010 CSE developed an IEP that addressed the student's needs based on adequate evaluative data (see IHO Decision at p. 13). At the June 2010 CSE meeting, the CSE reviewed the spring and midyear 2009-10 Aaron school reports, the May 2010 Aaron School speech and language and OT reports, the May 2010 classroom observation, the April 2009 social history, the January 2009 educational progress report, the January 2009 speech-language progress report, the January 2009 related service progress report, the February 2009 neurodevelopmental pediatric report, the December 2008 educational progress report; the November/December 2008 psychological evaluation, and the June 2009 OT evaluation (Tr. pp. 15-16, 50-51; Dist. Exs. 6-16).

Review of the documentary evidence included in the hearing record reveals that the June 2010 IEP reflected the student's then-current academic skills, social/emotional functioning, and related services needs as depicted in the evaluative data and progress reports reviewed by the CSE (compare Dist. Ex. 3 at pp. 3-5, with Dist. Exs. 6-16). According to the June 2010 IEP, the student exhibited overall high average cognitive abilities; however, he demonstrated delays with respect to his speech and language skills (compare Dist. Exs. 3 at p. 3, with Dist. Exs. 6 at p. 9; 15 at pp. 3, 8). A review of the November 2008 psychological evaluation and the February 2009 neurodevelopmental evaluation indicated that those reports provided the June 2010 CSE with detailed information regarding the student's needs and abilities in the areas of cognition, language processing, attention, and self-regulation (Dist. Exs. 13; 15). Specifically, according to the February 2009 neurodevelopmental evaluation, the student demonstrated difficulties with attention and distractibility, particularly in large groups; however, he responded to redirection (Dist. Ex. 13 at p. 6). Additionally, the neurodevelopmental evaluation report further indicated that despite the student's difficulties with sensory regulation, he responded well to intervention (id.).

The June 2010 IEP also included information contained in current teacher reports indicating that the student was an active participant in class and enjoyed assisting his teachers (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 14 at p. 2). Additionally, the June 2010 IEP contained specific information regarding the student's academic abilities, including his ability to decode and encode CVC words, identify sight words, rote count to 100, and write uppercase letters (Dist. Ex. 3 at p. 3). The June 2010 CSE also incorporated information into the resultant IEP provided by the student's teacher from Aaron School regarding his instructional levels including his abilities in the area of decoding (end of kindergarten), listening comprehension (mid though upper kindergarten), writing (end of kindergarten), and math computation (end of kindergarten) (Dist. Exs. 3 at p. 3; 4).

Further examination of the hearing record shows that the June 2010 IEP reflected information that was consistent with the student's spring and midyear 2009-10 Aaron School reports (compare Dist. Ex. 3 at p. 4, with Dist. Ex. 6). For example, the June 2010 IEP indicated that the student's delays in attention as well as expressive and pragmatic language negatively affected his educational performance (Dist. Ex. 3 at p. 4). In addition, the June 2010 IEP reflected that the student participated in classroom conversations and followed classroom rules and routines (id.). The June 2010 IEP also noted that the student exhibited an interest in social interactions with peers, but lacked the social and language skills needed for these interactions and as a result, he sometimes required adult assistance (id.). In addition, the June 2010 IEP reflected information from the November/December 2008 psychological evaluation that indicated the student did not exhibit significant emotional or behavioral concerns (Dist. Exs. 3 at p. 4; 15 at p. 5).

With respect to the student's health and physical development, the June 2010 IEP also was in accordance with information in the student's OT evaluation and OT progress report (Dist. Exs. 7 at pp. 6-10; 16 at pp. 1-7). For example, the May 2010 OT report from the Aaron School noted that the student demonstrated difficulties with his grasp while writing, but he continued to demonstrate improvement in his graphomotor skills (Dist. Ex. 7 at p. 8). Accordingly, the June 2010 IEP indicated that the student might exhibit self-stimulatory behavior in a large group setting and that the student required OT to address his sensory processing and fine motor needs (Dist. Ex. 3 at p. 5).

Based on the information before it, the June 2010 CSE built several of the recommendations and strategies included in the Aaron School progress reports and evaluations into the resultant IEP including placement in a small class, enhanced auditory input, adaptive seating, sensory breaks, visual cues, verbal prompts, and redirection (Tr. pp. 73-74; compare Dist. Exs. 3 at pp. 3-5, with Dist. Ex. 6 at pp. 2-4; Dist. Exs. 10 at pp. 1-5; 13 at p. 6; 15 at pp. 6-7). Additionally, the June 2010 CSE also recommended the provision of individual and group speech-language services and OT to address the student's receptive, expressive, and pragmatic language delays in addition to his sensory processing and fine motor needs based on related service progress reports and evaluations (Dist. Ex. 3 at p. 13). Lastly, the parent testified that the district afforded her and the student's teacher from the Aaron School an opportunity to participate in the development of the student's IEP, and the CSE meeting minutes reveal that the student's teacher provided the student's management needs that were incorporated into the June 2010 IEP (Tr. p. 249; Dist. Ex. 4). In light of the foregoing, the hearing record reflects that the information that was before the June 2010 CSE was sufficiently comprehensive to identify and address all of the student's special education and related services needs.

## 12:1+1 Special Class Placement

Next, as detailed below, the hearing record supports the district's claims that the recommendation of a 12:1+1 special class in a community school was tailored to meet the student's educational needs. The school psychologist testified that the CSE recommended a 12:1+1 special class in a community school based on the student's then-current academic and cognitive functioning as well as his social/emotional needs (Tr. pp. 20-22). According to the school psychologist, despite his delays with respect to sensory processing, attention, and language processing, the student demonstrated average academic skills and average to superior cognitive skills; therefore, he needed instruction provided within a small class setting (*id.*). Accordingly, the June 2010 CSE determined that a 12:1+1 special class placement would offer the student the additional assistance of a classroom paraprofessional to address his needs related to distractibility, attention, and social skills (Tr. p. 41). The school psychologist further testified that the recommendation for a 12:1+1 special class in a community school was based on the student's needs in language skills, social skills, sensory regulation, attention as well as input provided by the parents and student's teacher from the Aaron school (Tr. pp. 42-43).

Moreover, the parent testified that a 12:1+1 special class placement "in and of itself" was an appropriate placement for the student; however, she was concerned that the functioning levels of the students in the special class in the assigned school significantly differed from that of her son's (Tr. p. 215). Further review of the hearing record shows that the parents did not object to the 12:1+1 special class recommendation at the time of the June 2010 CSE meeting; rather, they raised concerns regarding the functional grouping of the students in the recommended classroom (Tr. p. 38; Dist. Ex. 4). Additionally, the hearing record reflects that the student's teacher from the Aaron school agreed that a class of 10 to 12 students would be appropriate for the student (Tr. pp. 30, 38). Based on the above, the hearing record demonstrates that the recommended 12:1+1 special class placement offered to the student in the June 2010 IEP was reasonably calculated to enable him to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192 [2d Cir. 2005]).

### Conclusion

Having determined that the district offered the student a FAPE for the 2009-10 school year, it is not necessary to reach the issue of whether the Aaron School was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

**THE APPEAL IS SUSTAINED.**

**Dated:** Albany, New York  
November 25, 2011

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**