



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-126

### **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, Lisa R. Khandhar, Esq., of counsel

Law Offices of Regina Skyer and Associates, attorneys for respondents, Sonia Mendez-Castro, 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 the parents for their son's tuition costs at the Stephen Gaynor School (Stephen Gaynor) for the 2010-11 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Stephen Gaynor (Tr. pp. 139-41; see Dist. Ex. 1 at p. 1). The Commissioner of Education has not approved Stephen Gaynor 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 a speech or language impairment is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]; see also Dist Ex. 3 at p. 1).

#### **Background**

As a young child, the student exhibited delays in speech and language development including difficulty with pronunciation (Tr. p. 178; Dist. Ex. 7 at pp. 1, 2-3). He attended a "regular mainstreamed school" for prekindergarten, but was placed in a small, special education type of

class with nine students and three or four teachers (Tr. pp. 178-79; see Dist. Ex. 7 at p. 1).<sup>1</sup> The student began receiving private speech-language therapy at age three (Dist. Ex. 9 at p. 1).<sup>2</sup> At age five, the parents obtained a private psychological evaluation of the student, which according to the student's mother, made them realize that the student required a placement that could provide him with speech-language therapy, occupational therapy (OT), and more 1:1 attention (Tr. p. 180).<sup>3</sup> The student attended a general education kindergarten program but had difficulty processing language, following directions, and grasping academics (Dist. Ex. 7 at pp. 1-2). Due to organizational difficulties and graphomotor delays, the student received OT services beginning in kindergarten (id. at p. 2). In September 2005, the parents placed the student at Stephen Gaynor in a first grade class of ten students with one teacher and a teacher assistant (id.). The student has remained at Stephen Gaynor since that time (id.; Tr. pp. 139-40; Dist. Ex. 8 at p. 1).

In June 2008 at the end of the student's third grade year, he was evaluated by a speech-language pathologist (Dist. Ex. 9 at p. 1). Administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) yielded the following standard scores (and percentile ranks): core language score 66 (1st percentile), receptive language index 67 (1st percentile), expressive language index 67 (1st percentile), language content index 64 (1st percentile), and language memory index 64 (1st percentile) (id.). According to the speech-language pathologist the student's scores revealed substantial deficits in language skills, placing the student in the "[v]ery low range" for a core language score, as well as for all indexes, and indicating marked difficulties in receptive language skills, expressive language skills, semantic skill development, and language memory skills (id. at pp. 1, 6). With respect to auditory comprehension, the speech-language pathologist reported that based on informal interaction, the student demonstrated an adequate ability to answer questions about identity, aspirations, and predilections (id. at pp. 2, 6). However, she also noted that on the CELF-4 the student had difficulty following single and multistep directions and understanding how words are related (id.). With respect to expressive language, the speech-language pathologist reported that the student exhibited functional social expressive language skills, but mild to moderate deficits in morphological and syntactic development (id. at p. 6). She noted that the student's use of multiple word verbs and age level complex sentences was lacking (id.). The speech-language pathologist further noted that the student exhibited a mild delay in meta-linguistic awareness on a sentence formulation task and a moderate deficit in explaining word relationships and in sentence repetition (id. at pp. 2-3, 6). The speech-language pathologist judged the student's intelligibility to be "adequate" (id. at p. 1). With regard to semantic skills, the speech-language pathologist reported that the student exhibited a mild deficit in understanding spoken paragraphs and a moderate to severe deficit in labeling and

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<sup>1</sup> A social history conducted by the district in December 2008, indicated that the student began receiving special education services at the Committee of Preschool Special Education (CPSE) level; however, the student's mother stated that the student attended the prekindergarten class from age three to age five and that he was not evaluated "early" by the district (Tr. p. 179; Dist. Ex. 7 at p. 1). The prekindergarten program was reportedly a special education preschool housed in a synagogue (Dist. Ex. 7 at p. 1).

<sup>2</sup> The private speech-language therapy reportedly continued until the student was six years old (Dist. Ex. 9 at p. 1).

<sup>3</sup> The student's mother testified that she "believed" that she had referred the student to the CSE based on the private psychological evaluation (Tr. p. 180). She did not recall when an IEP was first developed for the student (Tr. pp. 179-80) and the hearing record does not otherwise indicate when the student was first classified.

understanding/explaining how words are related (id. at p. 6). In language memory, the student exhibited substantial difficulty with tasks that required him to retain and recall information (id.). Based on the student's moderate deficits in receptive and expressive language skills, as well as his deficit in semantic skills development, the speech-language pathologist opined that the student would experience substantial difficulty in understanding classroom instruction and participating verbally in class (id.). She recommended that the student receive speech-language therapy two times per week (id.).

In October 2008 during the student's fourth grade year, the parents obtained a private psychological evaluation of the student (Dist. Ex. 8 at p. 1). The evaluating psychologist reported that although the student had done very well at Stephen Gaynor his expressive language skills remained relatively weak and his writing, though improved, remained underdeveloped (id.). The psychologist noted that although the student did what was required of him, he gave up easily and rarely pushed himself (id.). In addition, the student continued to struggle with transitions (id.). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded the following percentile ranks: verbal comprehension 27th percentile, perceptual reasoning 6th percentile, working memory 27th percentile, processing speed 5th percentile, and full scale IQ 8th percentile (id. at p. 9).<sup>4</sup>

The psychologist opined that while the scores appeared to be an accurate reflection of the student's then-current functioning, they significantly underestimated the student's ultimate intellectual potential, which was in the average range (Dist. Ex. 8 at pp. 3, 7). According to the psychologist, attitudinal and neuropsychological factors contributed to the student's underperformance (id. at p. 3). With regard to attitudinal factors, the psychologist explained that the student's level of effort and motivation were uneven and that he was only intermittently able to stay sharply focused on the material (id.). With respect to neuropsychological factors, the psychologist cited two "overarching vulnerabilities" (id.). First, the student consistently had difficulty finding the words and syntactic forms that would have allowed him to adequately convey what he knew about the topic being discussed and second, the student demonstrated a "vulnerability of executive functioning" the core of which was the student's inability to devise effective problem solving strategies (id.).

The psychologist noted that a split between the student's expressive and receptive language capabilities was evident throughout testing (Dist. Ex. 8 at p. 3). He reported that the student seemed to comprehend what was being said to him at an age appropriate level, but was less adept at coming up with words to document his understanding (id. at pp. 3-4). The psychologist noted, however, that even though the student's grammar and syntax were immature, during friendly conversation the student's ability to communicate his intended message was good (id. at p. 4). He described the student's pragmatic language as an important strength (id.). According to the psychologist, the student struggled with many of the visually based tests he administered and the "mechanics" of the student's visual processing, both expressive and receptive, were relatively weak (id.). He noted that the student's graphomotor skills were immature and a "concern" to the extent that it may impact the quality of his written expression (id.). He indicated that the student's handwriting was generally very neat, although it took him extra time to produce the high quality

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<sup>4</sup> The psychologist did not report the student's standard scores for the WISC-IV (Dist. Ex. 8 at pp. 2-3, 9).

penmanship (id.). The psychologist characterized the student's short-term memory as "relatively weak" (id. at p. 5).

With respect to attending, the psychologist reported that the student was not hyperactive but that he was occasionally impulsive and not infrequently distractible (Dist. Ex. 8 at p. 5). The psychologist further reported that the student's ability to initiate and sustain a sharply narrowed focus was uneven and he periodically drifted off a task after working on it for a while (id.). According to the psychologist, the student manifested other relevant vulnerabilities in organization, planning, and self-monitoring that fell under the rubric of executive functioning (id.). He noted that the student's absence of strategic thinking was significant in that it interfered with his ability to tackle the more complex aspects of learning and also led to the student's feeling frustrated and overwhelmed, emotions which resulted in the student avoiding challenge and thereby exacerbating his tendencies toward inattention and distractibility (id.).

With respect to academic functioning, the psychologist reported that the student had made significant progress, noting that less than two years previously the student was essentially a non reader (Dist. Ex. 8 at p. 5). However, despite the student's progress, the psychologist noted that the student's reading mechanics remained relatively weak and that he had difficulty with phonics and word identification tests (id. at pp. 5-6; see id. at pp. 9-11). The psychologist reported that the student was not yet secure in his knowledge of vowel sounds and on occasion made visual discrimination errors (id. at p. 6). Administration of the Gray Oral Reading Test (GORT) yielded the following percentile ranks: rate 16th percentile, accuracy 37th percentile, fluency 25th percentile, and comprehension 16th percentile (id. at pp. 6, 10). The psychologist reported that the student read slowly and somewhat dysfluently but that his accuracy benefited from the existence of context and he identified words at a close to age appropriate level (id. at p. 6). The psychologist reported, however, that the student put so much effort into reading words that his comprehension suffered (id.). He concluded that in general the student's profile was consistent with a diagnosis of "dyslexia" (id.). The psychologist further reported that the student obtained a modestly below average score on a standard word at a time spelling test but attributed the student's success to his visual memory rather than his ability to sound out words (id.).

According to the psychologist, the student's writing samples reflected both strengths and weaknesses (Dist. Ex. 8 at p. 6). He noted that on the positive side, the student wrote with painstaking neatness and on earlier test items gave considerable thought to what he wanted to say (id.). However, the psychologist reported that the student tired over the course of the test and his effort on the later items was cursory (id.). The psychologist noted that at times the student was so intent on writing neatly that it distracted him from what he was writing (id.). He opined that the written expression process required the student to keep so many different aspects in mind that he often felt that he was unable to keep track of them or complete an assignment without feeling overwhelmed (id.). The psychologist noted that the student nonetheless seemed to enjoy writing and was motivated to improve his skills (id.).

The psychologist reported that math was an area of strength for the student, where he felt "competent and empowered" (Dist. Ex. 8 at p. 8). He reported that the student demonstrated a good understanding of addition and subtraction, but grasped only the rudiments of multiplication and division (id. at p. 6). The student obtained his best score on an applied problems task (id.).

According to the psychologist, testing did not raise significant concerns reading the student's self-esteem or emotional well being (Dist. Ex. 8 at p. 7). He reported that the student seemed fundamentally happy and "comfortable in his skin" (id.). He noted that the student did not like school and his self-image with respect to academics was vulnerable; however, commented that the student did not seem "'turned off' to school or learning in any deep or enduring way" (id.). The psychologist concluded that to date, the student had done well at Stephen Gaynor and would be best served, at least for the foreseeable future, by staying there (id. at p. 8).

In December 2008 (fourth grade), the district conducted a social history in preparation for the student's annual review (Dist. Ex. 7 at p. 1). Based on parent report, the social history indicated that the student had received speech-language therapy continuously since first grade and OT from kindergarten through June 2008 (the end of third grade) (id. at p. 2). As noted in the social history, the student's mother reported that as a fourth grader the student exhibited delays in receptive and expressive language, as well as learning difficulties (id.). More specifically, she indicated that the student reversed letters and words and had very weak decoding skills, and that he had been diagnosed with "dyslexia" and executive function difficulties (id.). She further reported that although the student's reading skills had improved and he was able to read more independently, he did not like to read as it was a struggle for him (id.). The social history reflected that the student had significant problems with language processing, auditory comprehension, and short-term memory (id.). According to the student's mother, at home and in school the student had always had "very good" social skills and was able to interact well with peers and adults (id.).

As part of a requested review, in December 2008 (fourth grade) the district's school psychologist completed an educational update of the student consisting of achievement testing, projective testing, a record review, and clinical interview (Dist. Ex. 6 at p. 1). The psychologist noted that rapport was easily established with the student and that he remained engaged and well related to the examiner during the testing session (id.). However, she also noted that the student's eye contact was "somewhat" minimal and sometimes fleeting and that the student asked for several breaks during testing (id.). The psychologist indicated that the student sometimes spoke very quietly and was difficult to understand, but that he initiated appropriate questions related to the situation at hand (id.). The psychologist cited the findings reported in the parents' October 2008 private psychological evaluation and stated that the student demonstrated the same strengths and weaknesses during her assessment of the student (id. at p. 2). Notably, the student's strengths included his ability to ask appropriate social questions and respond adequately to questions about his personal life (id.). The psychologist reported that the student sometimes stumbled over word choice but was able to convey what he meant (id.). The psychologist also reported that the student demonstrated several weaknesses during the evaluation (id.). Specifically, she indicated that the student lacked strategies to respond to reading comprehension questions and seemed to struggle with receptive language in that he often provided responses which did not pertain to the questions asked (id.).

Administration of the Wechsler Individual Achievement Test- Second Edition (WIAT-II) by the school psychologist yielded the following standard scores: word reading 91, reading comprehension 69, pseudoword decoding 87, numerical operations 111, math reasoning 101, spelling 85, and written expression 101 (Dist. Ex. 6 at pp. 2-4). According to the psychologist, the student's performance on the WIAT-II indicated that when compared to others his age, the student's ability to apply academic skills was uneven (id. at p. 2). She noted that the student demonstrated

age appropriate skills in reading decoding, math problem solving, and written expression (id.). She identified math calculation as an area of relative strength for the student, while noting that his spelling skills were slightly below average and reading comprehension skills significantly below average (id.). The psychologist reported that the student demonstrated significant difficulty with reading comprehension and when given the option, the student chose to read passages silently (id. at p. 3). According to the psychologist, the student was unable to provide the correct response to comprehension questions even though he looked back at the passage to find answers (id.). In addition, when the student was asked to respond to questions related to short passages that he read aloud he was unable to respond correctly (id.). With respect to spelling, the psychologist noted one letter reversal in the student's work (id. at pp. 2-3). The psychologist reported that based on clinical interview and her observations during the assessment, the student was pleasant and friendly and appeared to have positive coping and socialization skills (id. at p. 4).

The Committee on Special Education (CSE) convened on January 5, 2009 (Parent Ex. B at pp. 1-2). The present levels of performance on the resultant individualized education program (IEP) primarily reflected information from the district's December 2008 educational update (compare Dist. Ex. 6, with Parent Ex. B at pp. 3-4). The IEP stated that the student's difficulties in the areas of language, academic development, self-regulation, and attention necessitated a self-contained, specialized setting in order for the student to progress toward attaining his IEP goals (Parent Ex. B at p. 11). The January 2009 CSE recommended that the student be found eligible for special education services as a student with a speech or language impairment and placed in a 12:1 special class in a community school (id. at p. 1). In addition, the CSE recommended that the student receive related services of two 30-minute sessions of speech-language therapy per week and three 30-minute sessions of group speech-language therapy per week (id. at p. 13). The January 2009 IEP included annual goals and short-term objectives related to mathematics, reading, spelling, writing, expressive language, and sequencing (id. at pp. 6-10, 15-18). The IEP also afforded the student the following testing accommodations: extended time (1.5x) with a 10 minute break for every 30 minutes of testing, separate location of no larger than 12:1, questions read aloud except for reading comprehension, and directions read and reread (id. at p. 13). The IEP indicated a projected initiation date of January 10, 2009 and a review date of January 4, 2010 (id. at p. 2). For the 2009-10 school year, the student attended Stephen Gaynor (see Dist. Ex. 5).

On or about February 19, 2010, the parents signed a contract enrolling the student in Stephen Gaynor for the 2010-11 school year (Parent Ex. D). On February 26, 2010 the parents made a deposit payment of \$8,600 toward the student's Stephen Gaynor tuition for the 2010-11 school year (Dist. Ex. 22).

An undated progress report from the student's 2009-10 school year at Stephen Gaynor provided information regarding the student's academic and social functioning (Dist. Ex. 5). The progress report indicated that the student was at an independent reading level of 3.5 and an instructional reading level of 4.0 for phonics and sight words (id. at p. 1). According to the student's reading teacher, he was able to decode phonetic words easily and his ability to recognize unfamiliar words was improving (id.). The student had reviewed all diphthongs, some irregular word patterns, and -tion/sion words, and was learning syllabication rules and suffixes with different spelling patterns (id.). The student's reading teacher indicated that the student was learning strategies for decoding unfamiliar multisyllabic words by breaking words into segments to help sound them out and required continued review in this area (id.). The reading teacher

described the student as a fluent reader and indicated that she was working with the student on annunciation and using a louder "tone" while reading (id.). According to the reading teacher, the student was beginning to read with some expression and to acknowledge punctuation (id.). The teacher reported that with respect to fluency the student benefited from teacher modeling, repeated reading, tracking text with his finger or an index card, and use of the "Great Leaps" program (id.). The student's independent reading level for comprehension was 3.0 and his instructional reading level was 4.0 (id. at p. 2). The teacher reported that the student had been able to make text-to-self connections and enjoyed making predictions (id.). She noted that the student's basic understanding of text was more literal but that he had a good memory for facts and the ability to sequence (id.). The teacher indicated that highlighting and annotating were useful techniques for the student, and that along with review and teacher support, assisted the student with differentiating between the main idea and details (id.). The teacher indicated that with much teacher assistance, the student was beginning to work on an inferential level (id.).

According to the student's reading teacher, spelling was taught in conjunction with reading (Dist. Ex. 5 at p. 2). As with reading, the student was working on syllabication and suffixes with different spelling patterns (id.). The teacher noted spelling was reviewed on a daily basis though the use of warm ups, daily dictations, writing assignments, answering written questions, and homework assignments (id.). She indicated that the student performed very well on dictations and was able to retain learned phonic rules and most sight words; however, he benefited from continued practice (id.). The teacher commented that the student was transferring learned spelling skills to his independent writing and was making good progress (id.). With respect to writing, the teacher reported that the student understood the format of a basic paragraph and was beginning to use it in his independent writing (id. at p. 3). She noted that when writing about a familiar topic, the student was able to write a clear and informative paragraph and was beginning to expand his sentences to include more details (id.). The teacher stated that the student benefited from the use of graphic organizers and outlines and that he was beginning to edit his work independently using a checklist (id.). The teacher described the student's handwriting as neat and legible when he took his time (id. at p. 4). She noted that the student's use of cursive was inconsistent as it was more laborious for him (id.). The teacher indicated that the student did not need a laptop in the classroom but benefited from using one on longer writing assignments (id.).

The reading teacher further indicated that the student's listening comprehension skills were approximately at a 3.5 grade level (Dist. Ex. 5 at p. 3). She stated that the student was able to recall major facts and details from stories and content area material (id.). The teacher reported that at times the student required scaffolding in order to make inferences and that he benefited from having complex information broken down into small chunks and presented in clear, concise language (id.).

According to the student's math teacher, the student's math skills were at approximately a 4.5 grade level (Dist. Ex. 5 at p. 4). The math teacher described the student's progress in math, noting that when he began the school term he needed help with triple digit multiplication and long division with a two digit divisor (id. at p. 5). The math teacher reported that the student had no knowledge of statistics nor did he understand fractions (id.). The math teacher indicated that the student had since mastered long division with a two digit divisor and indicated that the student was able to do triple digit multiplication, although he needed reinforcement with this skill (id.). The math teacher reported that the student was able to find the average, median, mode, and range for a

group of numbers (id.). According to the math teacher, the student had learned to read, write, and draw fractions, as well as convert improper fractions to mixed numbers (id.). The student could also add and subtract mixed numbers with like denominators and reduce fractions (id.). The math teacher reported that the student's greatest strength was in his computation skills, and that he excelled at following and memorizing step by step procedures (id.). He noted that the student's weakness in math was in understanding concepts (id.).

The student's progress report indicated that in social studies, when the student was interested in the topic he was an active participant in group discussions (Dist. Ex. 5 at p. 6). He benefited from teacher encouragement to make sure he was focused and on topic when working in small groups (id.). The progress report indicated that the student understood the concepts covered in social studies but benefited from visuals and hands on activities to grasp more abstract concepts (id.). The progress report reflected that the student required frequent repetition and review in order to retain information (id.).

With regard to perceptual functioning, the student's progress report indicated that he was able to copy familiar words from the board without looking at each letter, that he had a good memory for rote information, and that he was able to perform fine motor and gross motor tasks (Dist. Ex. 5 at pp. 7, 8). The progress report indicated that the student was able to follow simple verbal directions, but benefited from having multistep directions broken down into small sequential steps and was able to follow simple written directions, but benefited from having more complex directions reviewed verbally (id. at p. 8). In oral language and communication, the progress report indicated that the student had difficulty with word finding and more sophisticated communication (id.). According to the progress report, the student tended to use "very simple" vocabulary and although his personal narratives were sequenced and organized, they tended to be very general and lack specific details (id. at p. 9). The progress report reflected that the student recalled information but struggled making connections (id.). The progress report indicated that the student received individual speech-language therapy once a week, as well as speech-language therapy in a dyad once per week (id.). In addition, a "language specialist" pushed into the classroom three times per week to support content area material (id. at p. 8).

Turning to the student's behavior, the progress report stated that he could be unfocused and impulsive at times, especially when he was not interested in a topic (Dist. Ex. 5 at p. 9). The report identified the following methods for dealing with the student's behavior: setting personal goals to earn rewards, verbal reminders and refocusing, positive reinforcement, and discussions (id. at p. 10). According to the report, the student interacted appropriately with peers in structured situations and although he could be "silly" in unstructured situations, he was never disrespectful to others (id. at p. 11). The report described the student as organized and reported that he benefited from the school color coding system (id. at p. 12). When given clear and direct instructions the student was able to work independently; however, he benefited from teacher check-ins to make sure that he was on task (id.). The report indicated that the student regularly completed his homework and did not have difficulty carrying out homework assignments (id.).

In a cover letter to the parents dated May 4, 2010, the CSE chairperson indicated that she had enclosed an appointment letter for a CSE review meeting to discuss the student's needs (Dist. Ex. 12 at p. 1). The CSE chairperson indicated that if the student had been evaluated since the last IEP meeting, the most recent evaluations would be enclosed and would also be discussed at the



CSE review meeting (*id.*). She requested that the parents send copies of the most recent evaluations to the teachers and service providers from the student's school who would be participating in the CSE meeting (*id.*). The CSE chairperson stated that it was "imperative" that the student's teacher participate in the CSE meeting and requested that the parents speak to the administration at the student's school to ensure that the teacher was available to participate, either in person or by telephone (*id.*). An enclosure indicated that the student's CSE meeting was scheduled for May 24, 2010 (*id.* at p. 2). It does not appear that any evaluations were included with the CSE meeting notice (Tr. pp. 186-93; *see* Dist. Ex. 12).

On May 24, 2010, the CSE convened for the student's annual review and to revise the student's IEP for the 2010-11 school year (Dist. Ex. 3 at pp. 1-2). Present for the meeting were a school psychologist who also served as the district representative, a district regular education teacher, a district special education teacher, an additional parent member, and the student's mother (*id.* at p. 2).<sup>5</sup> The student's special education teacher from Stephen Gaynor participated in the CSE meeting by telephone (Tr. pp. 12, 27; Dist. Ex. 3 at p. 2). According to a document dated May 24, 2010 and described as a CSE "review rationale" that was prepared in conjunction with the May 2010 CSE meeting, the evaluations used by the CSE to develop the IEP were a "School report" and "Review of record" (Dist. Ex. 4 at p. 1). The present levels of performance in the resultant IEP contained information found in the Stephen Gaynor progress report regarding the student's academic abilities, as well as handwritten notations (Dist. Ex. 3 at pp. 3, 4). The handwritten notations in the IEP indicated that the student struggled with language and was very concrete, and that he loved sports and was very social (*id.*). Although the IEP narrative stated that the student was performing at a third grade level in reading and a mid-fourth grade level in math, a grid contained in the IEP estimated the student's instructional levels for reading, writing, and math to be at a sixth grade level (*id.* at p. 3). The May 2010 CSE recommended that the student be found eligible for special education services as a student with a speech or language impairment and that for the 2010-11 school year, he be placed in a 12:1 integrated co-teaching (ICT) class (*id.* at p. 1).<sup>6</sup> For related services, the CSE recommended that the student receive two 40-minute sessions of individual speech-language therapy and one 40-minute session of group speech-language therapy (5:1) per week (*id.* at pp. 2, 11). The IEP indicated that the student benefited from the following environmental modifications and human/material resources to address his academic management needs: repeated exposure to text; use of a marker to track his place; complex information broken down into manageable chunks; graphic organizers and editing his writing; and reinforcement of material (*id.* at p. 3). The IEP included annual goals and short-term objectives related to receptive language skills, expressive language skills, phonemic awareness, reading comprehension, math problem solving, and writing (*id.* at pp. 6-8). The CSE recommended that the student be afforded testing accommodations of extended time (1.5x), separate location, questions read aloud, and

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<sup>5</sup> The hearing record indicates that the student's mother participated in the CSE meeting for the first fifteen minutes by telephone and in person thereafter (Tr. p. 12; Dist. Ex. 4 at p. 1).

<sup>6</sup> Within the continuum of services, State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). State regulations require that an ICT classroom "shall minimally include a special education teacher and a general education teacher," and further, that the "maximum number of students with disabilities" in an ICT class "shall be determined in accordance with the students' individual needs . . . , provided that the number of students with disabilities in such classes shall not exceed 12 students, unless a variance is provided" (8 NYCRR 200.6[g][1]-[2]).

directions read aloud (*id.* at p. 11). The CSE determined that the student was not eligible for a 12-month school year (*id.* at p. 1).

According to the CSE review rationale, the parent had the "school report" prior to the CSE meeting (Dist. Ex. 4 at pp. 1-2; *see* Dist. Ex. 5).<sup>7</sup> The review rationale stated that the parent was asked for updated medical and related service reports and goals, but did not have them (*id.* at p. 2). According to the review rationale, the parent indicated that she would have all the reports sent to the CSE by the following week (*id.*). The CSE review rationale reflected that for future reference, the student's mother was told that the CSE needed to have the updated reports before the meeting (*id.*). The parent reported that the student was having a new "medical" that day and that she would send it to the CSE (*id.*). The parent was told that if the CSE had a speech-language progress report, it would ensure that the student's goals were "up to date" (*id.*). According to the CSE review rationale, the IEP goals were reviewed and "all agreed" (*id.*). The CSE discussed the student's speech-language therapy mandates and explained that speech-language therapy five times per week was an "extreme mandate" (*id.*). In response to questions during the CSE meeting, the parent indicated that the student had been receiving speech-language therapy five times per week "for many years" (*id.*). As reflected in the rationale, CSE members believed that the student's speech-language needs could be met in 40-minute sessions instead of 30-minute sessions (*id.*). The CSE review rationale indicated that the parent was told she could request a new speech-language evaluation from the CSE; however, she indicated that "the new mandates were fine" (*id.*).

The May 2010 IEP and the CSE review rationale indicated that a 12:1 special class in a community school was discussed at the meeting, as was speech-language therapy five times per week, but that both were ruled out as being too restrictive (Dist. Exs. 3 at p. 10; 4 at p. 2). The student's teacher from Stephen Gaynor stated that the student benefited from a small class due to language difficulties (Dist. Ex. 4 at p. 2). The rationale also stated that the mandated speech-language therapy and the special education teacher in the ICT classroom could address the student's language difficulties (*id.*). The parent indicated that the student was "surrounded" in his current school, and his teacher indicated that staff at Stephen Gaynor addressed the student's language difficulties "across the board" (*id.*). The CSE indicated that in the ICT, language difficulties were also addressed "across the board" (*id.*).

On May 31, 2010, the parents made a tuition payment of \$9,100 toward the student's tuition at Stephen Gaynor for the 2010-11 school year (Dist. Ex. 22).

In a letter from the district dated August 5, 2010, the parents were notified of the school to which the district assigned the student for the 2010-11 school year (Dist. Ex. 10). By letter dated August 16, 2010, the parents acknowledged the school to which the student had been assigned, but indicated that they would not accept the district's offer until they had visited the school (Dist. Ex. 11).

Subsequently, in a letter dated August 24, 2010, the parents advised the district that they would be placing the student at Stephen Gaynor as of the first day of school for the 2010-11 school year and that they intended to seek tuition reimbursement from the district for this placement

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<sup>7</sup> Although not specified in the CSE review rationale, it appears from the context of the hearing record that the school report referred to was the Stephen Gaynor progress report (*see* Dist. Ex. 5).

(Parent Ex. A at p. 1). In addition, the parents advised the district that they were rejecting the May 2010 IEP and placement proposed by the CSE as "insufficient to meet [the student's] identified special education needs" (id. at pp. 1-2). The parents maintained that the IEP and placement denied the student a free appropriate public education (FAPE) on both procedural and substantive grounds (id. at p. 1).

In August and September 2010, the parents unsuccessfully attempted to visit the assigned school and were offered an opportunity to tour the school on a Saturday in November (see Tr. pp. 199-202; Dist. Ex. 13).

### **Due Process Complaint Notice and Response**

By due process complaint notice dated January 18, 2011, the parents requested an impartial hearing, alleging that the district failed to offer the student a FAPE for the 2010-11 school year for a variety of procedural and substantive reasons (Dist. Ex. 1). Among other things, the parents asserted that the May 2010 CSE did not rely on sufficient evaluations to determine the student's then-current skill levels in that only teacher estimates were used, which the parents alleged are not an acceptable assessment method (id. at p. 2). The parents also asserted that the failure to properly assess the student led to a discrepancy between the narrative information regarding the student's grade level functioning in reading and math (third and mid-fourth grade level, respectively) and the instructional grade levels reported for reading, writing, and math in the chart on the student's May 2010 IEP (sixth grade for all) (id.). The parents asserted that this discrepancy in the IEP would confuse teachers and service providers and therefore, precluded the development of an IEP based on the student's actual needs (id.). The parents also asserted that the annual goals on the student's IEP were generic, vague, unduly broad, and that the absence of specified levels of targeted performance in the annual goals and short-term objectives rendered them inappropriate (id. at pp. 2-3). The parents further asserted that their placement of the student at Stephen Gaynor was appropriate and that they cooperated with the district in the CSE process (id. at p. 4). They sought tuition reimbursement for the student's tuition costs at Stephen Gaynor for the 2010-11 school year (id. at p. 1).

In a response to the due process complaint notice, the district generally denied the parents' allegations and affirmatively stated that the May 2010 IEP's recommended placement and the assigned school were reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 2 at pp. 1-3).

### **Impartial Officer Decision**

An impartial hearing was conducted on April 5 and June 6, 2011 (Tr. pp. 1, 58). In a decision dated August 26, 2011, the impartial hearing officer found that the district failed to offer the student a FAPE for the 2010-11 school year (IHO Decision at pp. 12-16).<sup>8</sup> Specifically, the

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<sup>8</sup> The hearing record shows that at the conclusion of the impartial hearing, the impartial hearing officer solicited a request for extension of the compliance date (Tr. pp. 215). 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

impartial hearing officer determined that the March 2010 CSE failed to adequately evaluate the student in that it relied "solely" on a Stephen Gaynor progress report for evaluative information and failed to properly assess the student's present levels of academic functioning (id. at pp. 12-15; see Parent Ex. C). The impartial hearing officer further found that the CSE did not have an adequate basis for its recommendation to reduce the amount of speech-language therapy and change the student's placement from a 12:1 special class to an ICT classroom (id. at pp. 12-13, 15).<sup>9</sup> The impartial hearing officer found that the failure to adequately evaluate the student and determine his present levels of performance resulted in annual goals and short-term objectives that were generic, vague, not measurable, and not tailored to his individual needs (id. at p. 13). He further found that because the annual goals did not include an "objective grade level," the CSE failed to provide "any meaningful baseline or guidance" to the providers who would be responsible for implementing the goals (id.). The impartial hearing officer also found that the May 2010 IEP

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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 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 NYCRR 200.5[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). Additionally, I note that the parties agreed at the final hearing date on June 6, 2011, to submit written closing briefs to the impartial hearing officer on or before July 11, 2011, and that the impartial hearing officer did not issue his decision until August 26, 2011 (Tr. pp. 214-17; IHO Decision at p. 16). State regulations require that in cases where extensions of time to render a decision have been granted, the decision must be rendered no later than 14 days from the date of the record closure (8 NYCRR 200.5[j][5]; see Office of Special Education guidance memorandum dated August 2011 titled "Changes in the Impartial Hearing Reporting System" available at <http://www.p12.nysed.gov/specialed/duprocess/ChangesinIHRs-aug2011.pdf>). Although a cover sheet on the impartial hearing officer's decision indicates that the record close date was August 9, 2011, there is no indication of what, if anything, was received into the hearing record at that point or what contributed to the additional delay, who requested an extension (if anyone), or the factors considered in granting an extension (see 8 NYCRR 200.5[j][5], [ii]). Assuming the parties submitted written closing briefs as directed on July 11, 2011, a decision should have been rendered no more than 14 days from that date, however the impartial hearing officer's documentation of the extensions of the timeline are inadequate (id.). Lastly, it is difficult to determine with certainty whether the impartial hearing officer considered written closing briefs that the parties agreed to submit in making his determinations (see IHO Decision pp. 9-10), but, in the event that he did rely on the written briefs, I note that he has failed to identify or include these documents with the hearing record as required by State regulations (8 NYCRR 200.5[j][5][v]). I caution the impartial hearing officer to comply with the timeline requirements and extension documentation requirements for impartial hearings in State regulations.

<sup>9</sup> The impartial hearing officer found that the district violated both section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-796[1]) and State regulations (IHO Decision at pp. 12-13). To the extent that the parties continue to raise arguments on appeal based on section 504, I note that New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and a State Review Officer does not review section 504 claims (see Application of a Student Suspected of Having a Disability, Appeal No. 11-044; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-001; Application of a Child with a Disability, Appeal No. 05-111; Application of the Bd. of Educ., Appeal No. 05-108; Application of the Bd. of Educ., Appeal No. 05-033; Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 00-051; Application of a Child with a Disability, Appeal No. 00-010; Application of a Child with a Disability, Appeal No. 99-10). Therefore, I have no jurisdiction to review any portion of the parties' claims or the impartial hearing officer's decision regarding section 504.

inaccurately reflected the student's instructional level because although the IEP indicated that the student was not functioning above a fourth grade level, the CSE had recommended goals that were typical for a sixth grade curriculum (id. at p. 14). The impartial hearing officer found that the above reasons, among other things, resulted in a substantive denial of a FAPE to the student for the 2010-11 school year (id. at pp. 12-15).

The impartial hearing officer also found that the parents established that Stephen Gaynor was an appropriate unilateral placement in that it was reasonably calculated to provide meaningful educational benefits to the student and he had made meaningful progress at the school (id. at pp. 15-16). More specifically, he found that the parents had established that the student required individual attention from teachers and small group instruction "in order to succeed in the mastery of expressive and receptive language skills" and that Stephen Gaynor was appropriate to meet those needs (id. at p. 16). Lastly, the impartial hearing officer determined that there were "no compelling equitable considerations" that would preclude or diminish the parents' request and he ordered that the district pay for the student's tuition costs at Stephen Gaynor (id.).

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

The district appeals, requesting that the impartial hearing officer's decision be reversed in part.<sup>10</sup> In particular, with respect to the 2010-11 school year, the district asserts that the impartial hearing officer erred in determining that the district failed to offer the student a FAPE and erred in determining that there were no equitable considerations barring tuition reimbursement. The district contends that the CSE review process was "thorough and proper" in that the CSE reviewed and relied upon two psychological evaluations, a social history update, a speech-language evaluation, a Stephen Gaynor progress report, and input from one of the student's teachers at Stephen Gaynor in formulating the student's 2010-11 IEP. The district further contends that it is not required to conduct its own evaluations where appropriate private evaluations exist and that the CSE had sufficient evaluative material to determine the student's needs and present levels of academic performance. The district contends that the May 2010 IEP was comprehensive in that, read as a whole, it accurately described the student's present levels of performance and noted that the student was functioning at a third grade level in reading and a mid-fourth grade level in math. The district also contends that the IEP properly identified the student's instructional level as sixth grade. The district also contends that the annual goals and short term objectives in the IEP were appropriate and that State regulations do not require that annual goals include information related to "objective grade level." The district next argues that the May 2010 CSE's decision to change the student's recommended placement from a 12:1 class to an ICT class was appropriate because the ICT class was the student's least restrictive environment (LRE) given the evaluative information in the Stephen Gaynor progress report that showed the student had made academic and social progress and could function in a regular education classroom. The district also contends that the May 2010 CSE's recommendation to reduce the amount of speech-language therapy on the student's IEP was appropriate because the student had made progress in speech-language, the CSE maintained the number of individual weekly therapy sessions, the recommendation was

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<sup>10</sup> The district does not appeal the impartial hearing officer's determination that the parents' unilateral placement at Stephen Gaynor was appropriate (Pet. ¶ 6; see IHO Decision at pp. 15-16).

supported by the speech-language evaluation, and the students speech-language needs were addressed elsewhere in the IEP.

Lastly, the district argues that the impartial hearing officer erred in finding that equitable considerations did not preclude tuition reimbursement because the parents never intended to place the student in public school, they rejected the assigned school without visiting it, they did not inform the CSE at the May 2010 meeting that they had signed a contract with Stephen Gaynor prior to the meeting, and they failed to give timely notice of their intent to enroll the student at Stephen Gaynor.

In their answer, the parents deny many of the district's allegations and request that the district's petition be dismissed. Specifically, the parents argue that the impartial hearing officer properly found that the district failed to offer the student a FAPE because, among other reasons, the May 2010 CSE lacked adequate evaluative information in that the only evaluative information that was reflected in the IEP was the Stephen Gaynor progress report, and much of the information from the report was either not present in the IEP or was inaccurately reflected. The parents further contend that the resultant IEP did not contain accurate objective evaluative information regarding the student's needs and functional levels or appropriate goals and that as a result, the CSE's recommended change in placement to an ICT class was not supported by evaluative information and was inappropriate. The parents argue that the student would not have been appropriately placed in an ICT classroom and would not have been able to access a sixth grade curriculum in such a class. The parents further contend that the impartial hearing officer correctly determined that there were no equitable considerations barring reimbursement for tuition at Stephen Gaynor.

### **Applicable Standards**

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

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

v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at

370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **Discussion**

### **May 2010 IEP**

#### **Evaluative Data**

On appeal, the district asserts that the CSE relied on appropriate evaluative material to determine the student's then-current skills and present levels of performance. More specifically, the district asserts that the CSE reviewed a wide range of evaluative material including the October 2008 and December 2008 psychological evaluations, the December 2008 social history, the June 2008 speech-language report, the Stephen Gaynor progress report for the 2009-10 school year, and input provided at the meeting by the student's special education teacher at Stephen Gaynor. For the reasons discussed below, I find the hearing record does not support the district's assertions.

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 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]).



Although the hearing record indicates that the district's special education teacher reviewed the reports and evaluations listed above prior to the May 2010 CSE meeting, what transpired during the CSE meeting is not clear (Tr. pp. 11-12, 28-30). The district's response to the parents' due process complaint notice indicates that the CSE relied upon a psychoeducational evaluation and teacher progress reports in making its decision (Dist. Ex. 2 at pp. 2-3). The district's special education teacher indicated that she was "not sure" if the October 2008 psychological evaluation was discussed at the CSE meeting and she did not remember reviewing at the CSE meeting the recommendations contained in that evaluation report (Tr. pp. 30-31). The district's special education teacher acknowledged that the CSE did not have updated medical or related services reports at the time of the CSE meeting (Tr. pp. 35-36; Dist. Ex. 4 at p. 2). Although the CSE found the student eligible for special education services as a student with a speech or language impairment and the district's special education teacher believed that this was the student's most significant deficit (Tr. pp. 37-38), there is no evidence in the hearing record that the June 2008 speech-language evaluation of the student or a speech-language related service report from Stephen Gaynor was available to the CSE participants. Nor did the IEP reflect any of the information contained in the Stephen Gaynor progress report regarding the student's oral language and communication abilities or needs (compare Dist. Ex. 3 at pp. 3-4, with Dist. Ex. 5 at pp. 8-9). Moreover, the IEP itself does not reflect the extent to which the CSE considered information regarding the student's needs that were contained in the other evaluations (see Dist. Exs. 6; 7; 8; 9).

It was not improper for the district to use the information contained in the Stephen Gaynor progress report in developing the student's present levels of performance rather than conducting its own evaluations (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at \*10 [S.D.N.Y. Feb. 16, 2011]). In view of the foregoing evidence, I find that sufficient evaluative data was available to formulate the student's IEP, but the extent to which it was considered and at what point it was considered by the members of the CSE is not clear.<sup>11</sup> The procedural deficiency of failing to consider evaluative data during a CSE meeting does not constitute a per se denial of a FAPE, but instead it must be established that the deficiency also impeded the parents' participation in the IEP's development or denied the student educational benefits (Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at \*2 [2d Cir. 2011]).<sup>12</sup> However, in view of the sparse evidence in the hearing record on this particular point and my determinations below regarding the present levels of performance, annual goals, and speech language services, it is not necessary to make definitive findings of the effect of the district's failure to consider all of the student's evaluative information while the CSE meeting was being conducted.

### **Present Levels of Performance**

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation

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<sup>11</sup> Beginning with the 2011-12 school year, such information regarding the information that the CSE relied upon should be readily available on the prior written notice form prescribed by the Commissioner of Education now and required under State regulations (see 8 NYCRR 200.5[a][3][iv]; <http://www.p12.nysed.gov/specialed/formsnotices/PWN/memo-jan10.htm>).

<sup>12</sup> There are no parent participation claims raised in this proceeding (see Dist. Ex. 1).

to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2]).

I find that the IEP, as a whole did not accurately reflect the student's special education needs. While the present levels of performance in the student's IEP indicated that the student was functioning at a third grade level in reading and a mid-fourth grade level in math, the IEP did not, as noted above, identify the student's deficit areas or detail the skills that the student needed to develop. For example, with respect to reading, the IEP indicated that the student was able to decode phonetic words and was learning strategies to decode unfamiliar multisyllabic words by breaking them into segments (Dist. Ex. 3 at p. 3). The IEP further indicated that the student was a fluent reader and that he was beginning to read with expression and acknowledge punctuation (id.). It also indicated that he was able to make text-to-self connections and predictions and was beginning to make inferences (id.). While this narrative provides information regarding the student's level of functioning and strengths, it fails to identify the student's areas of unique need. In the example above, I note that the IEP did not reflect the student's difficulty with reading comprehension, which was discussed in both the October 2008 psychological evaluation and December 2008 educational update (Dist. Exs. 6 at p. 3; 8 at p. 6).

Furthermore, as noted above, the student is classified as a student with a speech or language impairment and this remains a significant area of need. Yet the IEP included a single sentence regarding the student's speech-language functioning, indicating that the student "struggle[d] with language" and was "very concrete" (Dist. Ex. 3 at p. 3). The IEP did not detail the student's expressive and receptive language needs as revealed in the most recent speech-language evaluation, nor did it reflect the severity of the student's language deficits (see Dist. Ex. 9). I find that the IEP, therefore, did not accurately reflect the student's needs.

### **Annual Goals**

The district objects to the impartial hearing officer's finding that the annual goals and short-term objectives contained in the student's IEP were "'generic, vague and not measurable,'" in part because the goals do not include an "'objective grade level'" (Pet. ¶ 43; IHO Decision at p. 13).<sup>13</sup>

With respect to the student's annual goals, an IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation

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<sup>13</sup> Although the district asserts that the State regulations do not require that the goals include information related to an objective grade level, it does not otherwise defend its goals as being appropriate or measurable.

procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]). Further, according to State regulations:

The individual needs of a student shall be determined by a committee on special education in accordance with the provisions of section 200.4 of this Part upon consideration of the present levels of performance and expected learning outcomes of the student. Such individual-need determinations shall provide the basis for written annual goals, direction for the provision of appropriate educational programs and services and development of an individualized education program for the student.

(8NYCRR 200.1[ww][3][i]).

In this case, the special education teacher for the district testified that she drafted the annual goals for the student's May 2010 IEP based on the Stephen Gaynor progress report, as well as page three of the IEP (Tr. p. 19).<sup>14</sup> As discussed in detail above, because the present levels of performance in the IEP did not clearly identify the student's needs, the CSE had an inadequate basis for developing measurable annual goals and insufficient information by which to identify services to meet the student's needs. Although the annual goals contained in the IEP included accuracy criteria, each goal referenced numerous broad skills, making them effectively immeasurable.<sup>15</sup> Furthermore, the hearing record shows that the student's mother was told at the CSE meeting that the CSE needed to have updated related services reports and that if the CSE had a speech-language progress report, it would have ensured that the student's goals were up to date.

### **Speech-Language Therapy**

Lastly, the district contends that CSE relied on the progress report from Stephen Gaynor as a basis for reducing the frequency of the student's speech-language therapy from his prior IEP. Due to the increased length of the speech-language sessions recommended in the 2010-11 IEP, the actual reduction in the student's speech-language services would have been 30 minutes per week (compare Parent Ex. B at p. 13, with Dist. Ex. 3 at p. 11). The CSE review rationale indicated that the parent was in agreement with the recommendation to reduce the frequency of the student's speech-language therapy services (Dist. Ex. 4 at p. 2). However, the student's oral language and communication needs as detailed in the Stephen Gaynor progress report were not reflected in the student's IEP, and the CSE did not have available to it, and therefore did not consider, related services reports for speech-language therapy from Stephen Gaynor (Dist. Ex. 4 at pp. 1-2). The CSE was free to, but opted not to conduct its own evaluation of the student to determine his speech-language needs.. The hearing record suggests that the decision to reduce the student's speech-

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<sup>14</sup> Page three of the IEP describes the student's present levels of performance with respect to academic performance and learning characteristics, including language development (Dist. Ex. 3 at p. 3).

<sup>15</sup> While an IEP may not be inadequate solely because a goal references more than one particular skill, in this case, multiple goals were overbroad and referenced too many skills at once, making it difficult to measure or determine whether the student is or is not making progress toward achieving the goal.

language frequencies was based in part on the view of district staff members that speech-language therapy five times per week was an "excessive mandate," rather than evidence of an individualized determination of the student's functioning (Tr. pp. 23, 186-87; Dist. Ex. 4 at p. 2).

Based on the inadequacy of the student's present levels of performance and the annual goals, as well as the district's failure to determine the student's speech-language therapy services in relation to his needs, I find that the district has not offered the student a FAPE for the 2010-11 school year (see Application of the Bd. of Educ., Appeal No. 11-129; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

### **Unilateral Placement**

In this case, neither party appeals the impartial hearing officer's determination that the parents' unilateral placement at Stephen Gaynor for the 2010-11 school year was reasonably calculated to provide meaningful educational benefits to the student (IHO Decision at pp. 15-16; see Pet. ¶ 6 n.3). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR200.5[j][5][v]), and accordingly, whether the student's placement at Stephen Gaynor was appropriate under the Act will not be further addressed in this decision (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

### **Equitable Considerations**

The remaining criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 360-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], *aff'd*, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

Equitable considerations may not support an award of tuition reimbursement where parents have failed to cooperate with a school district or have otherwise frustrated a district's attempt to

offer a FAPE (see Bettinger, 2007 WL 4208560, at \*6 [stating that a "major consideration" in deciding whether equitable considerations are satisfied is whether the parents have cooperated with the district throughout the process to ensure that the student receives a FAPE]; Carmel, 373 F. Supp. 2d at 411, 417 [stating that numerous courts have held that parents who refuse to cooperate with the CSE equitably forfeit their claim for tuition reimbursement]). Moreover, equitable principles dictate that parents cannot deliberately withhold their child from an intake interview and impede a district's ability to offer a FAPE and also secure a future award of tuition reimbursement at a private school of their choosing (see Bettinger, 2007 WL 4208560 at \*7-\*8; see also Application of a Child with a Disability, Appeal No. 06-025; Application of a Child with a Disability, Appeal No. 05-075).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2001]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at \* 13 [E.D. Pa. Oct. 22, 2007]).

In this case, the district contends that the impartial hearing officer erred in finding that equitable considerations did not preclude tuition reimbursement because the parents never intended to place the student in a public school and failed to give the district timely notice of their intention to unilaterally place the student.

Initially, I find that the parent's notice of unilateral placement dated August 24, 2010 was both timely and sufficient in that it was sent to the district more than ten days before the student began the 2010-11 school year at Stephen Gaynor, informed the district that they were rejecting the proposed placement, stated their concerns, and stated their intent to enroll the student in a private school at public expense (Parent Ex. A at pp. 1-2).<sup>16</sup>

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<sup>16</sup> Although it is understandable that parents may wish to visit the particular school building or classroom to which their school district assigns their child in advance of enrolling the student in the proposed program, this is not always feasible. Although a district should not be discouraged from offering opportunities for parent visits, the IDEA allows parents to participate in the development in the IEP and does not confer a right upon the parent to visit the proposed building or classroom (see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*12 [S.D.N.Y. Nov. 9, 2011]).

The student's mother attended the May 2010 CSE meeting and participated in the discussions regarding the student's recommended program, annual goals, and related services (Tr. pp. 185-97; Dist. Ex. 4 at pp. 1-2). The student's mother testified that both she and the student's teacher from Stephen Gaynor expressed disagreement at the meeting with the CSE over its recommended placement, but that the CSE did not modify the proposed IEP to reflect those concerns (Tr. pp. 193, 196). The hearing record reflects the parents effectuated an enrollment agreement with Stephen Gaynor, which they signed on February 19, 2010 for the 2010-11 school year (Parent Ex. D at pp. 1-3). While the contract was executed prior to the May 2010 CSE meeting, under the terms of the contract, only the deposit was nonrefundable and the parents would not have been obligated to make any further tuition payments in the event that they decided to place the student in a public school and withdrew the student from Stephen Gaynor prior to September 9, 2010 (*id.* at p. 2). Additionally, the student's mother testified at the impartial hearing that she remained open to a public school placement if an appropriate one had been offered (Tr. p. 203). She also testified that because the district's assigned school had just begun to operate, and she had been unable to get much information from the district about the recommended program, she decided to secure a placement at Stephen Gaynor to ensure that the student had access to an appropriate program (Tr. pp. 202-03, 207). I further note, that the hearing record does not otherwise suggest that the parents failed to cooperate with the district in developing an appropriate program for the student.

Accordingly, the parents' actions in this case are distinguishable from cases in which tuition reimbursement may be reduced or denied due to a delay in notifying the CSE of rejection of a district's IEP or due to misconduct, obfuscation or a lack of cooperation in identifying an appropriate public school placement warranting a limitation or denial of relief (see *S.W.*, 646 F. Supp. 2d at 364; *Carmel*, 373 F. Supp. 2d at 417-18). Therefore, I will not disturb the impartial hearing officer's findings with regard to equitable considerations on the bases raised by the district.

## **Conclusion**

Having concluded that the district failed to offer the student a FAPE during the 2010-11 school year, that the parties have not appealed the impartial hearing officer's determination that the parents' unilateral placement at the Stephen Gaynor was appropriate, and that equitable considerations in this case favor an award of tuition reimbursement, I will not disturb the impartial hearing officer's decision directing the district to reimburse the parents for tuition payments made to Stephen Gaynor for the 2010-11 school year.

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of the determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
November 23, 2011**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**