The University of the State of New York

The State Education Department
State Review Officer
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No. 11-156

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

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Neha Dewan, Esq., of counsel

Thivierge & Rothberg, P.C., attorneys for respondents, Jessica Stein, Esq., and Christina D. Thivierge, 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') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Aaron School and for private after-school related services for the 2010-11 school year. The appeal must be sustained.

Background

At the time of the impartial hearing, the student was attending the Aaron School in a 12:1+2 class with in-school related services and a full-time 1:1 "shadow" provided by a private agency, and receiving four 60-minute sessions of speech-language therapy per week, one or two 45-minute sessions of occupational therapy (OT) per week, and one 45-minute session of physical therapy (PT) per week outside of school (Tr. pp. 224-26, 245-46, 392, 632, 678-81, 693).[1] The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The

[1] The amount of private out-of-school related services the student received varied over the course of the 2010-11 school year (Tr. pp. 677-81).

student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (Dist. Ex. 12 at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

According to the student's father, the parents began having concerns about the student's development when she was two and a half years of age, and they believed that her language skills were delayed (Tr. pp. 731-32). In fall 2008, the student began to attend a regular education preschool, where she exhibited behavioral difficulties (Tr. p. 734). Due to continuing concerns about the student's speech-language development, the parents referred the student in October 2008 for a bilingual social history evaluation (Dist. Ex. 3). Also in October 2008, the parents referred the student to the Committee for Preschool Special Education (CPSE) and a November 2008 evaluation reportedly indicated that the student had developmental and language delays (Tr. pp. 735-36). The CPSE convened in December 2008, determined the student eligible for special education services, and recommended her placement in a "center based program" (Tr. pp. 736-38). In January 2009, the student began attending a 12:1+1, half day program at the Kennedy Center (Tr. p. 739).[2] According to the student's father, the student's behavioral difficulties continued, and worsened, while she attended the Kennedy Center and in June 2009, the student was evaluated again, and received a diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS) (Tr. pp. 739-40). Shortly thereafter, the parents initiated another CPSE meeting in an effort to obtain 1:1 special education itinerant teacher (SEIT) services, which began at the rate of five hours per week (Tr. pp. 740-41).[3]

Over a period of three days during November and December 2009, a neuropsychological evaluation was conducted in order to assess the student's developmental, sensory, and learning needs (Dist. Ex. 7 at pp. 1, 6). Administration of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) yielded a full scale IQ of 73, placing her overall thinking and reasoning abilities in the 4th percentile (id. at p 3). The evaluators indicated that the student performed better on some subtests showing strengths in visual-motor-visual perceptive skills, general language, and pre-academic skills, and that her weaknesses included verbal functioning (id. at pp. 3-4). Additionally, administration of the Adaptive Behavior Assessment System-Second Edition (ABAS-II) yielded scores that placed the student well below the average for her age in overall adaptive functioning (id. at p. 4). Among other things, the evaluators opined that the Kennedy Center was not an appropriate placement for the student because it did not provide sufficient structure, 1:1 support, or Applied Behavioral Analysis (ABA) therapy, and was not sufficiently challenging for the student (id. at pp. 1, 5). The evaluators recommended that the student receive "immediate, intensive, behaviorally based services" including, among other things, ABA and a 12-month curriculum (id. at p. 5).

[2] The hearing record states elsewhere that the student attended an 8:1+2 program at the Kennedy Center (Dist. Ex. 8 at p. 1).

[3] Although the hearing record does not provide precise dates, it is apparent that the student began to attend the Kennedy Center full-time and also received related services consisting of speech-language therapy, OT, PT, counseling, and home-based SEIT services (Tr. p. 741; Dist Ex. 8 at p. 1).

In a Kennedy Center educational progress report dated January 10, 2010, a special education teacher at the Kennedy Center estimated the student's expressive and receptive language development at the 15-24 months age range with scattered skills; her cognition/general knowledge in the 30-42 months age range with scattered skills; her social/emotional development in the 12-24 months age range with scattered skills; her activities of daily living in the 36-42 months age range; her fine motor skills in the 30-42 months age range with scattered skills, and her gross motor skills in the 30-46 months age range with scattered skills (Dist Ex. 6 at pp. 1-4). The special education teacher concluded that the student had made many gains, but continued to demonstrate delays in most areas and that she should remain in a classroom with a small student to teacher ratio (id. at p. 4).

In January 2010, the parents removed the student from the Kennedy Center and placed her at Incidental Behavioral Intervention Associates (IBI), where she received ABA, among other services (Tr. pp. 366, 745; Dist. Ex. 8 at p. 1). Also in January 2010, IBI conducted a behavioral and educational evaluation of the student (Tr. pp. 369-70; Dist Ex. 8 at p. 1). The evaluator described the student's behavior, socialization, play and leisure skills, and academic skills (Dist Ex. 8 at pp. 1-5). The evaluator made a series of detailed recommendations that included specific behavioral and language strategies, home based 1:1 behavioral intervention, opportunities for socialization, a behavior plan to "replace and extinguish self-stimulatory behaviors," speech-language therapy, and a psychoeducational evaluation (id. at pp. 5-8).

Over two dates in December 2009 and January 2010, the student was evaluated by a speech-language pathologist (Dist. Ex. 5 at pp. 1, 6).

On February 9, 2010, the CPSE conducted a meeting to review the student's educational needs and recommended a full day special class program with related services consisting of counseling, OT, PT, speech-language therapy, and SEIT (Parent Ex. C). The CPSE sent the parents a "notice of eligibility for partial services" because it was unable to identify a preschool where the student could receive all of the special education services listed on her individualized education program (IEP), and offered the student partial services consisting of 17 hours direct and 3 hours indirect SEIT services in the home and the school, speech-language therapy, five times per week for 45 minutes per session in a 1:1 setting; OT, three times per week for 45 minutes per session in a 1:1 setting; and PT, three times per week for 45 minutes per session in a 1:1 setting from district approved providers(id.).[4] The CPSE indicated that it would continue its efforts to identify a preschool setting where the student would be able to receive all of the special education services recommended on her IEP (id.).

On March 23, 2010, the parents executed a contract with the Aaron School for the student's enrollment for the 2010-11 school year (Parent Ex. W at pp. 1-2).

Also on March 23, 2010, the district's school psychologist conducted a classroom observation of the student at IBI (Dist. Ex. 9 at pp. 1-2). The school psychologist noted that the student attended to the tasks her therapist requested of her, with frequent redirection, and that the

[4] It is not clear from the hearing record the extent to which the parents availed themselves of these partial offered services.

student "frequently" moved around in her chair and looked around the room rather than at the materials before her (id. at p. 2). According to the observation, the school psychologist discussed the student with an associate director at IBI and was told that the student had made progress in her ability to sit in a chair and work on a task (id.).

On March 24, 2010, the district conducted an OT school function evaluation (Dist. Ex. 9A at p. 1). The evaluation provided background information on the student and assessed the student's needs and abilities related to behavior and attention, social and emotional development, self-care skills, fine motor skills, gross motor skills, and visual-motor and pre-writing skills (id. at pp. 1-4). In summary, the evaluator noted that the student was reported to have made progress at IBI in the areas of attention, following directives, communication and participation, but that difficulties remained in the areas of attention, participation, fine motor skills, social and communications skills, and gross motor skills (id. at p. 5). The evaluator recommended school based OT, and made other suggestions for the home and classroom for the student (id. at pp. 5-6).

On April 2, 2010, the district's school psychologist completed a psychoeducational assessment of the student consisting of academic achievement testing, social/emotional functioning and projective testing, a record review, and a clinical interview (Dist. Ex. 10 at pp. 1-7). The evaluation noted that the student related well to the evaluator, and that although the student showed some signs of hyperactivity and distractibility, she attempted every task presented to her (id. at p. 2). The evaluating psychologist noted that the student exhibited some frustration during the examination and that she displayed expressive and receptive language skills that were below age expectancy (id.). The psychologist cited the results of the administration of the WPPSI-III that had been conducted by a private neuropsychologist on December 22, 2009, and noted that she did not re-administer a cognitive assessment of the student (id.). Administration of the Kaufman Test of Educational Achievement-Second Edition (KTEA-II) yielded the following standard scores (percentile ranks): letter and word recognition 101 (53) and, math concepts and applications 69 (25) (id. at p. 3). In relation to the administration of the Draw-A-Person test, the psychologist noted that the student did not comply with the instruction and instead scribbled and drew ovals, which the psychologist opined was consistent with the student's behaviors associated with autism, her receptive language difficulties, and her delays with fine motor coordination skills (id. at p. 4). The parents' completion of the Vineland Adapted Behavior Scales-Second Edition (Vineland–II) yielded an adaptive behavior composite score of 70, classifying the student's level of general adaptive functioning as "low" (id.). Parent responses indicated adaptive functioning in the communication domain was "moderately low," adaptive functioning in the socialization domain was "low," adaptive level for the gross motor skills domain was "low," and adaptive level for the fine motor skills domain was "adequate" (id. at pp. 4-5). Administration of the Childhood Autism Rating Scale (CARS) yielded a total score of 34, which was within the "mildly-moderately autistic" range (id. at p. 5). Administration of the Developmental Assessment of Young Children (DAYC) yielded a general developmental quotient of 64, placing the student's functioning in the "very poor" range (id. at pp. 5-7).

On April 15, 2010, the Committee on Special Education (CSE) convened to develop her IEP for the 2010-11 school year (Dist. Ex. 12 at pp. 1-2). Attendees included a regular education teacher, who also served as district representative, the school psychologist, the parents, and a

special education teacher (Tr. pp. 37-40; Dist Ex 12 at p. 2).[5] During the meeting, the student's father signed a letter declining the participation of an additional parent member (Dist. Ex. 11). The April 2010 CSE determined that the student was eligible for a special education program and related services as a student with autism, and recommended a 12-month special education program consisting of a 6:1+1 special class in a specialized school with related services consisting of speech-language therapy, twice per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a 2:1 setting; counseling services, once per week for 30 minutes per session in a 1:1 setting and once per week for 30 minutes per session in a 2:1 setting; OT, three times per week for 30 minutes per session in a 1:1 setting; and PT, twice per week for 30 minutes per session in a 1:1 setting (Dist. Ex. 12 at p. 24). The CSE further recommended program modifications to address health and physical management needs consisting of limited auditory and visual distractions and movement breaks as needed (id. at p. 9). The student's IEP also contained annual goals and short-term objectives addressing the areas of drawing, classroom participation, handwriting, attention, spatial relations, receptive language, expressive language, impulsivity, classification, math, and gross motor skills (Dist. Ex. 12 at pp. 11-21).

By letter to the district dated June 3, 2010, the student's father acknowledged receipt of a May 25, 2010 notice from the district that summarized the CSE's recommendations for the student and identified the school to which the district assigned the student (Parent Ex. F). The student's father further advised the district that the parents had been unable to visit the assigned school and requested more time to determine if they would accept the recommended placement (id.).

By letter dated June 21, 2010, the student's father informed the district that he had attended an information session about the assigned school, that the session was not held at the assigned school, and that as a result of the session, the student's father believed that the recommended program in the assigned school would not be appropriate for the student (Parent Ex. D at pp. 1-2). The student's father further informed the district that the student had been placed in the Aaron School and that the parents would seek reimbursement for the placement and for other services the parents had obtained (id.).

Due Process Complaint Notice and Response

By due process complaint notice dated September 2, 2010, the parents requested an impartial hearing to adjudicate their claims for tuition reimbursement for the Aaron School and reimbursement for private related services delivered inside and outside of the school (Dist. Ex. 1 at pp. 1, 4-5). Among other arguments, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) because: (1) the April 2010 CSE failed to develop an appropriate IEP; (2) the CSE was not properly constituted; (3) the parents were denied meaningful participation in the development of the student's IEP; (4) the annual goals and short-term objectives on the student's IEP were vague, not objectively measurable, and inappropriate;

[5] The conference information page of the IEP notes that the parents attended the meeting, but their signatures are not present on the page (Dist. Ex. 12 at p. 2). According to testimony from the student's father and the school psychologist who attended the meeting, the parents attended the meeting but the original conference information page of the IEP was misplaced and the parents consented to having the page replaced with their attendance noted (Tr. pp. 39, 756).

(5) the district's recommended placement in a 6:1+1 special class in a specialized school was not appropriate, and; (6) the CSE failed to conduct a functional behavior assessment (FBA) and develop a behavior intervention plan (BIP) for the student (id. at p. 4). The parents further asserted that the assigned school was inappropriate because the student would be placed in a classroom containing students of significantly variant functioning levels (id.).

In a response to the due process complaint notice, dated January 5, 2011, the district denied the allegations of the complaint and asserted that the assigned school identified in the May 25, 2010 notice was reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 2 at pp. 1-3).

Impartial Hearing Officer Decision

On October 4, 2010, the parties proceeded to an impartial hearing that concluded on September 8, 2011, after nine days of testimony (Tr. pp. 1-876). On October 18, 2011, the impartial hearing officer rendered a decision in which she ordered the district to reimburse the parents for the cost of the student's tuition at the Aaron School for the 2010-11 school year and the costs of private related services delivered both inside and outside of the Aaron School (IHO Decision at pp. 14-15). Specifically, the impartial hearing officer concluded that the April 2010 CSE was duly constituted and the parents had a meaningful opportunity to participate in the development of the student's IEP (id. at p. 13). However, she found that the district nonetheless failed to offer the student a FAPE because, according to the opinion of the private neuropsychologist, the development of an FBA and a BIP were necessary to address the student's behavioral needs (id. at p. 13). She also concluded that the particular school to which the district assigned the student was inappropriate because it would not have met the student's "unique needs;" would not have adequately prepared her for "further education, employment and independent living;" would not have provided the student with sufficient academic instruction; and because it employed the Treatment and Education of Autistic and other Communication Handicapped Children (TEACCH) methodology, which was inappropriate for the student and the student would not have been functionally grouped with the other students in the assigned classroom (id. at pp. 13-14).

The impartial hearing officer further found that because the student had made progress at the Aaron School and with the other services the parents had obtained for her, the unilateral placement and services were appropriate for the student and further that there were no equitable considerations barring reimbursement (IHO Decision at pp. 14-15).

Appeal for State-Level Review

The district appeals and requests that the impartial hearing officer's decisions that the district did not offer the student a FAPE for the 2010-11 school year, that the parents' unilateral placement and services were appropriate, and that there were no equitable considerations barring reimbursement be annulled. More specifically, the district contends that the impartial hearing officer failed to provide a legal basis for her determinations in that she failed to reference applicable law and made minimal citations to the hearing record in her decision. The district further contends that the impartial hearing officer erroneously relied upon the testimony of the

private neuropsychologist in making her finding that the assigned school was inappropriate because the private neuropsychologist lacked a sufficient basis for his testimony. The district contends that it offered the student a FAPE in that the recommended 6:1+1 placement for the student was appropriate because the student required intensive supervision in a small class setting. Further, the district contends that the impartial hearing officer erred in finding that the student required an FBA and a BIP because, among other reasons, the student's behavior was consistent with those of an autistic child, "thereby obviating the need to develop an FBA in order to determine the cause of" her behaviors, and because the student's behaviors would have been appropriately addressed in the assigned school. The district asserts that the IEP "contained specific needs such as counseling" to address the student's social/emotional needs. The district also contends that the impartial hearing officer erred in finding that the student would not have been functionally grouped in the assigned class because it was speculative to have made such a finding given that the student never attended the assigned school, and further, the student would have been appropriately grouped in the assigned class. Moreover, the district contends that the assigned school was appropriate.

The district also argues that the parents' unilateral placement at the Aaron School was not appropriate for the student because it failed to provide sufficient related services and the supplementation of the required related services by private services obtained by the parents does not support a finding that the Aaron School was appropriate to meet the student's needs. The district also contends that the Aaron School failed to provide a 12-month school year, failed to provide individualized goals, and failed to provide the small class setting the student required. The district further argues that the impartial hearing officer erred in relying solely on the student's progress as the criteria for finding that the Aaron School was appropriate because progress does not itself demonstrate that that a private placement is appropriate. Lastly, the district contends that equitable considerations weigh against an award of reimbursement to the parents because the hearing record shows that they did not seriously intend to place the student in a public school.

The parents submitted an answer and assert that the impartial hearing officer's decision should be upheld. More specifically, the parents argue that the impartial hearing officer properly determined that the district failed to offer the student a FAPE during the 2010-11 school year because: (1) the district failed to conduct an FBA and develop a BIP which were required given the student's unique behaviors; (2) the district's recommended placement in a 6:1+1 special class was not appropriate because, among other reasons, the student was able to make progress in a setting with a general education curriculum with typically developing students; and (3) the assigned school was inappropriate because the other students in the class did not possess comparable cognitive and academic abilities to the student and the TEACCH methodology used would not be appropriate for the student.

The parents also contend that the impartial hearing officer correctly determined that their unilateral placement of the student at the Aaron School and all of the private related services obtained by the parents were appropriate and necessary for the student, including the private "1:1 ABA-trained shadows" who provided direct services and supervision services, and the private OT, PT and speech-language therapy. The parents further contest that the district failed to object in its petition to the impartial hearing officer's award of reimbursement for the private related services

obtained by the parents.[6] The parents also assert that the impartial hearing officer correctly found that equitable considerations favored an award of reimbursement. Lastly, the parents assert that, contrary to the claim of the district, the impartial hearing officer provided sufficient bases for her decision and did not rely solely on the testimony of the private neuropsychologist. They further assert that the testimony of the district's school psychologist should be disregarded.

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.,

[6] In a reply, the district opposes the parents' assertion.

873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 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

Scope of Impartial Hearing and Review

Initially, I note that neither party has appealed from the impartial hearing officer's decision with respect to the following issues: (1) the April 2010 CSE was properly constituted, and; (2) the parents had a meaningful opportunity to participate in the development of the student's IEP (IHO decision at p. 13). Therefore, those determinations are final and binding on the parties and will not be reviewed on appeal (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Next, I find that the impartial hearing officer exceeded her jurisdiction by basing her decision in part on an issue that was not identified in the parents' September 2010 due process complaint notice. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at an impartial hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). It is essential that the impartial hearing officer disclose her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an impartial hearing officer has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the impartial hearing officer to raise issues that were not presented by the parties and then base her determination on the issues raised sua sponte. Here, the parents did not assert in their September 2010 due process complaint notice that the assigned school was inappropriate because it used the TEACCH methodology (see Parent Ex. A). Further, the hearing record does not reflect that the parents requested, or that the impartial hearing officer authorized, an amendment to their September 2010 due process complaint notice to include this additional issue. Thus, the impartial hearing officer should have confined her determination to the issues raised in the parents' due process complaint notice and erred in finding a denial of a FAPE on the basis that TEACCH was an inappropriate methodology for the student (see 20 U.S.C. § 1415[c][2]; [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]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [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.P.G., 2010 WL 3398256, at *8; Application of a Student with a Disability, Appeal No. 11-073).

Additionally, although the parents set out substantive and procedural arguments in their answer that were not ruled on by the impartial hearing officer, the parents do not cross-appeal the impartial hearing officer's lack of a determination regarding any of these claims. State regulations provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer (8 NYCRR 279.4[b]). Although the parents assert in their answer reasons, in addition to those delineated in the impartial hearing officer's October 18, 2011 decision, to support their claim that the student was denied a FAPE, a review of the parents' verified answer indicates that the parents did not cross-appeal from the impartial hearing officer's decision (see Answer). 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" (8 NYCRR 279.6). In essence, a party who fails to obtain a favorable ruling with respect to an issue submitted to an impartial hearing officer is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal. Accordingly, regarding the first prong of the Burlington/Carter test, the only issues to be considered on appeal in this case concern whether the impartial hearing officer erred in finding that the student was denied a FAPE based upon findings that the 6:1+1 placement was inappropriate; that the student required an FBA and a BIP; and that the assigned class was inappropriate because the student would not have been grouped with students with similar functional ability (see Application of the Dep't of Educ., Appeal No. 11-127).

6:1+1 Special Class Placement

Next, I will consider the parties' claims regarding the district's April 2010 placement recommendation.[7] Upon review of the hearing record, I find that the 6:1+1 special class placement recommended in the April 2010 IEP was designed to provide an appropriate level of academic and social-behavioral support for the student and constituted an appropriate educational setting that was reasonably calculated to provide the student with meaningful educational benefits.

The CSE found the student eligible for special education programs and related services as a student with autism and recommended a 12-month placement in a 6:1+1 special class in a specialized school (Dist. Ex. 12 at p. 1). The district's school psychologist testified that a 6:1+1 special class placement was appropriate for the student because she required a small class placement with additional supervision (Tr. p. 76).

The CSE considered several documents including a bilingual social history, an educational progress report, a behavioral and educational evaluation, a school functional evaluation, a private psychological evaluation, an OT evaluative report, two speech-language evaluations, a psychoeducational evaluation report, a physical examination report, teacher reports, and a classroom observation (Tr. pp. 49-50). The school psychologist testified that the CSE recommended a 12-month placement in a 6:1+1 special class based on the student's needs and corresponding level of support required to meet those needs as indicated in the evaluative reports and observation that she conducted of the student (Tr. pp. 44-45, 51-66, 71-76, 79-82).

To address the student's social/emotional needs, the CSE recommended related services of one 30-minute session of counseling per week in a group of two and one 30-minute session of individual counseling per week (Tr. p. 46; Dist. Ex. 12 at p. 24). To address the student's needs related to sensory regulation and fine and gross motor skills, the CSE recommended three 30-minute sessions of individual OT and two 30-minute sessions of individual PT per week (id.). The

[7] While the hearing record indicates that the parents sought a CTT placement for the student, the parents did not assert that the district's recommended placement was not the LRE for the student. The hearing record does not support a conclusion that the student did not require a special class and, furthermore, even the parents decided to place the student in a special class setting at the Aaron School.

CSE also recommended two 30-minute sessions of individual speech-language therapy and one 30-minute session of speech-language therapy in a group of two to address the student's language processing skills (id.).

The CSE discussed the student's needs related to language processing, social/emotional functioning, motor skills, sensory regulation, communication, academics, cognition, attention, play skills, and impulsivity all of which were addressed in the IEP (Tr. pp. 49-66, 71-76, 79-82). The school psychologist stated that the student required a 6:1+1 special class placement to address her needs and that the CSE considered the parents concerns and reviewed the evaluative documents and recommended an appropriate placement (Tr. pp. 76, 99). The CSE rejected both special education teacher support services (SETSS) and collaborative team teaching (CTT) placements because, according to the district's school psychologist, both of those placements employed a general education curriculum and the student could not follow a general education curriculum in light of on her functioning levels in the areas of language, cognition, and attention (Tr. p. 96; Dist. Ex. 12 at p. 23).

Regarding the parents' assertion that the recommended placement would not have provided sufficient academic instruction for the student, I note that the April 2010 IEP contained several academic goals and that the special education teacher in the assigned class testified that she was capable of implementing the student's IEP annual goals within the assigned class setting (Tr. pp. 132-33; Dist Ex. 12 at pp. 12, 20). The special education teacher also testified that the curriculum in her class included academic instruction in math, reading, and writing and that she provided academic instruction 1:1 and in small groups and modified the level and type of instruction based on her students' individual needs and abilities (Tr. pp. 128, 138, 140, 144-46, 151, 157, 162, 168, 189-90).

Based on the above, the hearing record supports the district's claims that the recommendation of a 6:1+1 special class was tailored to meet the student's educational needs.

Special Factors and Interfering Behaviors

The impartial hearing officer found that the student required an FBA and a BIP in order to address the student's tantrumming, echolalia, and self-stimulatory behaviors (IHO Decision at p. 13). As set forth in greater detail below, the hearing record supports the district's contention that the student did not require a BIP, that the CSE properly considered special factors, and that the April 2010 IEP appropriately addressed the student's behavioral needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Board of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 09-

101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.).[8] State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of

[8] While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[9] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

Here, the hearing record indicates that the student engaged in tantrums, self-stimulatory behaviors, and echolalia (Tr. pp. 293, 374-75). The district school psychologist who attended the April 15, 2010 CSE meeting conducted both the March 24, 2010 observation of the student and the psychoeducational assessment dated April 2, 2010 (Dist. Exs. 9 at p. 1; 10 at p. 1; 12 at p. 2). According to the school psychologist's testimony, the student's behaviors included difficulty maintaining attention, echolalia, frequent fidgeting during the assessment process, tantrums, and perseveration and that as a result, the student required significant individual support in the school setting (Tr. pp. 45, 56, 75-76, 81-83, 88-89, 108). The April 2010 CSE determined that the student's behaviors seriously interfered with instruction requiring additional adult support and

[9] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

noted this on her IEP (Dist Ex. 12 at p. 8). The student's IEP identifies the student's behaviors to include occasional resistance, self-directed behavior, hyperactivity, and short attention span, and notes that the parents had reported recent improvements in her behaviors (id. at pp. 3, 5, 8-10, 22-23; see Tr. pp. 81, 88-89).

To address the student's need for behavioral support, the CSE determined, as discussed above, that the student would be placed in a 6:1+1 program for children and that her teachers, classroom paraprofessional, and related service providers would provide the student with additional behavioral support when necessary (Tr. pp. 86, 88-89, 95-97, 114; Dist. Ex. 12 at p. 8, 22-23). State regulations mandate that "[t]he maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6 [h][4][ii][a]). The student's IEP provides for limited auditory and visual distractions and movement breaks as needed to address her health and physical management needs (Tr. pp. 92-93; Dist. Ex. 12 at p. 9). To further address the student's social/emotional and behavioral needs, her IEP contained counseling services (Tr. p. 46; Dist. Ex. 12 at pp. 8, 24). The IEP also contained annual goals addressing needs related to the student's ability to attend and perform as a member of a group in class, to understand personal space, to reduce impulsivity, and to improve independence (Dist. Ex. 12 at pp. 11-13, 16, 18, 21). The school psychologist testified that the purpose of an FBA is to determine why certain behaviors are occurring, that an FBA was not required in this instance because the student's stereotypic behaviors were consistent with autism, and that a BIP was not required because the recommended program, supports and related services were adequate to address the student's behavioral needs (Tr. pp. 47, 89-90, 99-101, 107-09, 112, 124-25).[10] In addition, the special education teacher of the assigned school testified that the student's behavior would have been adequately addressed in part by developing a schedule to address the student's anxiety regarding unfamiliar situations (Tr. pp. 139-40, 143).

In light of the above, I find that the lack of an FBA or BIP in the student's IEP does not compel a finding that the district failed to offer the student a FAPE and that, accordingly, the impartial hearing officer erred in finding to the contrary (see A.C., 553 F.3d at 172-73).[11]

[10] To the extent that the district contends that the recommended services and placement are appropriate simply because the student is diagnosed as having autism and the program is designed for the student, I do not accept this proposition insofar as it oversimplifies the matter. An 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 Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; Application of a Student with a Disability, Appeal No. 09-126 ["a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). Notwithstanding the district's argument, the evidence in the hearing record nevertheless supports the conclusion that the recommended program was designed to address the student's needs.

[11] I further note that, as set forth above, State regulations require in pertinent part that a CSE consider developing a BIP when "the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR 200.22[b][1]). Here, because the student has not attended the district's recommended program, there has been no opportunity to determine if the student's impeding behaviors would have persisted despite consistently implemented general

Assigned School

Functional Grouping

I will next address the parents' contention that the student would not have been grouped appropriately in the assigned class. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, a meaningful analysis of the parents' claim with regard to functional grouping would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP

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school-wide or class-wide interventions. Moreover, according to testimony from the special education teacher in the assigned class, class-wide interventions were employed that may have addressed the student's anxiety and other impeding behaviors (Tr. pp. 138-40).

may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parents rejected the IEP and enrolled the student at the Aaron School prior to the time that the district became obligated to implement the student's IEP. Thus, the district was not required to establish that the student had been grouped appropriately upon the implementation of his IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 6:1+1 special class at the assigned district school provided the student with suitable grouping for instructional purposes and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. 2011 WL 4001074, at *9).

Here, in September 2010, the assigned kindergarten class consisted of six students who ranged in age from four through five years old (Tr. pp. 128-29, 177-180). All the students within the assigned class had received the educational classification of autism (Tr. p. 140). The private neuropsychologist testified that the students in the assigned classes lacked the cognitive and academic abilities that the student possessed and therefore the student would not receive appropriate instruction (Tr. pp. 560-78). However, the functional math and reading levels of the students in the class were from pre-kindergarten through the kindergarten level, similar to the student's math and reading levels which were at the kindergarten level (Tr. pp. 129-30, 263). The special education teacher in the assigned class testified that the student exhibited similar needs in the areas of attention, understanding of abstract concepts, and speech/language compared to the students in the assigned class (Tr. pp. 140-42). The special education teacher of the assigned class also placed students within groups according to ability and provided differentiated instruction and individual attention (Tr. pp. 140-46).

Given these facts and circumstances, I decline to find a denial of a FAPE on the ground that the student would not be appropriately grouped for instructional purposes with other students

in the assigned class, particularly in the case here where the student never attended the assigned school and the available evidence does not support this contention.

Conclusion

In summary, I find that the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2010-11 school year must be reversed. The hearing record contains evidence showing that the April 2010 IEP recommending a 6:1+1 special class in a specialized school with related services consisting of speech-language therapy, counseling, OT, and PT was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having reached this determination, 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; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).[12]

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

IT IS ORDERED that the portion of the impartial hearing officer's decision dated October 18, 2011 which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to reimburse the parents for the costs of the student's attendance at the Aaron School and out-of-school related services is hereby annulled.

Dated: **Albany, New York**
January 20, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER

[12] Although I do not reach the issue of whether the Aaron School is appropriate, I note that the district is correct with regard to the inadequate standard employed by the impartial hearing officer, who relied on the progress of the student alone to determine that the unilateral placement was appropriate (IHO Decision at pp. 14-15). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]).