



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-120

### **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 child with a disability**

#### **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Daniel J. Schneider, Esq., and Vida Alvy, Esq., of counsel

Mayerson and Associates, attorney for respondents, Gary S. Mayerson, Esq., of counsel

### **DECISION**

Petitioner, the New York City Department of Education, appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' son and ordered it to reimburse respondents for the costs of tuition and related services at the McCarton School and the McCarton Center for the 2006-07 school year, excluding the costs of related services provided by Nexus Language Builders (Nexus).<sup>1</sup> Respondents cross-appeal from that part of the hearing officer's determination that denied their request for full reimbursement for certain after-school services. The appeal must be sustained in part. The cross-appeal must be dismissed.

At the commencement of the impartial hearing, the student was attending McCarton (Tr. p. 111). McCarton is not approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student began receiving private at-home applied behavioral analysis (ABA) instruction from Nexus in January 2007 (Tr. p. 196). The student has a diagnosis of autism and has identified deficits in expressive and receptive language as well as difficulties with sensory

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<sup>1</sup> The McCarton School and the McCarton Center are two separate entities; the former provides a full-time educational program and the latter provides after-school services (see Tr. pp. 6, 7, 26, 31, 34). However, since neither the school's nor the center's appropriateness are in dispute in this appeal; for convenience, they will be commonly referred to as "McCarton."

processing and motor planning (Dist. Exs. 4 at pp. 1-2; 16 at p. 1). The student also has deficits in speech production and communicates by using a Dynavox, which is an augmentative communication device (Tr. p. 12). In addition to his cognitive deficits, the student presents with interfering behaviors, including screaming and self-stimulation (Tr. pp. 14, 22-23). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The hearing record shows that the student attended McCarton starting in 2004 as a preschooler (Dist. Ex. 4 at pp. 3, 4). A January 2006 progress report from the student's speech-language pathologist at McCarton described the student as able to follow one-step commands independently and able to identify familiar objects and actions across a variety of settings and contexts (Dist. Ex. 3 at p. 1). He had difficulty understanding descriptive concepts and categories and difficulty understanding "wh" questions (id.). Expressively, the student was able to use the Picture Exchange Communication System (PECS) to request and comment, and was using PECS and verbal approximations to spontaneously request items in and out of sight (id. at pp. 1-2). He had made progress with labeling familiar objects and actions using verbal approximations, and was working on requesting desired items using attributes (id.). He was reported to have difficulty responding to yes/no questions as well as with speech motor planning skills, which interfered with his ability to produce words and word approximations (id.). The student demonstrated eye contact during communication and appropriately reciprocated greetings, but required prompting to initiate and reciprocate interactions with peers (id. at p. 2).

A January 9, 2006 occupational therapy (OT) progress report indicated that the student had made some progress toward objectives for his sensory processing goal, continued to seek proprioceptive and vestibular input, and could request this input independently using PECS (Dist. Ex. 4 at pp. 1-2). The student was able to remain on task 60 percent of the time with minimal prompts and was beginning to ask for assistance with challenging tasks (id. at p. 2). The student's bilateral coordination was described as underdeveloped and he was noted to require physical prompts for activities such as jumping and clapping (id. at pp. 2-3). Improvement was reported in fine motor activities (id. at p. 4). He could use scissors with physical prompts and had been working on writing his first name (id.). He was reported to have good attention for all writing activities (id.). The student began receiving at-home ABA services from Nexus on January 3, 2007 (Tr. p. 196).

A January 10, 2006 education progress report from McCarton stated that the student made "significant" progress when provided with individualized, structured instruction, a consistent predictable routine, and continuous positive reinforcement (Dist. Ex. 2 at p. 1). The report noted that the student required "constant individualized adult intervention" to address his variable attention and his impulsivity, and that he would often protest by "screaming and throwing himself to the floor" (id.). He had mastered sorting by category, could select up to 20 items by category, and had acquired 100 labels of common objects (id. at p. 2). He was able to focus on preferred activities and his attention for externally directed activities had increased, but remained variable (id.). The student was toilet trained and was working on using PECS to communicate his need to use the bathroom (id.). His independent play skills had improved, and he was working on taking turns using PECS and adult prompting (id. at p. 3). The student's teacher reported that the student had made "marked improvements" in all areas and was learning to generalize information he had acquired (id.).

On June 9, 2006, petitioner's Committee on Special Education (CSE) met for an annual review and to prepare the student's IEP for the 2006-07 school year (Dist. Ex. 1). The CSE recommended that the student remain classified as a student having autism and that he be placed in a 6:1+1 ratio special education class within one of petitioner's special education schools (id. at p. 1). The CSE also recommended that the student receive related services of 1:1 OT five days per week for 60 minutes per session, and push-in 1:1 speech-language therapy five days per week for 60 minutes per session (id. at p. 11). The CSE further recommended the termination of physical therapy services (id.). The CSE also recommended that the student receive assistive technology, special education transportation, adaptive physical education and extended school year services (ESY) (id. at p. 1).

The hearing record shows that on August 1, 2006, petitioner mailed a final notice of recommendation (FNR) of program and placement to respondents recommending a specific special education school for their son; however, it was reportedly addressed incorrectly (Tr. pp. 1112-14; Dist. Ex. 9). Petitioner then mailed a second FNR to respondents' correct address on August 17, 2006 (Tr. p. 1115; Dist. Ex. 10).

By letter dated August 16, 2006, respondents notified petitioner that petitioner had failed to timely recommend a specific school for their son, and that they were unilaterally placing him at McCarton for the 2006-07 school year and summer 2007 (Parent Ex. C at p. 1). They also notified petitioner that they would be providing "additional ABA services and speech and language and occupational therapies" for their son, and that they were requesting reimbursement from petitioner (id.).

By due process complaint notice dated September 14, 2006, respondents requested an impartial hearing seeking reimbursement for tuition at McCarton and related services (Parent Ex. A). Respondents also sought an order regarding the student's pendency program (id.). Respondents asserted that the June 2006 IEP was both substantively and procedurally flawed in "at least the following ways:" 1) petitioner failed to make appropriate provisions for individual parent training and counseling as required under 8 NYCRR 200.13(d); 2) even though the IEP recommended ESY, it failed to indicate recommended services or a staffing ratio for the ESY; 3) the recommended placement with a 6:1+1 ratio was inappropriate given the student's need for 1:1 teaching and support; 4) petitioner failed to ensure the participation of requisite IEP team members at the June 2006 IEP meeting, including an additional parent member and a regular education teacher; 5) petitioner failed to perform an adequate "present levels analysis"; 6) the IEP failed to indicate the student's present levels of behavioral support; 7) the IEP incorrectly states that the student doesn't require assistive technology devices or services; 8) the recommended related services were insufficient; 9) the CSE predetermined the recommendations; 10) the behavioral intervention plan (BIP) was vague and/or inadequate; 11) the functional behavior assessment (FBA) was vague and/or inadequate; and 12) the June 2006 IEP failed to include any goals and objectives related to the student's behavioral issues (id. at pp. 2-3).

The impartial hearing commenced on May 10, 2007 and concluded on July 18, 2007, after seven days of testimony (IHO Decision at p. 3). In a decision dated September 12, 2007, the impartial hearing officer determined that: 1) petitioner failed to timely offer the student a free

appropriate public education (FAPE) for the 2006-07 school year, specifically citing a lack of credibility on the part of one of petitioner's witnesses regarding the timelines of the FNR; 2) the June 2006 IEP was flawed because the CSE team lacked an additional parent member in violation of 8 NYCRR 200.3; 3) respondents met their burden in proving that McCarton was appropriate for their son; and 4) equitable considerations favored respondents (*id.* at pp. 18-19). The impartial hearing officer further determined that petitioner should not be held liable for reimbursement for the after-school services provided by Nexus because the costs were "considerable" and "excessive" (*id.* at p. 20). The impartial hearing officer did not make a substantive determination concerning the program or placement offered by petitioner.

The impartial hearing officer ordered petitioner to reimburse respondents for the costs of tuition and expenses for all related services at McCarton for the 2006-07 extended school year, excluding the after-school services provided by Nexus.

Petitioner appeals the impartial hearing officer's decision, asserting among other things, that the impartial hearing officer erred when she determined that: 1) it failed to offer a FAPE to respondents' son due to a lack of an additional parent member; 2) it failed to offer a FAPE in a timely manner; and 3) there were no equitable factors which would mitigate an award of tuition reimbursement. Petitioner also alleges that the program it offered the student was appropriate.

Respondents cross-appeal<sup>2</sup> that part of the decision which denied their request to be reimbursed for after the school services provided by Nexus.<sup>3</sup>

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see *Schaffer v. Weast*, 546 U.S. 49, 51 [2005]; *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-81, 200-01 [1982]; *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written 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).<sup>4</sup>

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<sup>2</sup> In their answer, respondents also request "leave from the SRO for discovery to secure 'additional evidence' on the issue of [petitioner's employee's] credentials, to be made part of the reviewable record." Respondents had ample time and opportunity to obtain this information during the proceeding below, and failed to do so. Therefore their request is denied.

<sup>3</sup> In their answer, respondents ask that I recuse myself. I have considered respondents' request and find no basis in law or fact for recusal (see 8 NYCRR 279.1).

<sup>4</sup> The term "free appropriate public education" means special education and related services that--  
(A) have been provided at public expense, under public supervision and direction, and without charge;  
(B) meet the standards of the State educational agency;  
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;  
and  
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.  
(20 U.S.C. § 1401[9]).

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 (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]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

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]; see also 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]). 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 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).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). 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 (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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 child 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).

Petitioner asserts that the impartial hearing officer erred when she determined that petitioner had failed to offer a FAPE to the student because the June 2006 CSE meeting did not include an additional parent member. Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.344), New York State law requires the presence of an additional parent member on the committee that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL101618765, at \*5 [S.D.N.Y. July 11, 2005]; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). New York law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]).

In the instant case, it is undisputed that no additional parent member attended the June 2006 CSE meeting (Dist. Ex. 1 at p. 2). There is no indication in the hearing record that respondents declined in writing the additional parent member's participation at the June 2006 CSE meeting. However, I am not persuaded by the evidence in the record that the absence of an additional parent member at the June 2006 CSE meeting was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][i]; see also 34 C.F.R. § 300.513; 8 NYCRR 200.5[j][4]). Respondents assert that parent participation at the CSE meeting was not meaningful because of the absence of the additional parent member. They base this assertion not on the record, but on mere speculation in their arguing papers on appeal. A review of the hearing record demonstrates that respondents participated in the development of the student's IEPs for the 2004-05 and the 2005-06 school years, and as such, are familiar with the CSE process and knowledgeable about IEP development (see Parent Ex. D at p. 1). Further, the student's special education teacher from McCarton participated at the June 2006 CSE meeting and provided information about the student's needs to the CSE members (Tr. pp. 986-87; Dist. Ex. 1 at p. 2). Although the June 2006 CSE was improperly constituted under State law and regulation (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]), there is insufficient evidence in the hearing record to demonstrate that the

composition of the June 2006 CSE rose to the level of a denial of a FAPE (R.R., 2006 WL 1441375 at \*5; Mills, 2005 WL101618765 at \*5; see Application of a Child with a Disability, Appeal No. 07-107; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058).

Petitioner next asserts that it offered a FAPE to the student for the 2006-07 school year. Respondents assert that the June 2006 IEP is flawed because the CSE failed to assess the student's present levels of performance (see 34 C.F.R. §§ 300.320[a][1], 300.324[1]; 8 NYCRR 200.4[f][1], 200.4[d][2][i]). Descriptions of the student's academic performance indicate that he was able to imitate ten actions, match patterns, build a three block structure from a picture card, sort by category, and write his name with minimal assistance (Dist. Ex. 1 at p. 3). In describing his learning characteristics, the IEP noted that the student learned best within a structured setting and demonstrated steady acquisition of new skills when provided with repetition and graduated support (id.). Socially, the student was described as able to share materials and follow an activity schedule with prompts (id. at p. 4). He was working on taking turns and was able to gesture to request a turn (id.). These descriptions of the student are consistent with information provided by the student's teacher at McCarton and directly reflect her January 10, 2006 progress report (Dist. Ex. 2). Further, the student's teacher was present at the June 2006 CSE meeting and was available to confirm the accuracy of the information and to provide updates to her report in order to ensure that the present performance levels described were current and accurate (Dist. Ex. 1 at p. 2). Therefore, I find that the June 2006 IEP adequately reflects available information and describes the student's present performance levels at the time that the CSE convened, but for the student's behavioral needs, discussed below (see O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 703-04 [10th Cir. 1998]; Application of the Bd. of Educ., Appeal No. 04-031).

Respondents further assert that the June 2006 IEP is flawed because it fails to identify goals and objectives to address the student's behavioral concerns. The June 2006 IEP contains academic goals and objectives that adequately reflect the student's academic needs as reflected in evaluation reports provided to the CSE by McCarton. However, I agree with respondents' assertion that the June 2006 IEP does not provide sufficient information describing the student's behavioral needs, nor does the IEP contain any goals and objectives pertaining to the student's behavioral needs (see 34 C.F.R. §§ 300.320[a][2][i], 300.324[a][2][i]; 8 NYCRR 200.4[d][2][iii], 200.4[d][3][i]).

Next, I turn to respondents' assertion that the FBA and the BIP are inadequate.<sup>5</sup> In this case, the parties do not dispute that an FBA needed to be developed by the CSE to assess the student's behavioral needs. An FBA is defined in the 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" (8 NYCRR 200.1[r]), and includes, but is not limited to,

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<sup>5</sup> In developing an IEP and considering "special factors," when a child's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and New York State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and New York State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, as presented in the instant case, New York State regulations (8 NYCRR 200.22[a],[b], 200.4[d][3][i]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

"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"

(id.).

According to the 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 may be developed that addresses "antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student's preferences for reinforcement" (8 NYCRR 200.22[a][3]).

The June 2006 CSE reviewed an FBA created by petitioner's school psychologist, developed a BIP for the student and attached both documents to the student's IEP (Tr. pp. 110, 990-91; Dist. Ex. 1 at pp. 13-14). The FBA is reflective of information provided to the CSE by McCarton staff (Dist. Ex. 1 at p. 14). However, the FBA developed by petitioner is vague and does not provide sufficient information about the student's behavior to allow for the development of an appropriate BIP. Petitioner's FBA consists of a single-page form with check boxes to identify precipitating conditions, consequences, functions of the behavior and assessment techniques used (id.). The completed form identifies the student's targeted behaviors of hitting himself, tensing his muscles and screaming, but does not describe the frequency, duration or intensity of the behaviors (id.). The FBA briefly and vaguely describes precipitating conditions via check boxes delineating "unstructured time" and "academic instruction" and is equally brief and vague in stating that the function of the student's behaviors is "escape/avoidance" and "frustration" (id.). The FBA does not describe factors that appear to cause and maintain targeted behaviors or identify skill deficits that contribute to the behaviors, nor does it include a hypothesis regarding how antecedents or consequences could be manipulated to eliminate or reduce the targeted behaviors (id.). The section of the FBA under which consequences are to be identified, contains a statement that the student's behaviors should be blocked and his screaming should be controlled, but offers no information about how the student uses his behaviors to attempt to gain control of his environment (id.). The FBA was finalized at the June 2006 CSE in the presence of the student's teacher from McCarton, yet no additional information was added to the document that would have allowed for the development of an appropriate BIP (id. at p. 2).

Without an adequately developed FBA, the June 2006 CSE could not develop an appropriate BIP. If a CSE determines that a student needs a BIP, the CSE must consider the development of the student's BIP relying upon, among other things, the student's FBA (8 NYCRR 200.1[mmm]; 200.22[a][3], [b]). Petitioner's school psychologist testified that he had obtained more specific information through review of the student's file and through discussion with the student's teacher (Tr. pp. 990-91). The student's teacher from McCarton, who was familiar with strategies that had been successful with the student in the past, participated in the

June 2006 CSE (Tr. p. 999; Dist. Ex. 1 at p. 2). Although the hearing record indicates that these individuals discussed these factors at the June 2006 CSE meeting, the information discussed was not included on the FBA or the BIP (Tr. pp. 986-87; Dist. Ex. 1 at pp. 13, 14).

The BIP, like the FBA upon which it was reportedly based, is also vague and does not provide sufficient information regarding how the student's behaviors would have been addressed. A BIP must, at a minimum, include "a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]). The BIP developed by the June 2006 CSE re-states the behaviors of screaming, hitting self and tensing muscles from the FBA, but again provides no information about frequency, intensity, duration or conditions under which the behaviors are either exacerbated or diminished (Dist. Ex. 1 at p. 13). The BIP states that the expected behavior changes are that the student will "stop screaming, hitting self and tensing his muscles," and provides neither methods nor standards of measurement (*id.*). The strategies for addressing target behaviors state that the student will "benefit from a behavior modification program with the appropriate strategies," and recommends that these strategies include reinforcement of incompatible appropriate behaviors, but does not describe what those strategies or reinforcements should be (*id.*). The form used by the CSE to develop the student's BIP includes a section for identifying supports that will be employed to address target behaviors (*id.*). This section states that the staff at the recommended placement would "collaborate to implement the above program and strategies," yet the BIP contains no such program or strategies (*id.*).

Pertaining to the development of the June 2006 IEP, in addition to violating State regulations regarding the development of an appropriate FBA and BIP, petitioner failed to adequately "consider the use of positive behavioral interventions and supports, and other strategies" to address the student's behaviors that interfered with her ability to obtain educational benefit from her special education program and services as mandated by federal law (34 C.F.R. § 300.324[a][2][i]). Based on the foregoing, I find that petitioner failed to offer the student a FAPE for the 2006-07 school year.

The impartial hearing officer determined that respondents met their burden in demonstrating that McCarton was appropriate for the student. Petitioner does not appeal from that part of the impartial hearing officer's decision. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). Consequently, the impartial hearing officer's determination as to the second Burlington/Carter criterion is final and binding (Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073). As such, I will now address petitioner's final assertion that the impartial hearing officer erred when she determined that there were no equitable considerations that precluded respondents from an award of tuition reimbursement.

The final criterion for an award of tuition reimbursement is that the parents' claim is supported by equitable considerations (see 20 U.S.C. § 1412[a][10][C]; Frank G., 459 F.3d at

363-64; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 416 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. 2006]). Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; Mrs. C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"]). Such considerations "include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters" (Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001], citing Town of Burlington v. Dep't of Educ., 736 F.2d 773, 801-02 [1st Cir. 1984], aff'd, 471 U.S. 359 [1985]). Parents are required to demonstrate that the equities favor awarding them tuition reimbursement (Carmel, 373 F. Supp. 2d. at 417).

With respect to equitable considerations, the IDEA allows that tuition 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 Mrs. C., 226 F.3d at n.9). The IDEA allows that tuition 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 child 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 tuition 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. 2002]).

Petitioner asserts that respondents should not be awarded reimbursement because respondents believed that the only appropriate program for their son was a 1:1 program and would not consider the 6:1+1 program recommended by petitioner. After a comprehensive seven day impartial hearing, the impartial hearing officer concluded that there were no equitable factors that would mitigate against an award of tuition reimbursement and that respondents had made diligent efforts to communicate with petitioner in an effort to secure the student's educational placement (IHO Decision at p. 19). After a thorough review of the hearing record, I find no reason to disturb the impartial hearing officer's decision with respect to the third criterion of the Burlington/Carter analysis.

Respondents cross-appeal that part of the impartial hearing officer's decision which denied their request for reimbursement for the at-home ABA services provided through Nexus. As an affirmative defense, petitioner asserts that the cross-appeal does not conform with the regulations of the Commissioner of Education (8 NYCRR 279.4[a]). Section 279.4(a) provides, in pertinent part that: "[t]he petition for review shall clearly indicate the reasons for challenging

the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner." A cross-appeal challenging all or part of an impartial hearing officer's decision must be included in respondents' answer (8 NYCRR 279.4[b]). An answer must include any written argument, memorandum of law, and additional documentary evidence (8 NYCRR 279.5) (emphasis added). The regulations also require that the paragraphs in the pleadings are to be numbered and that assertions are supported with references to the hearing record (8 NYCRR 279.8[a][3], [b]).

Here, respondents are represented by counsel. The cross-appeal is unduly vague and ambiguous such that it precludes petitioner from effectively formulating a responsive answer (see Application of the Bd. Of Educ., Appeal No. 07-121) and it fails to adequately identify respondents' reasons for challenging the impartial hearing officer's decision, including identifying the findings, conclusions and orders to which exceptions are taken. I further note that respondents fail to number the first five and one half pages of their answer. Accordingly, I find that the cross-appeal fails to meet the requirements of the State regulations and in the exercise of my discretion, I will not consider the cross-appeal (8 NYCRR 279.8).

I have considered the parties remaining contentions and find that they are without merit.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the impartial hearing officer's decision is annulled to the extent that it determined that the lack of the additional parent member at the June 9, 2006 CSE meeting constituted a denial of a FAPE.

**Dated:** Albany, New York  
February 7, 2008

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**