



The University of the State of New York

The State Education Department State Review Officer

No. 08-019

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED] Department of Education

Appearances:

Mayerson & Associates, attorneys for petitioners, Gary S. Mayerson, Esq., of counsel

Hon. Michael A. Cardozo, Corporation Counsel, attorneys for respondent, Tracy Siligmüller, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for costs of their daughter's 1:1 school-based special education itinerant teacher (SEIT) for the 2007-08 school year and directed respondent's (the district's) Committee on Special Education (CSE) to convene to revise the student's 2007-08 individualized education program (IEP) consistent with the impartial hearing officer's determinations regarding related services and home-based applied behavioral analysis (ABA) services for the 2007-08 school year. The district cross-appeals from those portions of the impartial hearing officer's decision which determined that the parents met their burden to establish that the home-based ABA services met the student's special education needs and directed the district's CSE to convene to add 7.5 hours per week of home-based ABA services to the student's 2007-08 IEP and which directed the district to provide home-based ABA services for summer 2008. The appeal must be dismissed. The cross-appeal must be sustained.

Preliminarily, I must address a procedural issue. In their petition, the parents attached three exhibits for consideration as additional evidence (Pet. Exs. A-C). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application

of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003). I find that the exhibits attached to the petition are not necessary to render a decision in this matter, and thus, I decline to consider them.

The student's prior educational history is described in Application of a Child with a Disability, Appeal No. 06-004, issued on March 29, 2006, and will not be repeated here in detail. When the student was two years old, a developmental pediatrician and pediatric neurologist diagnosed the student with Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS) (Parent Exs. X at p. 1; QQ at p. 1). An April 2007 evaluation report indicated additional diagnoses of expressive and receptive language disorder, pragmatic language disorder, auditory processing disorder, and fine/graphomotor delays (Parent Ex. MM at p. 1). Assessments conducted in April 2007 yielded results that characterized the student's overall intellectual ability within the average range, her academic skills within the average to superior range, and her processing speed within the low average range (id. at pp. 9-10, 12-13). The assessments also yielded a full-scale IQ score of 90 (average range) (id. at p. 12). The student exhibits social skills deficits and difficulties with organization (Tr. pp. 295-96). 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]).

At the time of the impartial hearing, the student was attending a 12:1 third grade collaborative team teaching (CTT) classroom—a classroom taught by both a regular education teacher and a special education teacher—in one of the district's schools and was receiving the following services pursuant to the impartial hearing officer's interim decision on pendency in this matter: 40 hours per week of ABA SEIT services;^{1,2} five individual 60-minute sessions per week of speech-language therapy services; five individual 60-minute sessions per week of occupational therapy (OT) services; and three individual 60-minute sessions per week of physical therapy (PT) services (July 11, 2007 IHO Decision at p. 2; see Parent Ex. B at p. 1). The interim impartial hearing officer decision also directed the district to provide Related Service Authorizations (RSA) for the student's related services, to provide ten hours per month of parent training/counseling and ABA SEIT supervision services, and to reimburse the parents

¹ The hearing record refers to the student's school-age educational support services as "SEIT" support. However, the Education Law defines special education itinerant services (commonly referred to as "SEIT") as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]). Although mischaracterized in the hearing record, I will continue to refer to the privately obtained school-age educational support service providers who used ABA methods with the student as "ABA SEITs" to remain consistent with the hearing record and to avoid confusion in this decision.

² The student's father testified that his daughter received 32.5 hours per week of school-based ABA SEIT services and 7.5 hours per week of home-based ABA SEIT services (Tr. p. 12). At the time of the impartial hearing, the student attended the third grade CTT classroom with a full-time, 1:1 "confederate" ABA SEIT (Tr. pp. 74, 83-87, 103, 113-14, 156; Parent Ex. B at p. 1). In this case, the "confederate" ABA SEIT was known to the student and her classmates as a classroom teacher assistant and not as specifically dedicated to the student (Tr. pp. 114, 157-58).

for the costs of those services up to a specified rate (July 11, 2007 IHO Decision at p. 2; see Tr. pp. 12, 25, 32-34).³

During the 2006-07 school year, the student attended a 12:1 second grade CTT class in the district's public school with a full-time, 1:1 confederate ABA SEIT (Parent Ex. MM at p. 1). The student also received home-based 1:1 ABA SEIT services, as well as five sessions per week of speech-language therapy, five sessions per week of OT, and three sessions per week of PT (Parent Exs. MM at p. 1; QQ at p. 1; see Tr. pp. 651-53). The student received all of her related services individually and in a location outside of school for 60-minute sessions (Parent Ex. FF at p. 1).

During the 2006-07 school year, the student's second grade teachers prepared progress reports (Parent Exs. J; SS). The winter 2007 progress report regarding the student's first semester in second grade indicated that the student relied on structured, predictable classroom routines and her teachers in order to make transitions and stay engaged in lessons (Parent Ex. SS at p. 1). Academically, the teacher reported that the student met "standards across the curriculum" and her reading skills were either at or above grade level (id.). At that time, the student benefitted from redirection and refocusing during math and writing lessons, although, overall, the teacher described her skills in these areas as "good" (id.).

The student's second semester progress report, dated spring 2007, indicated that she made "good progress" in the areas of peer interaction, organization, word knowledge, reading and math (Parent Ex. J at p. 1). The report stated that the student benefitted from individualized in-class behavior modification techniques, had become more self-aware, and was able to express her feelings (id.). She received designations from her teachers that her effort was "consistent" in reading, writing, social studies, and science, and "inconsistent" in math (id. at p. 4). The teacher indicated the need for additional work or development in the areas of personal/social growth and work habits/organizational skills (id.).

In spring 2007, the district's school psychologist conducted a functional behavioral assessment (FBA) of the student (Dist. Ex. 8; see Tr. pp. 967-68, 1015-28). The psychologist noted that the student's attention difficulties, which occurred daily in all academic contexts, interfered with her ability to perform to her academic and social potential (Dist. Ex. 8 at pp. 1-2). The psychologist reported that the student's difficulties remaining on task caused her "frustration," which resulted in "small outbursts" that lasted between 1 and 30 minutes and disrupted the flow of learning for the student and her classmates (id. at p. 1). The psychologist also reported that due to the cooperative nature of the classroom, the student's attentional problems and impulsivity affected her ability to partner with others (id.). According to the report, the student's attentional difficulties caused feelings of distress, anxiety, anger, and inadequacy, which led to a breakdown of her ability to organize and plan her thoughts and actions (id. at p. 2). The psychologist further reported that the student had difficulty coping with routine rules and transitions and that her "frustration tolerance" distorted the "intensity of her response" to seemingly minor problems (id.). She identified following the "routine on rug" as an

³ The impartial hearing officer's interim decision on pendency directed the district to directly fund the 40 hours per week of ABA SEIT services (July 11, 2007 IHO Decision at p. 2). The interim decision on pendency indicated that the order was retroactive to the date of the parents' due process complaint notice, dated May 23, 2007, to ensure the provision of services during summer 2007 (id.; see Tr. pp. 44-45).

antecedent to the student's behavior and as consequences, redirection to the lesson and the removal of books or objects (id.). The student received reinforcement and praise when she exhibited appropriate behavior (id.). The psychologist opined that the student engaged in behaviors to attempt to communicate that she needed assistance (id.). The FBA report indicated that the "high level" curriculum met the student's academic needs and that female peers often volunteered to help her with games, follow rules, participate in class, and organize (id.).

Between February and May 2007, the student's school-based and home-based ABA SEIT providers, ABA SEIT supervisor/program consultant, related service providers, and developmental pediatricians prepared reports detailing the evaluations, assessments, and classroom observations conducted, and reported the student's progress and recommendations for the student's 2007-08 school year (Parent Exs. U; W-X; Z; FF; GG-MM; QQ-RR; TT). During this time, the student's regular education and special education teachers prepared progress reports for the student's 2007-08 annual review and the district's school psychologist conducted two classroom observations of the student (Dist. Exs. 3-4; Parent Exs. DD; OO; see Tr. pp. 715-19).

In February 2007, a speech-language pathologist conducted a speech-language evaluation of the student (Parent Ex. TT). Selected subtests from three standardized tests used to assess "discrete aspects of receptive and expressive language functioning" revealed standard scores in the average range (id. at pp. 2-3). The student's performance on open-ended tasks that required "higher levels of language," such as comprehension of non-literal language, yielded standard and scaled scores 1 to 1.5 standard deviations below the mean (id. at p. 3). During a narrative language task, the student exhibited moderate difficulty formulating longer and more complex ideas (id. at p. 5). In May 2007, the student's home-based speech-language pathologists reported that the student made "consistent," "significant," and "meaningful" progress during the 2006-07 school year in all speech-language areas, but continued to exhibit delays in expressive, receptive, and pragmatic language skills, as well as auditory processing and social skill deficits (Parent Exs. U at p. 1; Z at pp. 2, 5). For the 2007-08 school year, the speech-language pathologist who evaluated the student in February 2007 and the student's two home-based speech-language pathologists recommended that the student continue to receive five 60-minute individual sessions of speech-language therapy per week on a 12-month basis and in a location outside of school (Parent Exs. U at p. 2; Z at p. 5; TT at p. 5).

In February and May 2007, the student's two home-based occupational therapists reported that she made "steady" progress in her graphomotor, fine motor, visual motor, and self-care skills, but that she continued to exhibit significant delays in fine motor, graphomotor, visual perceptual/motor, handwriting, processing, modulation of sensory information, and activity of daily living (ADL) skills (Parent Exs. W at p. 2; RR at p. 2). For the 2007-08 school year, both occupational therapists recommended that the student continue to receive five 60-minute individual home-based sessions of OT per week on a 12-month basis (Parent Exs. W at p. 2; RR at p. 2).

In April 2007, one of the student's two home-based physical therapists reported that she had made "great gains" in her bike riding, dynamic balance, and ball skills, and also increased her stamina and abdominal strength (Parent Ex. HH at p. 3). Reports provided by both of the student's home-based physical therapists indicated that the student continued to exhibit gross motor delays, and among other things, decreased agility, balance, endurance, strength, motor

planning, coordination, and proprioceptive skills (Parent Exs. HH at p. 3; JJ at p. 5). For the 2007-08 school year, both physical therapists recommended that the student continue to receive three 60-minute individual home-based sessions of PT per week on a 12-month basis (id.).

In April 2007, the student's psychological/developmental evaluation included the administration of the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), which yielded a verbal comprehension index standard score of 96 (average range), a perceptual reasoning index standard score of 94 (average range), a working memory index standard score of 94 (average range), and a processing speed index standard score of 85 (low average range) (Parent Ex. MM at pp. 4, 12). The student achieved average math scores, superior written language scores, and average to superior reading scores as a result of the administration of the Wechsler Individual Achievement Test, Second Edition (WIAT-II) (id. at pp. 6, 13). The evaluator reported that the student exhibited variability in her cognitive functioning, visual, attentional and processing skills, and ability to process complex language (id. at p. 9).

Reports dated April and May 2007 and prepared by the student's school-based and home-based ABA SEITs and ABA SEIT supervisor/program consultant, indicated that during the 2006-07 school year, the student demonstrated progress in academics, social skills and language skills (Parent Exs. X; FF-GG; II; LL). For the 2007-08 school year, two developmental pediatricians, all of the student's ABA SEITs, and the ABA SEIT supervisor/program consultant consistently recommended placement in a third grade CTT with full-time, 1:1 ABA SEIT support that would be gradually "faded" during the school year, and at least ten hours per week of home-based ABA SEIT services (Parent Exs. X at p. 2; FF at p. 3; GG at pp. 2-3; II at pp. 6-7; LL at p. 3; MM at p. 10; QQ at p. 2). The ABA SEIT supervisor/program consultant, the student's school-based ABA SEIT, and two developmental pediatricians also recommended that the student receive services on a 52-week schedule, including holidays, weekends and vacations (Parent Exs. X at p. 2; II at p. 7; MM at p. 10; QQ at p. 3). The providers also recommended additional hours for ABA supervision/coordination/consultation, team meetings, and parent training (Parent Exs. X at p. 2; FF at p. 3; II at p. 7; MM at p. 11; QQ at p. 3).

By letter dated May 30, 2007, the parents sent copies of all of their daughter's evaluation reports, progress notes, observations, and recommended goals and objectives to the CSE in preparation for the student's upcoming annual review (Parent Ex. T at pp. 1-2; see also Parent Ex. AA at p. 1).

On June 6, 2007 the CSE convened for the student's annual review and to develop the student's IEP for the 2007-08 school year (Parent Ex. B at pp. 1-2). Participants at the CSE meeting included the following individuals: the district representative, the student's second grade regular education teacher, the district's school psychologist who had conducted the student's FBA and two classroom observations, a social worker, the student's second grade special education teacher, the assistant principal of the student's current school, a speech therapist, the student's parents, the student's ABA program consultant, the student's pediatric neurologist, and the student's 1:1 school-based ABA SEIT (id. at p. 2). Present levels of academic performance contained within the IEP indicated that the student met academic standards "across the curriculum" and described the student's strong reading and writing skills (id. at pp. 3, 7). Test scores included in the IEP reflected the student's instructional level as "3.0" in the areas of reading comprehension, listening comprehension, writing, computation and problem solving, and

as "3.8" in the area of decoding (id. at p. 3). The CSE reported that the student benefitted from a highly structured, predictable classroom environment with consistent expectations and consequences (id.). The CSE described the student in the academic performance and learning characteristics section of the IEP as a visual learner who responded well to "visuals" to support her adherence to classroom rules and procedures (id.). In addition, the CSE noted in the social/emotional performance section of the IEP that the student used written language to solve problems, resolve conflicts and cope with disappointments (id. at pp. 5, 7). The student occasionally had difficulty starting work without prompts, staying on task, and completing activities (id. at p. 4). The CSE reported that the student was "highly" motivated by an individualized behavior modification program (sticker chart), which reflected her performance during each period of the school day, in addition to praise, reward programs and short breaks (id. at pp. 3-4).

The June 2007 IEP indicated that the student's social skills had progressed in that she sought out peers to play games and complete activities, responded to peers when they offered assistance, and that she had a close relationship with a female peer (Parent Ex. B at pp. 5-6). At the time of the June 2007 CSE meeting she also was learning to verbally problem solve disputes with peers (id. at p. 7). She had improved her ability to verbally express her feelings and at the time the IEP was developed, expressed her dissatisfaction with her teachers and some classroom rules (id. at pp. 5-7). The IEP provided examples of the student's difficulty sustaining attention throughout the school day, which necessitated frequent redirection and praise from adults (id. at pp. 5-6). She reportedly responded to visual supports and verbal cues to follow directions and make transitions (id. at p. 5). Her behavior was described as seriously interfering with instruction such that additional adult support was required (id.).

The June 2007 IEP contained approximately 49 annual goals and 259 corresponding short-term objectives in the following areas: reading, written language, mathematics, social/emotional skills, speech-language (including pragmatic, receptive and expressive language and auditory memory), behavior, attention, fine motor skills (including visual-spatial, visual-motor, visual-perceptual, and handwriting), ADLs, play, time management, organization, sensory processing/modulation, and gross motor skills (including balance, coordination, locomotion, endurance, speed, and agility) (Parent Exs. B at pp. 9-43; DDD-GGG). The IEP provided the student with the testing accommodations of extended time, separate location, answers recorded in any manner, directions read and repeated aloud, and "masks" and markers to maintain place (Parent Ex. B at p. 45). The IEP also included a behavioral intervention plan (BIP), which identified the student's difficulty staying on task, attending to and completing tasks/activities, and her feelings of anxiety (id. at p. 47). The BIP documented strategies to change the student's behaviors, including the use of a positive reinforcement system, behavior modification plan, physical and gesture cues, and repetition of simple, easy to understand expectations and instructions (id.).

For the 2007-08 school year the CSE recommended placement in a 12:1 CTT classroom with a full-time shared (2:1) crisis management paraprofessional and school-based related services of speech-language therapy, OT, and PT services (Parent Ex. B at pp. 1, 45-46). Specifically, the CSE recommended two individual 30-minute sessions per week of speech-language therapy, two group 30-minute sessions per week of speech-language therapy, two individual 30-minute sessions per week of OT, one group 30-minute session per week of OT,

and two individual 30-minute sessions per week of PT (*id.* at p. 45). For summer 2007, the CSE recommended speech-language therapy, OT, and PT services (*id.* at p. 1; *see* Parent Exs. K-N).

By amended due process complaint notice dated July 23, 2007, the parents alleged that as a result of numerous procedural and substantive violations, the district failed to offer their daughter a free appropriate public education (FAPE)⁴ for the 2007-08 school year (Parent Ex. LLL at pp. 1-5).⁵ As relief, the parents requested that the impartial hearing officer determine that although the CTT placement and related services offered in the June 2007 IEP "may be *appropriate components*" of the student's educational program, the special education programs and services offered were not "sufficient, in and of themselves, to provide [their daughter] with a FAPE" in the least restrictive environment (LRE) (*id.* at p. 5). The parents noted that an appropriate 12-month program for the student's 2007-08 school year, and summer 2008 services, included the following: school-based 1:1 ABA SEIT services; home-based 1:1 ABA SEIT services; "ABA consultation, supervision, coordination, school observations and ongoing parent training; ABA team meetings" and "teaching clinics for program review and modification and ongoing training;" and a continuation of speech-language therapy, OT, and PT services at the student's current levels (*id.* at p. 6).

The first day of the impartial hearing occurred on September 5, 2007, and concluded after six days of testimony on December 17, 2007 (Tr. pp. 48, 1090). The parents presented several witnesses to testify, including the student's school-based ABA SEIT, two ABA SEIT supervisor/program consultants,⁶ the student's home-based ABA SEIT, the student's related service providers, and the parents (Tr. pp. 1-627, 1065-76). In addition, the parents also submitted documentary evidence at the impartial hearing (Parent Exs. A-Z; AA-ZZ; AAA-GGG; LLL-MMM). The district presented the student's second grade regular education and special education teachers, the school psychologist, and related service providers as witnesses at the

⁴ 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]).

⁵ During the pendency hearing on July 11, 2007, the parents' attorney advised the impartial hearing officer that the district's CSE had convened on June 6, 2007 to conduct the student's annual review and to develop the student's IEP for the 2007-08 school year (Tr. pp. 36-37). He noted that because the CSE meeting occurred after the parents filed their due process complaint notice, dated May 23, 2007, the due process complaint notice would need to be amended to "incorporate" challenges to the 2007-08 IEP (Tr. pp. 37, 40-41). The July 23, 2007 due process complaint notice amended the May 23, 2007 due process complaint notice (*see* Parent Ex. LLL at p. 1; *compare* Parent Ex. A at pp. 1-5, *with* Parent Ex. LLL at pp. 1-5).

⁶ Two ABA SEIT supervisor/program consultants provided services to the student (Tr. pp. 290-377). The first ABA SEIT supervisor/program consultant worked with the student during the 2006-07 school year, and the second ABA SEIT supervisor/program consultant assumed that same role with the student in August 2007 (Tr. pp. 297, 347).

impartial hearing (Tr. pp. 649-838, 857-1065, 1092-1220). The district also submitted documentary evidence into the hearing record (Dist. Exs. 1-8).⁷

The student's school-based ABA SEIT testified that she did not provide academic instruction to the student, but, on occasion, assisted the student with math word problems and the organization of her math page (Tr. pp. 107, 109-13). She provided the student with graphic organizers for reading tasks (Tr. p. 110). She assisted the student with organization so the student could complete work, which she could usually correctly complete (Tr. p. 108). The ABA SEIT "incidentally" addressed the legibility of student's handwriting skills because although correct, sometimes the student's work was difficult to read (Tr. pp. 142, 177-78, 207-09). Compared to her non-disabled second grade peers, the school-based ABA SEIT opined that the student had "weaker" organization skills and that she needed "more assistance with certain parts of her day," but also acknowledged that she did not have any experience teaching typically developing second grade students (Tr. pp. 237, 245-47). Throughout her testimony, the school-based ABA SEIT repeatedly commented about the student's cognitive and academic "brightness" (Tr. pp. 77, 79, 83, 107-08, 114, 157-59; see Tr. pp. 178, 265).

The school-based ABA SEIT also helped the student focus and follow instructions, stay focused on a task, remain engaged in an activity for increasing lengths of time with less prompts, initiate and complete her work, understand multi-step instructions, manage transitions, and "regulate" her impulsive behavior (Tr. pp. 108, 136-37, 141-42). She testified that she works toward the student independently interacting with the teacher and assists the student in situations that require pragmatic and expressive language skills (Tr. pp. 107-08, 154).

Socially, the school-based ABA SEIT assisted the student with peer interactions and helped her respond appropriately, attend to and maintain conversations, use appropriate eye contact, "read" social situations, problem solve with peers, understand humor, as well as improve cooperative play and turn-taking skills (Tr. pp. 137-41, 166). She opined that the student's social and language skills were her greatest areas of weakness (Tr. pp. 143-44). She also stated that although the student "often" needed adult assistance interacting with peers during recess, the student's non-disabled peers played with her, sought her out, and involved the student socially (Tr. pp. 145-48).

During classroom time, the school-based ABA SEIT would sometimes provide prompts to the student's second grade teachers to intervene for an exhibited behavior, but she approximated that 90 percent of the time, the student's regular education and special education teachers "took over" (Tr. pp. 183-84). She stated that she tried to let the second grade teachers resolve the situation with the student and only intervened when the behavior escalated or did not resolve with the teachers' intervention (Tr. p. 184). She indicated that usually, the "most subtle prompting possible" worked with the student (Tr. p. 196).

The student's second grade regular education teacher testified that she often effectively helped the student with her areas of weakness, regardless of whether the school-based ABA SEIT was present in the classroom (Tr. pp. 649-51, 789-90). The regular education teacher opined that an empathetic, patient paraprofessional could supervise the student in a CTT class

⁷ The hearing record also included several impartial hearing officer exhibits (IHO Exs. I-VI).

(Tr. p. 700). The regular education teacher opined that the services provided by the student's school-based ABA SEIT paralleled those of a paraprofessional in that the ABA SEIT did not prepare or modify lessons to accommodate the student's needs (Tr. pp. 701-02, 742-43, 745-46). When asked if the student required SEIT support in non-academic situations, the regular education teacher stated that paraprofessionals helped students in the class modify their behavior to comport with their classroom requirements, the ABA SEIT was not necessary during the student's lunchtime, and adults were present during "yard time" (Tr. pp. 702-04).

With respect to the student's related services, the regular education teacher testified that school-based related services would provide the student with the opportunity to be in a small group, to enjoy a bit of a break, and the opportunity to be physically active, which would be a "welcome respite" for the student (Tr. pp. 700-01, 784).

The school psychologist opined that a paraprofessional could provide the student with redirection, transition assistance, and facilitate interactions with peers, and that the student did not require SEIT assistance to make academic and social/emotional progress (Tr. pp. 986, 1008-10). The school psychologist also opined that based upon her observations of the student, the student could make progress even if ABA interventions were not provided (Tr. pp. 967-68, 994-95). She stated that during her observations of the student in her second grade classroom, the special education teacher redirected the student "just like the SEIT had done" (Tr. pp. 995-96).

Regarding the provision of related services, the school psychologist indicated that school-based related services would benefit the student because the providers could collaborate with each other and with the student's teachers, and the providers would have the opportunity to "push-in" to her classroom (Tr. p. 993). The school psychologist agreed that the student could benefit from, and needed, some level of push-in related services (Tr. p. 1050).

The student's second grade special education teacher testified that within the structure of the CTT class, the student could function with a paraprofessional's support and did not require SEIT support (Tr. p. 887). Although the student needed adult direction to help her focus on her work, academically, she was able to complete the work without special education intervention (Tr. pp. 685-86, 700, 702, 790). Although the special education teacher did not have training in ABA interventions, she testified that she did not need to have ABA training to provide the interventions that the student's school-based ABA SEIT provided (Tr. pp. 903, 956-57). She also testified that the type of prompting provided by the school-based ABA SEIT to help the student complete work, transition, and socialize, was the same prompting that she had successfully used in her class in the past with other students (Tr. pp. 957-58). The special education teacher stated that a paraprofessional would be able to implement the same interventions used by the school-based ABA SEIT with the student (Tr. p. 959). She further stated that a special education teacher trains the paraprofessional to provide the correct amount of prompting to the student (Tr. pp. 878, 959). The special education teacher further stated that she was glad that the student had 1:1 support from an adult with "some meaningful level of experience and training" (Tr. pp. 918-19).

With respect to the student's related services, the special education teacher testified that a recommendation for school-based related services was appropriate (Tr. pp. 876-77). She stated that school-based related services would improve the efficiency of student's services because

there would be more communication among the therapists and teachers, the student would develop more relationships with adults in the building, and the related service providers could pre-teach academic concepts and provide review (Tr. p. 877). She stated that school-based therapy would also give the student opportunities to leave the classroom and increase her social skills by doing activities with other students (id.).

One of the student's home-based speech-language pathologists testified that she provided services to the student in her office three times per week from September 2006 through the remainder of that school year (Tr. pp. 446, 448, 450-51, 475-76). She worked with the student to improve her social pragmatic language skills, receptive and expressive language skills, auditory processing skills, "prophatic" elements of speech,⁸ and written language skills (Tr. pp. 448-49). She opined that the student would not learn these skills incidentally in the classroom and that she required individual therapy to develop and generalize these skills (Tr. pp. 449-50).

The speech-language pathologist testified that during the 2006-07 school year, she focused therapy on the student's primary deficit area, namely, the student's social language skills (Tr. pp. 472-73). Although she opined that the student required individual therapy to acquire these skills, the speech-language pathologist stated that the CTT classroom would provide the special education support necessary for the student to generalize pragmatic skills into the classroom (Tr. pp. 473-74). She described the student's progress in her social pragmatic language skills as "significant," "consistent" and "great" (Tr. p. 454). The speech-language pathologist testified that the student increased her ability to adjust body language and communication accordingly in social situations and to extend reciprocal conversations (id.).

Regarding other areas of progress, the speech-language pathologist testified that the student could recall facts from paragraphs and abstract stories and use compensatory strategies to ask for help and remember information (Tr. p. 455). She also testified that the student had "a lot" of vocabulary, improved her ability to organize her expressive language, told personal narratives in sequential order, expanded her utterances and improved her tone, rate, and inflection, which affected her social communication (Tr. pp. 455-56). The student also worked on processing and answering higher levels of discriminative questions (Tr. p. 456). The student could also answer "how" and "why" questions related to basic information or material (Tr. p. 480).

The speech-language pathologist testified that the student made meaningful progress in therapy during the 2006-07 school year and recommended for the 2007-08 school year that the student continue to receive five individual 60-minute sessions of speech-language therapy per week (Tr. pp. 453-56). She testified that that level of service was required to target areas of need addressed during the 2006-07 school year so that the student could acquire new skills, maintain skills, generalize skills, prevent the likelihood of regression, and integrate skills successfully in school and in the community (Tr. pp. 464-65).

⁸ Although the speech-language pathologist referred in her testimony to "prophatic" elements of speech, it appears that this may be a transcription error because the description of the student's difficulties more accurately describes "prosodic" elements of speech (see Tr. pp. 448, 456).

The district's speech-language therapist testified that she knew the student from her work with the student's classmates, her review of the student's speech-language progress reports, and her attendance at the June 2007 CSE meeting (Tr. pp. 1189-90, 1201; see Parent Ex. B at p. 2). During group sessions, the speech-language therapist prompted students to use certain language and facilitated their discussions (Tr. p. 1192). She stated that group therapy sessions focused primarily on pragmatics, but that receptive and expressive language skills were also addressed during group therapy (Tr. p. 1191). After her review of the June 2007 IEP, the speech-language therapist opined that she could implement the student's speech-language goals within the school-based setting (Tr. p. 1198). She disagreed that pulling the student out of the classroom for therapy reduced her time with peers because of the nature of group therapy sessions (Tr. p. 1210).

Based on her review of the student's reports, the speech-language therapist testified that the student exhibited difficulties with written language, explanation of abstract concepts, and understanding abstract concepts and inferences in the areas of expressive and receptive language (Tr. pp. 1193-95). To assist the student with these difficulties, the speech-language therapist would use graphic organizers and outlines to help the student organize and develop her thoughts, and review stories for keywords to increase understanding (id.). For students with auditory memory difficulties, the speech-language therapist asked students to repeat increasingly longer and more complex utterances (Tr. pp. 1195-96). She also explained techniques that she would use for students who demonstrated difficulty with transitions and who exhibited inappropriate behaviors (Tr. pp. 1196-98).

The speech-language therapist noted that she often collaborated with teachers in the CTT classrooms to identify deficit areas observed in the classroom, which could be addressed in therapy (Tr. pp. 1198-99). The speech-language therapist stated that the services are "cohesive," in that a student received services with her that are tied into what was learned in the classroom (Tr. p. 1199). She collaborated with other related service providers "all the time" to share information about students they shared in common (Tr. pp. 1199-1200). Although she primarily provided speech-language therapy in a separate location within the school, the therapist stated that she also provides push-in services if requested (Tr. p. 1200). During the school year, she meets with parents at least annually or more frequently upon request (id.). The speech-language therapist could suggest strategies to the parents to use at home (Tr. pp. 1200-01).

The home-based physical therapist who worked with the student during the 2006-07 school year testified that the student exhibited gross motor deficits in the areas of coordination skills, hand-eye coordination skills, and "contact manipulation" (Tr. p. 544). She reported that the student demonstrated delayed balance skills and poor endurance (id.). The physical therapist testified that the only assessment available for her use was standardized for children through the age of six (Tr. p. 573). She indicated that the student completed many of the tasks on the assessment, but did not complete "a lot" of the tasks at the six year old level (Tr. pp. 573-74). During the school year, the student's physical therapist focused on improving the student's cardiovascular fitness by taking her on walks, using the treadmill, swimming, running, and performing jumping jacks (Tr. pp. 566, 575-76). She opined that school-based PT would not provide the variety of activities that the student needs (Tr. pp. 568-69).

The district's physical therapist testified that all PT goals must relate to improving the student's ability to function within the school environment (Tr. p. 1094). Based on her review of the June 2007 IEP and student's April 2007 PT progress reports, the district's physical therapist indicated that one of the student's strengths was her ability to function within the school environment (Tr. pp. 1096-98). According to the April 2007 progress reports, the student's weaknesses were in the areas of endurance and community-related skills, such as attention, safety, and environmental awareness (Tr. pp. 1098-99). Most of the student's June 2007 IEP goals, with the exception of swimming and bike-riding, could be adjusted to a school-based setting (Tr. pp. 1104-06, 1122-23). The district's physical therapist could also help the parents work on the student's community-based goals that did not require a physical therapist (Tr. pp. 1107, 1122-23).

The district's physical therapist stated that the student's needs were not different from other children currently on her caseload, and she testified about the types of interventions she would use to improve the student's endurance, safety awareness, and ability to physically transition (Tr. pp. 1099-1104). For example, independent stair negotiation goals allowed the student to access the school environment; sitting, balance, and standing tolerance goals allowed the student to better participate in classroom activities; and coordination and physical education skill goals allowed the student to increase participation with peers (Tr. p. 1094). She stated that she collaborated on a daily basis with the district's occupational therapist and approximately once per week with the classroom teacher (Tr. pp. 1107-08).

During the 2007-08 school year, the main focus of the student's home-based OT was improving the student's handwriting skills (Tr. p. 624). The home-based occupational therapist who worked with the student from March through June 2007, testified that the student displayed an approximate one-year delay in handwriting skills (Tr. pp. 419, 436-37; see Parent Ex. W). Her visual motor difficulties were related to her ability to stay on the line during writing tasks (Tr. p. 425). The student also exhibited sensory-seeking behaviors and was "highly" distractible, sometimes requiring 10 to 15 minutes to complete transitions and refocus her attention (Tr. pp. 426-27). She testified that a level of service less than five 60-minute individual sessions per week would not be appropriate and that the student made "ideal" progress during individual home-based OT services (Tr. pp. 428-31).

The district's occupational therapist stated that she was familiar with the student from working with her classmates in the second grade CTT classroom (Tr. pp. 1137-41). The occupational therapist read the February and May 2007 home-based OT progress reports and stated that the conclusions contained in the reports coincided with her impressions of the student's level of functioning (Tr. pp. 1171-72). The district's occupational therapist stated that the student exhibited fine motor, visual motor, visual conceptual, self-care, organization, self-regulation and sensory processing deficits (Tr. pp. 1144-45). To address the student's deficits, the school-based occupational therapist would use the interventions mentioned in the student's home-based OT progress reports and would address the actual activities that the student had difficulty with (Tr. pp. 1145-46). She provided specific examples of activities she would use to improve the student's handwriting, attention, visual-perceptual, fine-motor, self-care and transition skills and indicated that she had effectively used these interventions in the past with students who had needs similar to those of the student (Tr. pp. 1146-52). The district's occupational therapist stated that if the student had difficulty in a particular area at home, she

could assist the parents by providing suggestions or a home program (Tr. pp. 1151-52). She collaborated "pretty consistently" with other school-based related service providers and "regularly" with classroom teachers (Tr. pp. 1153-54).

The district's occupational therapist recommended two individual sessions and one group session of school-based OT per week (Tr. pp. 1142-44). She recommended that the student receive group OT to work on social and play skills and because it would be motivating for the student to work with a peer (Tr. p. 1156). She stated that she did not create the OT goals contained in the student's June 2007 IEP, but that the goals were, "for the most part" educationally relevant, and that she could work on underlying skills (i.e. time management) for some short-term objectives that would not be specifically addressed in school (i.e. bathing) (Tr. pp. 1153, 1160-61, 1176-77, 1182-83).

By decision dated February 14, 2008, the impartial hearing officer determined that the parents sustained their burden to establish that the district failed to offer the student a FAPE for the 2007-08 school year (Feb. 14, 2008 IHO Decision at pp. 36-38). The impartial hearing officer noted that upon finding that the district denied the student a FAPE, she had the discretion and the authority to direct the district to "provide additional services, in lieu of merely remanding the matter to the CSE, where the record provides a sufficient basis for such an order" (*id.* at p. 38; see Application of a Child with a Disability, Appeal No. 02-076). Concluding that the impartial hearing "explored at length" the student's areas of need regarding school-based classroom support, a home-based program, and related services, she opined that the "extensive record created on these issues" afforded her the basis upon which to determine the services to be provided to the student (Feb. 14, 2008 IHO Decision at p. 38). The impartial hearing officer then went on in her decision to separately analyze the student's areas of need, the services obtained by the parents to meet the student's needs, and the evidence presented with respect to the following issues: paraprofessional support (school-based ABA SEIT) services, related services (speech-language, OT, and PT), 12-month programming, home programming (home-based ABA SEIT services), parent training, an FBA and a BIP, and reimbursement for ABA consultation (*id.* at pp. 38-44).

On the issue of paraprofessional support, the impartial hearing officer determined that the parents did not sustain their burden to establish that the full-time 1:1 school-based ABA SEIT was appropriate to meet their daughter's special education needs (Feb. 14, 2008 IHO Decision at pp. 38-39). She noted that, to the contrary, the evidence demonstrated that a paraprofessional would be capable of providing the "type of support" the student required in the classroom (*id.* at p. 38). In particular, the evidence established that teachers and service providers in the school "had the necessary training and experience" to encourage the student "to improve her social interactions" in the classroom and that they could similarly guide a paraprofessional to provide the same (*id.* at p. 39). In finding that a paraprofessional could support the student in the classroom, the impartial hearing officer then explained that the 2:1 shared paraprofessional recommended by the CSE was not, however, adequate support (*id.*). She referred to the testimony elicited from the student's second grade CTT teachers, who both testified regarding the student's need for 1:1 support "to get her started with her work, to refocus her, to remove her from the class at times, and to engage her in activities independent of the group, at times when she can no longer focus on classroom activities" (*id.*). The impartial hearing officer also noted that the student required support to engage in "academic and social activities with her peers"

(id.). In addition, testimony from the student's second grade special education teacher indicated that 2:1 paraprofessional support in the classroom would only be appropriate if the "other student's needs were less intensive" (id.). Based upon the evidence, the impartial hearing officer concluded that the student's need for classroom support could be met by a 1:1 paraprofessional, and thus directed the district to modify the student's 2007-08 IEP to include a recommendation for 1:1 paraprofessional support in the classroom (id. at pp. 39, 44).

Turning next to related services, the impartial hearing officer determined that the parents' rationale for rejecting "all in school related services" was neither persuasive nor supported by the evidence, and therefore, she concluded that the CSE's recommendations for school-based related services were appropriate, except for the recommendations for speech-language therapy (Feb. 14, 2008 IHO Decision at pp. 39-41). The impartial hearing officer noted that testimony by the student's second grade CTT teachers and her school-based ABA SEIT indicated that the student "became fatigued in the afternoon, and would withdraw from classroom activity" (id. at p. 39). According to her teachers, "a physical activity, such as OT or PT would provide respite from academics, and give [the student] the opportunity to be refreshed" (id. at pp. 39-40). In addition, all of the district's related services' witnesses "described how they would manage the transition" and "be flexible in scheduling, so as to accommodate" the student's needs (id. at p. 40).

With respect to PT, the impartial hearing officer credited the testimony of the district's physical therapist that two individual 30-minute sessions of PT per week would be appropriate for the student because she has demonstrated independence and ability to function within the school environment (Feb. 14, 2008 IHO Decision at p. 40). According to the district's physical therapist, although she could not "fulfill" the student's short-term objectives for "bike-riding and swimming" because they were not available at the district's school, she convincingly testified how "she would address the goals which those activities support; improving coordination, balance, locomotion and physical skills" (id.). The district's physical therapist also had experience working with students with autism and provided testimony regarding how she could manage "transitions" (id.).

The impartial hearing officer also credited the testimony provided by the district's occupational therapist that the student would make meaningful progress toward her IEP goals with the amount of OT recommended by the CSE (Feb. 14, 2008 IHO Decision at p. 40). Moreover, based upon the testimony of the student's teachers and the district's occupational therapist, the impartial hearing officer noted that the student would receive "tremendous benefit" from school-based OT services because the therapist "can observe [the student] throughout her school day, and provide support where needed" (id.). The impartial hearing officer further found that school-based OT would provide the student with a "needed break" from academics during the day and would provide the student with "social interaction and extra motivation during group sessions" (id.). Finally, the impartial hearing officer concluded that the evidence did not support the parents' request for five 60-minute sessions per week of OT to address the student's handwriting, and in fact noted that there was no testimony "that any of [the student's] many other OT goals [were] being addressed in her private sessions" (id. at p. 41).

Turning to speech-language therapy, the impartial hearing officer first noted that the CSE's recommendations for four 30-minute sessions per week of speech-language therapy did not meet the regulatory requirements set forth in 8 NYCRR 200.13(a)(4) (Feb. 14, 2008 IHO

Decision at p. 41). Because the impartial hearing officer determined that pragmatic language was one of the student's "main weaknesses," she credited the testimony from the district's speech-language pathologist that pragmatic language was "best taught in group sessions" (id.). She was not persuaded, however, by testimony from the student's private providers that the student's interaction with other children in the "waiting room" was "an effective way of improving [the student's] social language" (id.). Thus, the impartial hearing officer determined that the group speech-language therapy recommended by the CSE, for two 30-minute sessions per week, were "appropriate and necessary" and that the school-based sessions "will not deprive [the student] of language and social interaction" but would "increase her exposure to both language and social interactions" (id.).

With respect to individual speech-language therapy sessions, however, the impartial hearing officer credited the information provided by the student's private providers that "due to the intensity of [the student's] needs, she requires a more intensive level of speech/language therapy than recommended by the CSE" (Feb. 14, 2008 IHO Decision at p. 41). The impartial hearing officer determined that the student required three 60-minute sessions per week of speech-language therapy, "which should be provided outside of school," because that level of service would be "disruptive" to the student's school day (id.). Thus, she directed the CSE to modify the individual speech-language therapy sessions recommended in the student's 2007-08 IEP to provide three 60-minute sessions of individual speech-language therapy in a location outside of school (id. at p. 44).

Turning next to the issue of home programming and the need for home-based ABA SEIT services, the impartial hearing officer noted that she credited the testimony provided by the student's school-based ABA SEIT and the ABA supervisor/ program consultant that the student required additional home-based ABA services "to generalize skills learned at school" (Feb. 14, 2008 IHO Decision at p. 42). In addition, the impartial hearing officer noted that the home-based ABA SEIT testified that she helped the student with "conversation, social interactions, transitions, and homework" and that she communicated with the student's parents (id.). As such, she directed the CSE to modify the student's 2007-08 IEP to include the provision of 7.5 hours of home-based special education services (id. at p. 44). The impartial hearing officer also determined that the student required "some level" of home-based services during the summer to "prevent regression in her social interactions" and directed the CSE to determine the level of services required (id. at p. 42).

On appeal, the parents assert that the impartial hearing officer erred in denying reimbursement for the costs of the student's school-based ABA SEIT support and in modifying the student's related services in both amount and location. The parents argue that although the impartial hearing officer "does have the power to order services that are not recommended by the CSE *if* the record supports such a finding," the hearing record in this case does not support the impartial hearing officer's determination that a 1:1 paraprofessional was appropriate, nor does it support the modifications to the student's related services (Pet. ¶¶ 14-17). The parents assert that the student requires 1:1 school-based ABA SEIT support and related services at her current level of services. The parents request a modification of the impartial hearing officer's decision to

provide for additional reimbursement for the costs of the student's ABA SEIT and related services.⁹

In its answer, the district seeks to uphold those portions of the impartial hearing officer's decision appealed by the parents. The district cross-appeals, however, those portions of the impartial hearing officer's decision which determined that the parents met their burden to establish that the home-based ABA services met the student's special education needs and directed the district's CSE to convene to add 7.5 hours per week of home-based ABA services to the student's 2007-08 IEP and which directed the district to provide home-based ABA services for summer 2008. The district argues that the parents did not sustain their burden to establish the appropriateness of the 7.5 hours per week of home-based services and that the order to direct the provision of summer 2008 services was premature. The parents prepared a reply and answer, which asserted that the district was estopped from claiming that the summer 2008 services were premature because the student's 2007-08 IEP indicated that the student's recommended services would continue for one year beginning September 2007, and thus, included summer 2008.

A 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).

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]). 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

⁹ The parents ask that I recuse myself. I have considered the request and find no basis in law or fact for recusal and I find that I am able to impartially render a decision (see 8 NYCRR 279.1).

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). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Walczak, 142 F.3d at 132).

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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child 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).

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]).¹⁰

¹⁰ New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. In this case, the amended law does not apply because the impartial hearing was commenced prior to the effective date of the amendment (see Application of the Dep't of Educ., Appeal No. 08-

Initially, I note that neither the parents nor the district appeals from the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2007-08 school year (Feb. 14, 2008 IHO Decision at pp. 36-38). 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 that the district failed to offer the student a FAPE for the 2007-08 school year is final and binding upon the parties (Application of a Student with a Disability, Appeal No. 08-021; Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; 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).

I now turn to the second criterion for an award of reimbursement, namely, whether the parents sustained their burden to establish that the full-time, 1:1 school-based ABA SEIT services and the related services requested for their daughter were appropriate to meet her special education needs for the 2007-08 school year (Burlington, 471 U.S. 359; Frank G., 459 F.3d at 363). In order to meet that burden, the parents must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., that the private education services addressed the student's special education needs (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192). Parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d at 105).

After carefully reviewing the entire hearing record, I find that the impartial hearing officer, in a thorough and well-reasoned decision, correctly determined that the parents did not sustain their burden to establish that the 1:1 school-based ABA SEIT services and/or the related services at the levels and location requested and obtained by the parents were appropriate to meet the student's special education needs (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192; Mrs. B., 103 F.3d at 1121-22; Application of the Bd. of Educ., Appeal No. 05-081). Moreover, the hearing record in this matter contains extensive testimonial and documentary evidence, which provides a more than sufficient basis upon which the impartial hearing officer could rely to properly determine and order services that were not recommended by the CSE. In addition to their own testimony, the parents presented seven witnesses, who directly provided services to the student, to testify (Tr. pp. 1-627, 1065-76) and submitted 23 documents into evidence at the impartial hearing representing progress reports, evaluations, reports of school observations, and recommendations for services with respect to the student (Parent Exs. U-X; Z; DD; FF-MM; OO; QQ-TT; DDD-GGG). The district also presented six witnesses for testimony and submitted documentary evidence (Tr. pp. 649-838, 857-1065, 1092-1220; Dist. Exs. 1-8).

The decision shows that the impartial hearing officer carefully considered all of the testimonial and documentary evidence submitted by both parties and that she analyzed the evidence with the proper legal authority to determine whether the parents sustained their burden

to establish the appropriateness of the services obtained for their daughter (Feb. 14, 2008 IHO Decision at pp. 1-44). In short, based upon my review of the entire hearing record, I find that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the determination of the impartial hearing officer (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]). Therefore, I adopt the findings of fact and conclusions of law of the impartial hearing officer, with the exception of the impartial hearing officer's determinations regarding the provision of home-based ABA special education services and summer 2008 services, as explained more fully below (see Application of a Student with a Disability, Appeal No. 08-021; Application of a Child with a Disability, Appeal No. 06-136; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096).

In addition to the findings and rationale expressed by the impartial hearing officer to support her conclusions and recommendations for services, the following information contained in the hearing record adds further support for her determinations and for the services ordered by the impartial hearing officer. As to the impartial hearing officer's determination that the student's classroom needs could be appropriately provided by a 1:1 paraprofessional, the hearing record contains several examples of classroom situations when either the CTT teacher and/or a paraprofessional could have effectively assisted the student in the same manner as the ABA SEIT (Tr. pp. 107-12, 136-42, 146-47, 154, 179-80, 244-46, 255-57, 273-75, 277-78, 280-81). In addition, the hearing record reflects that the student's second grade teachers used a variety of management techniques with the student independent of the classroom ABA SEIT. For example, the CTT teachers used preferential seating, special chairs, and allowed the student to engage in preferred activities to help manage her inattentive behaviors (Tr. pp. 727-30, 793-95). The special education teacher used humor and question reformulation to help the student find information and interact with her peers (Tr. pp. 814-15). The regular education teacher testified that during the school year, she was able to keep the student on task by using verbal reminders and additional assistance with class work (Tr. pp. 661, 664-65, 673-74, 679-80). The hearing record also sufficiently reflects that the classroom special education teacher could provide the appropriate prompting required by the student (Tr. p. 878).

In addition, the hearing record indicates that during the school-based ABA SEIT's seven-day absence from the classroom in spring 2007, the student's regular education and special education teachers were able to effectively provide the student with additional support and prompts to stay on task (Tr. pp. 658-60, 803). There was also no substitute provided during the school-based ABA SEIT's absence (Tr. pp. 659-60). The special education teacher testified that in the ABA SEIT's absence, everything went "fairly well" (Tr. pp. 795-96, 804).

With respect to the student's related services, the hearing record contains sufficient evidence to support the impartial hearing officer's findings that the student's pragmatic language needs should be addressed in group therapy sessions and that incidental encounters with other children in a "waiting room" or park do not appropriately address this need (Feb. 14, 2008 IHO Decision at p. 41; see Tr. pp. 476-77). The impartial hearing officer properly concluded that in conjunction with two group school-based speech-language therapy sessions, three individual home-based (outside of school) 60-minute speech-language sessions provided the student with the necessary levels and intensity of speech-language therapy to meet her special education needs. As set forth above, the student made significant progress in her pragmatic language skills,

her greatest area of need, during the 2006-07 school year (Tr. pp. 454, 472-73). In addition, the hearing record reflects that this deficit area was also addressed by the student's CTT teachers and that they were capable of providing support to the student to help her generalize these skills (Tr. pp. 473-74). The student also evidenced progress in other areas of speech-language domains (Tr. pp. 455-56, 480).

As for the student's PT services, although the home-based physical therapist opined that the student needed three individual 60-minute sessions of PT per week because she required consistency and repetition to achieve her goals, the hearing record reflects that the student's goals for the 2007-08 school year, including improving bike-riding, jump roping, ball handling, jumping, hopping, manipulating objects, running form, and endurance, could all be practiced during school-based PT and during the student's physical education classes (Tr. pp. 547-48, 554, 563-64, 574).

Turning to the student's OT services, the hearing record does not reflect that the student's needs addressed by OT were to the degree that she required five individual, home-based 60-minute sessions per week. Moreover, the impartial hearing officer correctly determined that the hearing record does not show that the home-based OT addressed anything more than her handwriting (Feb. 14, 2008 IHO Decision at p. 41; see Tr. p. 624). In addition, both the district's physical therapist and occupational therapist testified regarding their ability to provide either push-in or pull-out school-based services to accommodate the student's needs (Tr. pp. 1108, 1155, 1158-59).

Turning now to the district's cross appeal, I find that the hearing record does not support the impartial hearing officer's conclusion that the parents sustained their burden as to establish that the 7.5 hours per week of home-based ABA SEIT services were appropriate to meet their daughter's special education needs. Although the student's home-based ABA SEIT during spring 2007 was dually certified as a special education and regular education teacher, she testified that she acquired only "a couple weeks" of ABA training over three years ago (Tr. pp. 378-79). When working with the student at home, she assisted the student with initiating and completing homework and improving her conversational skills (Tr. pp. 381, 386-87). She reviewed what the student did in school and reviewed her homework (Tr. p. 400). The home-based ABA SEIT testified that she primarily addressed getting the student started on her work (Tr. p. 401). The home-based ABA SEIT used a verbal activity schedule with the student to help her transition between activities (Tr. pp. 387, 390-91, 405). Although the student needed prompting to change activities, the home-based ABA SEIT testified that the student followed the schedule, knew how to "time" her breaks and to determine when breaks were over, and would resume her work (Tr. pp. 405-06). In addition, she testified that the prompting the student required was successfully provided by her parents (Tr. pp. 403-04, 406-07). Her testimony provided little insight, however, into why the student required the services of a home-based ABA SEIT to help the student initiate tasks, a skill addressed in the school setting, and to provide prompting, which she indicated that the parents could successfully provide (Tr. pp. 108, 136-37, 141-42, 403-04, 406-07).

The hearing record indicates that the home-based ABA SEIT worked on "a lot" of academics with the student, however, the hearing record does not support the assertion that the student had academic needs to the extent that she required home-based services (Tr. pp. 77, 79, 83, 107-08, 114, 157-59, 392, 402-03, 799-801; see Parent Ex. B at pp. 3, 7). In addition, the

student's school-based ABA SEIT testified that she did not provide academic instruction to the student because the student was a "regular child in her academics" and she independently performed her academic work (Tr. pp. 107, 265).

The home-based ABA SEIT further testified that her services also focused on social skill development (Tr. p. 408). The home-based ABA SEIT took the student to libraries, bookstores, and "different places" to find opportunities for the student to interact socially with peers (Tr. pp. 379, 408-09). She helped the student improve her eye contact, conversation, and interaction skills (Tr. pp. 386-87). In school, the student received full-time school-based ABA SEIT support and special education teacher support for the development of her social interaction skills (Tr. pp. 85, 107-08, 795-96, 818-19). The hearing record does not support the parents' claim that the student's social skills needs required the home-based ABA SEIT services in addition to the services the student received at school (Tr. pp. 145-48, 826-27).

Another area addressed by the home-based ABA SEIT was the generalization of skills outside of her home (Tr. p. 386). She testified that the student generalized the skills she worked on at home to school "because [the student was] mostly with her peers and classmates at school" (Tr. pp. 386-87). The hearing record provides insufficient evidence, however, about how the home-based ABA SEIT generalized the skills that the student learned at school to her home environment.

Although the home-based ABA SEIT testified that she followed "a form with the program in the skill areas that I am working and keeping data on every day," the hearing record does not contain this documentation or, other than the testimony stated above, specific information regarding the services she provided to the student (Tr. pp. 385-86). The hearing record provides general information about the home-based ABA SEIT's services, but fails to specifically indicate that the student's deficits required home-based services or how the home-based services were specially designed to meet the student's unique needs for the 2007-08 school year.

Turning to the issue of summer 2008 services, the district contends that the impartial hearing officer erred when she directed the district to provide home-based ABA services for summer 2008 because such an award was premature. At the time of the impartial hearing officer's decision, the hearing record did not indicate whether the CSE had convened for the student's annual review and to develop the student's IEP for the 2008-09 school year, which would include a determination by the CSE as to whether the student would need summer 2008 (extended school year) services (see Feb. 14, 2008 IHO Decision at p. 42; see also 34 C.F.R. § 300.106; 8 NYCRR 200.6[j][1]).

A student's IEP is required to be reviewed periodically, but not less frequently than annually (20 U.S.C. § 1414[d][4][A][i]; 34 C.F.R. § 300.324[b][i]; Educ. Law § 4402[1][b][2]; 8 NYCRR 200.4[d][2][xi], [f]). Based upon the hearing record, which addressed the student's 2007-08 IEP and the 2007-08 school year, and because as a matter of law, the school year runs from July 1 through June 30, the district correctly argues that the impartial hearing officer's award of summer 2008 services was premature, since the student's need for summer 2008 services would be addressed in the student's upcoming 2008-09 IEP and 2008-09 school year, which begins on July 1, 2008 (Educ. Law § 2 [15]). Thus, that portion of the impartial hearing

officer's decision that directed the district to provide home-based ABA services during summer 2008 is annulled as premature (see Application of a Student with a Disability, Appeal No. 08-028; Application of a Child with a Disability, Appeal No. 07-050; Application of the Dep't of Educ., Appeal No. 07-037; Application of a Child with a Disability, Appeal No. 00-006).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that it directed the district to add 7.5 hours of home-based ABA services to the student's 2007-08 IEP; and

IT IS FURTHER ORDERED, that the impartial hearing officer's decision is annulled to the extent that it directed the district to provide home-based ABA services during summer 2008.

Dated: **Albany, New York**
 June 11, 2008

PAUL F. KELLY
STATE REVIEW OFFICER