



The University of the State of New York

The State Education Department

State Review Officer

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No. 08-133

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

Appearances:

Thivierge & Rothberg, P.C., attorneys for petitioner, Randi M. Rothberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which found that respondent (the district) had offered an appropriate educational program to the student and denied the parent's request for tuition reimbursement at the Rebecca School for the 2007-08 school year. In a cross-appeal, the district seeks to recoup the funds it paid during the pendency of the proceedings.¹ The appeal must be dismissed. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending the Rebecca School, accompanied by a private 1:1 aide (Tr. pp. 710, 711-12, 728). The Rebecca School is a private school that has not been 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's eligibility for special education 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 student exhibits significant deficits in his social/emotional functioning, communication skills, and academic performance (see Dist. Exs. 23-26). The student has received diagnoses of an autistic disorder; a post-traumatic stress disorder, chronic (PTSD); a pervasive developmental disorder, not otherwise specified (PDD-NOS); Tourette's disorder; "R/O" neuroleptic induced tardive

¹ The November 20, 2007 interim pendency order rendered by the impartial hearing officer was affirmed by a State Review Officer on February 11, 2008 (Application of a Student with a Disability, Appeal No. 07-140).

dyskinesia;² and dyssomnia, not otherwise specified (Dist. Ex. 27 at p. 3). The student's medical conditions include cerebral palsy, epilepsy, structural brain injury, chronic serous otitis media, and refractive error (id.)

The parties' familiarity with the student's prior educational history is presumed, therefore, it is unnecessary to repeat it in detail (see Application of a Student with a Disability, Appeal No. 07-140). However, some discussion of the student's history is instructive. Briefly, the student was noted to have autistic features and a left hemiparesis when he was approximately four and one half years old and subsequently received services that included applied behavior analysis (ABA) and the Picture Exchange Communication System (PECS) (Tr. pp. 748-50; Dist. Ex. 27 at p. 2). The student continued to receive home and clinic-based discrete trial learning, which had been previously initiated, for the next several years (Dist. Ex. 27 at p. 1). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) in October and November 2004, yielded a perceptual reasoning index score in the average range (30th percentile) and a verbal comprehension index score in the extremely low range (2nd percentile) (id. at p. 2). In August 2004, due to problem behaviors that included a disruptive vocalization and aggression toward other children, the student began treatment with his current private psychiatrist (id.). In spring 2005, the student began a home-based instructional program that employed "naturalistic learning," and he reportedly demonstrated improved behavior and self-regulation (id.). Although the student's overall behavior improved, he continued to exhibit "emotional meltdowns" and episodes of aggression, and in late summer 2006, the student began behavioral therapy with his current private psychologist "to address his occasional outbursts" (id. at pp. 1-2). The student began attending the Rebecca School with a private "full time caretaker" in September 2006 (id. at p. 2).

A psychiatric summary completed by the student's private psychiatrist in December 2006 reflected that, as reported by the parent and "caretaker," the student had started to adjust to his school environment (Dist. Ex. 27 at p. 2). The student continued to exhibit difficulty with self-regulation when noise or other stimulation was high, and for periods of weeks at a time the student had difficulty sleeping during which time he exhibited increased behavioral problems (id.). The student exhibited aggression toward his classmates and teachers, as well as disruptive screaming, both of which required removal from his classroom (id.). The student's psychiatrist reported that during her observation of the student in his home, the student greeted her appropriately, exhibited joint attention with his mother involving eye gaze and pointing at the page of an interactive classical music book (id.). The psychiatrist indicated that the student's affect was happy, his body posture was relaxed, and he was compliant with his mother's requests (id.). The student was observed to transition easily from reading the book to an activity on the computer, and then back to a game in another room (id.).

The student's private psychiatrist recommended that the student continue to attend the Rebecca School with a "full time aide" to facilitate social learning (Dist. Ex. 27 at p. 4). Additional recommendations included 60-minute sessions of occupational therapy (OT) at least three times per week, 45-minute sessions of speech-language therapy at least five times per week, behavior therapy from a named provider to address behavioral outbursts and sleeping problems, "highly skilled" counseling for the student's PTSD, and parent training and counseling

² Although not defined in the hearing record, it is presumed that "R/O" means "rule out."

to assist with behavior management and understanding developmental areas such as maturation (id.).

On February 8, 2007, a district special education teacher conducted an observation of the student in his classroom and during art and gym at the Rebecca School (Dist. Ex. 22). The student's classroom was comprised of one teacher, three teacher assistants, a 1:1 assistant, and seven students (id.). During gym, the student participated in dance movements to music. The student requested that the gym teacher "spin" him (id.). The gym teacher redirected the student to "dance first" several times and then gave the student a spin (id.). The observation report indicated that the student often grabbed his ears, but kept his glasses on (id.). The student also attempted to hit the gym teacher, but stopped himself and said "I'm sorry" (id.). The observation report indicated that when the student's 1:1 assistant observed he was getting angry, she removed the student to the "qui[et] room" where he remained for approximately 17 minutes (id.).

The student's speech-language therapist developed a progress report on February 27, 2007, which indicated that the student received four individual speech-language therapy sessions per week, either "push-in" or in a therapist's office (Dist. Ex. 25 at p. 1). She reported that the student was highly distractible by self-stimulatory and aggressive behaviors during therapy and required maximum redirection (id.). At times, the student exhibited noncompliance, but was calmed by taking a break, soothing voices, and sensory stimulation (id.). According to the speech-language therapist's report the student was easily redirected with motivating games and books (id.). She reported that the student's strengths were auditory comprehension, answering "wh" questions, and sequencing (id.). In the area of pragmatics, the speech-language progress report indicated that the student's therapy focused on "engaging and relating," "two-way intentional communication," and "problem solving gestures" through social interaction, feeling, and coping (id.). The student required maximum cues and/or modeling to initiate social interactions with peers and staff (id.). He requested his basic wants and needs and was receptive when "presenting activities" with peers, but demonstrated difficulty asking questions and expressing his own ideas outside of pretend play (id.). Receptively, the student's therapy focused on attending and regulating through following directions, recognizing appropriate social behaviors, answering yes/no, and attending to tasks (id. at p. 2). The student was able to follow two-step complex commands and sequence four-step sequencing cards (id.). He demonstrated the ability to attend for approximately seven minutes, exhibiting scattered self-stimulatory behaviors (id.). The progress report reflected that when presented with "feelings cards and peers," the student recognized actual feelings and explained why and what could have made people feel that way (id.). The speech-language therapist indicated that expressively the student's therapy focused on "[c]reating ideas or representations" and "[c]reating logical bridges between ideas" by expanding his mean length of utterances, modeling inflection and intonation, and story telling (id. at p. 1). The progress report reflected that the student spoke only on exhalation rather than coordinating respiration for easy flow of speech and that he used five to six word utterances instead of connected speech (id. at pp. 1-2).

The student's classroom teacher at the Rebecca School developed an academic progress report on March 8, 2007 (Dist. Ex. 26). The teacher reported that the student arrived at school happy and ready to make friends (id. at p. 1). She described the student as highly energetic, active, intelligent, and anxious to know what activities to follow next (id.). The teacher indicated

that the student demonstrated difficulty transitioning from one activity to the next and often became "impulsively aggressive" (id.). The student was able to start activities independently, ask an adult to engage in a specific activity, and was creative with dinosaurs and "Legos" (id.). The student's teacher reported that the student did not initiate appropriate interactions with peers during play and that when other students used higher-level words or ideas, the student became frustrated and physically aggressive (id.). To regain impulse control, the student was allowed to "relax" in a small quiet room with a mat (id.).

A Rebecca School physical therapy (PT) progress report dated March 8, 2007 indicated that the student was receiving individual 30-minute sessions of PT two times weekly (Dist. Ex. 24). The student's physical therapist reported that the student had made some progress in his ability to regulate himself during therapy, but that at times he had aggressive outbursts and focused best in quiet surroundings, with minimal visual and auditory distractions (id.). The student was able to verbally communicate his needs, but at times resorted to screaming and pulling his ear when he was frustrated or over stimulated (id.). According to the physical therapist, the student required frequent redirection to maintain attention to task, but was able to complete more than ten "circles of communication," and often initiated interactions with the therapist (id.).³ She also reported that the student was able to engage in purposeful problem solving interactions; elaborate on ideas with occasional adult prompting; and communicate when he felt "happy," "angry," and sometimes "nervous" (id.). The student demonstrated difficulty making connections between different internal representations or emotional ideas, separating reality from fantasy, modulating impulses and mood, and he sometimes communicated violent/aggressive thoughts (id.). The student's physical therapist reported that the student's transitions to and from therapy were "fairly smooth" and a great improvement from the past (id.). The therapist further reported that the student had made some progress in his locomotion and functional physical skills although it was slow due to his decreased attention span and task persistence for challenging gross motor activities, as well as improvements in his overall strength, coordination, and balance skills (id.).

A Rebecca School OT progress report also completed in March 2007 indicated that at that time, the student was receiving 30-minute sessions of individual OT four times per week and one time per week in a group of eight (Dist. Ex. 23 at p. 1). The occupational therapist reported that in the classroom, the student required extra support from his 1:1 assistant for sensory and emotional regulation (id.). She stated that in therapy, the student was related and engaged and although not age appropriate, he initiated play with toys and on suspended equipment (id.). According to the student's occupational therapist, the student was easily over stimulated, and as his excitement heightened, he became impulsive and "mischievous" (id.). She reported that the student demonstrated difficulty with transitions and often became "impulsively aggressive" (id.). The student inconsistently responded to visual, verbal, or tactile input to regain a calm and alert state and was allowed to regain control in a small quiet room with a mat (id.). The occupational therapist indicated; however, that the student had made progress in his ability to transition; that anticipation of expectations and verbalizing consequences assisted the student in maintaining a calm, alert, and regulated state; and that the length of time the student required to "self-regulate" had reduced (id.). The occupational therapist reported that the student required close supervision

³ "Circles of communication" are defined in the hearing record as the "back and forth" of communication between people (Tr. pp. 227-28).

and adult facilitation to engage in conversations and play and that safety awareness was of concern as the student often lacked the ability to "cognitively explore" consequences or potentially harmful acts (id.).

On April 19, 2007, the Committee on Special Education (CSE) convened for the student's annual review and to develop the student's special education program for the 2007-08 school year (Tr. p. 35; Dist. Ex. 1 at p. 1). Meeting attendees included the parent, a district representative who also participated as a school psychologist, the district special education teacher who had observed the student in his classroom, a district social worker, the student's private speech-language therapist,⁴ the student's private psychologist, a teacher assistant from the Rebecca School, and an additional parent member (Tr. pp. 35, 175-76; Dist. Ex. 1 at p. 2).

The hearing record reflects that the information reviewed at the time of the April 2007 CSE meeting included academic, PT, OT, and speech-language progress reports; a student observation report; a psychiatric report, and a physical examination report (Tr. pp. 176-77, 212-14; Dist. Ex. 2). The reports identified the student's present levels of performance, learning characteristics, health and physical development, academic management needs, and social/emotional management needs, and offered recommendations (Dist. Exs. 21-27).

The CSE determined that the student was eligible for special education services as a student with autism and recommended that the student be placed in a 12-month school year program in a 6:1+1 special class in a specialized school with related services of two individual 30-minute sessions of PT weekly, two individual and two group 30-minute sessions of OT weekly, two individual and two group 30-minute sessions of speech-language therapy weekly, and two 30-minute group sessions of counseling weekly (Dist. Ex. 1 at pp. 1, 16). The CSE also recommended that the student receive special education transportation by mini bus with limited travel time and temperature control (id. at p. 1).

The academic performance and learning characteristics portion of the resultant April 2007 IEP reflected that, based on teacher estimate and observation, the student's reading comprehension and decoding skills were at a second grade instructional level and that his math computation and problem solving skills were at a third grade instructional level (Dist. Ex. 1 at p. 3). The description of the student's present levels of performance accurately reflected the information contained in his Rebecca School progress reports (compare Dist. Exs. 23-26, with Dist. Ex. 1 at p. 3). The student's academic management needs included manipulatives for math, redirection to task, prompts, and verbal/visual cues (Dist. Ex. 1 at p. 4). In the area of social/emotional performance, the April 2007 IEP indicated that the student's teachers reported the student had made "good" behavioral progress since his earlier periods of aggression while adjusting to his new school (id.). The IEP indicated that the student had become more social and demonstrated an interest in connecting with others in the classroom, showed curiosity about play activities engaged in by his peers, and was becoming more aware of their feelings (id.). The April 2007 IEP indicated that the student was now able to attend to school tasks and participate in class activities; however, he continued to exhibit periodic episodes of screaming, though of lesser intensity and duration than earlier in the school year, that required his removal to a quiet room and conversation with an adult about why he was upset (id.). The student's

⁴ The student's speech-language therapist participated by telephone (Dist. Ex. 1 at p. 2).

social/emotional management needs included use of visual cues, redirection to task, teacher modeling of appropriate social communication, use of a behavior plan, and strategies to reduce inappropriate behaviors (*id.*). The April 2007 IEP indicated that the student's behavior required highly intensive supervision; designated the proposed teacher, related service providers, and counselor as responsible for providing behavioral support to the student; and indicated that a behavioral intervention plan (BIP) was developed (*id.*). The health and physical development portion of the April 2007 IEP listed the student's medical and psychiatric diagnoses, and indicated that the student required his medication to be administered in school twice daily (*id.* at p. 5). The April 2007 IEP did not identify any health/physical management needs for the student (*id.* at p. 4). The CSE developed 11 annual goals and 42 corresponding short-term objectives to address the student's social/emotional and behavioral deficits, as well as his communication, motor skills, and academic needs (Dist. Ex. 1 at pp. 6-13).

By Final Notice of Recommendation (FNR) dated June 4, 2007, the district offered the student a placement in a 6:1+1 special class at a specific district school (Parent Ex. D). The hearing record indicates that the district's recommended special class included five students primarily classified as students with autism (Tr. pp. 60, 68, 76). The class had five assigned adults – the classroom teacher, a classroom paraprofessional, two crisis paraprofessionals and a nurse (Tr. p. 68).

The parent, through her attorney, filed a due process complaint notice dated September 11, 2007, alleging that the district failed to offer the student a free appropriate public education (FAPE) on procedural and substantive grounds (Parent Ex. A at p. 2). Specifically, the parent alleged that: (1) page one of the April 2007 IEP identified the student as a sixth grade student, but page three identified the student's reading and writing levels as second grade and the student's math level as third grade; (2) the April 2007 IEP failed to identify a specific placement for the student; (3) the 6:1+1 district program indicated on the student's April 2007 IEP was insufficient and inappropriate for the student's individual educational needs; (4) the student would not be able to tolerate the mini bus listed on his IEP as his special education transportation; (5) the student's name was spelled incorrectly throughout the April 2007 IEP; (6) the April 2007 IEP failed to indicate the means of measuring the student's progress against his goals and objectives, as well as the individuals responsible for tracking the student's progress; (7) some of the goals and objectives were vague and not objectively measurable, insufficient and/or inappropriate; (8) the district failed to offer the student sufficient speech-language therapy; (9) the district failed to offer individualized parent training and counseling; (10) the April 2007 IEP failed to support the student's need for services outside of the school; (11) the April 2007 IEP reflected impermissible policy and predetermination; (12) the BIP was not based on a functional behavioral assessment (FBA); (13) although the BIP referenced "floortime"⁵ activities as an intervention in which the student would participate, the district failed to offer the student any floortime services; (14) the BIP was vague and insufficient for the student's needs; (15) the BIP

⁵ "Floortime" is described in the hearing record as an intervention used in the Developmental Individual Difference Relationship-based (DIR) methodology that requires an individual to "get down to the child's level" developmentally, but does not require that an individual work on the floor with a child although they may (Tr. pp. 225-26; *see* Parent Ex. U at p. 2). The Rebecca School program director testified that "floortime" is also referred to as "DIR" or the "Greenspan approach" (Tr. pp. 218-19).

failed to address the student's behavioral issues outside of the school; and (16) the district's recommended placement was not appropriate for the student (id. at pp. 2-3).

An impartial hearing convened for eight days from October 29, 2007 to June 17, 2008 (Tr. pp. 3, 25, 89, 164, 270, 370, 517, 704). The district called two witnesses and submitted 28 documents into evidence at the hearing (Tr. pp. 55, 168, 318; Dist. Exs. 1-28). The parent called eleven witnesses, including the parent, and submitted 35 documents into evidence (Tr. pp. 218, 272, 337, 373, 402, 519, 558, 595, 656, 708, 738; Parent Exs. A-Z; AA-II).

A November 1, 2007 progress report prepared by the student's private psychologist summarized the student's target behaviors, treatment history, and recommendations (Parent Ex. K). According to the report, the psychologist's services included parent and caregiver training, as well as working with the student's staff at the Rebecca School (id. at p. 1). According to the report, between September 2006 and May 2007, the private psychologist provided services to the Rebecca School staff approximately one time per month and communicated with the parent by e-mail and telephone several times per week (id. at pp. 1-2). The progress report identified the student's target behaviors as aggression, disruption, property destruction, enuresis, and encopresis (id. at p. 1).⁶ The private psychologist reported that when the student began at the Rebecca School, he initially experienced a "honeymoon period" with relatively few behavior problems; however, as academic demands increased, the student began to exhibit more maladaptive behavior and by early October 2006, was spending the majority of his time removed from the classroom (id. at p. 2). Based on several observations of the student in school and data collection, the private psychologist determined that the primary function of the student's behavior was to "escape/avoid academic and social demands" (id.). The progress report indicated that data collected on the student's aggressive behaviors showed that he exhibited 15 instances of aggression (1 per minute) during a 15-minute time period and 31 instances of aggression (3.1 per minute) during a ten-minute time period (id.).

The private psychologist reported that following her consultation with the Rebecca School and implementation of behavior control strategies, the student's maladaptive behaviors decreased to "approximately 2 per day with shorter duration" (Parent Ex. K at p. 2). The report noted that in March 2007, the student exhibited aggressive behavior approximately three days per week; in April and May 2007 the student exhibited aggressive behavior approximately one to two days per week, although screaming and other disruptive behaviors continued at higher rates (id.). The private psychologist indicated that at the time of her November 1, 2007 report, the student's aggression was rare and his disruptive screaming was infrequent (id. at pp. 2-3).⁷ She noted that data collection reflected that the student had reduced his incidents of aggression from

⁶ The progress report defined "aggression" as hitting, scratching, kicking, biting, body slamming, throwing objects at others, head butting, and hair pulling (Parent Ex. K at p. 1). "Disruption" was defined as screaming, throwing objects, knocking over furniture, clearing objects off of surfaces, hitting and kicking objects (id.). "Property disruption" was defined as ripping paper, breaking toys, kicking or pounding holes in walls, and banging on and pulling window shades (id.).

⁷ The private psychologist reported that the student exhibited a period of behavioral regression in the form of deliberate enuresis and encopresis when his long-term caregiver/1:1 aide left in June 2007; behavior, which the parent indicated to her, sometimes occurred during periods of transition (Parent Ex. K at p. 2).

rates as high as one aggressive episode per minute one year ago to approximately one (or no) aggressive episode(s) per week and occurrences of screaming to only a few times per month (id. at p. 3).

The private psychologist recommended the student's continued placement at the Rebecca School; two hours per week of parent training, training for the student's 1:1 aide, and consultation with Rebecca School staff provided by herself and the student's private psychiatrist; a 1:1 paraprofessional for the student to implement the behavior plan, collect data on behaviors, respond in a crisis, and help the student with academic goals; taxi transportation to and from school; and counseling services from a "highly skilled" counselor selected by herself and the student's "team" to address the student's emotional health (Parent Ex. K at pp. 4-5).

In a decision dated October 8, 2008, the impartial hearing officer found that the district offered the student a FAPE, and therefore, declined to award the parent tuition reimbursement (IHO Decision at p. 52). The impartial hearing officer found that the April 2007 IEP and recommended placement offered to the student by the district were appropriate and reasonably calculated to enable the student to receive educational benefits in the least restrictive environment (LRE) (id. at pp. 44, 52).

Initially, the impartial hearing officer determined that the hearing record did not indicate that the CSE was procedurally flawed (IHO Decision at p. 40). The impartial hearing officer found that the CSE reviewed the student's teacher's progress report, an OT evaluation,⁸ a speech-language evaluation,⁹ a PT report, an "updated" physical examination report, an observation performed by the district's special education teacher, and a psychiatric summary (id.). The impartial hearing officer also noted that the reports reviewed by the CSE were current and dated between February and March 2007, with the exception of the psychiatric summary dated December 22, 2006 (id. at pp. 40-41). The impartial hearing officer also noted that all of the reports submitted by the parent at the impartial hearing were written by the student's private school providers and were dated between November 2007 and January 2008, and therefore, were not available for the CSE to review at the meeting held on April 19, 2007 (id. at p. 41).

The impartial hearing officer also found that the April 2007 IEP accurately reflected the results of the student's current evaluations, identified the student's needs, established annual goals related to those needs, and provided for the use of appropriate special education services (IHO Decision at p. 44). After extensive review of the hearing record, the impartial hearing officer found that, with the exception of floortime activity and the assignment of a 1:1 aide, the recommendations contained in the student's reports and the April 2007 IEP "nearly mirror each other" (id.).

As to the parent's contention that the district's failure to provide a placement that incorporated floortime activity resulted in a deprivation of a FAPE, the impartial hearing officer

⁸ Although the impartial hearing officer refers to the report as an evaluation, it is titled as a "Rebecca School Occupational Therapy Progress Report" (Dist. Ex. 23 at p. 1).

⁹ Although the impartial hearing officer refers to the report as an evaluation, it is titled as a "Speech and Language Progress Report" (Dist. Ex. 25 at p. 1).

found that this issue did not invalidate the April 2007 IEP (IHO Decision at p. 44). The impartial hearing officer noted that, while an IEP must provide specialized instruction in the student's areas of need, a CSE is not required to specify teaching methodology on an IEP and that the precise methodology to be used by a student's teacher is generally a matter to be left to the teacher (*id.*). In addition, the impartial hearing officer found that the educational methodology used by the teacher of the district's proposed class would have provided the student with an educational program in the LRE (*id.*). As to the parent's contention that the failure to provide for a 1:1 aide resulted in a deprivation of FAPE, the impartial hearing officer reviewed the testimony extensively and, in particular, referenced a progress report dated November 1, 2007,¹⁰ prepared by the student's private psychologist and submitted by the parent at the impartial hearing (*id.*; Parent Ex. K). The impartial hearing officer noted, based upon the progress report, that the student had "unquestionably progressed" and that his behavioral outbursts had "significantly diminished" from one episode per minute to one episode or none per week (IHO Decision at p. 44). The impartial hearing officer found that the hearing record provided clear evidence that the student had progressed, and that his behavioral problems decreased drastically from when he first entered school (*id.* at p. 48). He found that the hearing record supported the conclusion that the student's language had improved and that the student was more socially engaged and more independent (*id.*). Moreover, the impartial hearing officer found that the hearing record supported a conclusion that the student was able to regulate himself more quickly and that his interest in his peers has increased (*id.*). The impartial hearing officer noted that the testimony showed that the student's 1:1 aide did not attend all of the student's related service sessions and that during OT sessions, the student's 1:1 aide was either in the classroom or "within earshot" down the hall (*id.* at p. 49).

The impartial hearing officer also found that the April 2007 IEP correctly identified the student's disabilities and addressed the student's behavioral problems, noting that the "student requires a small, highly structured class to address his severe social, behavior deficits and severe developmental delays," while also recognizing the student's significant progress (IHO Decision at p. 45). The impartial hearing officer further rejected the parent's claim that the April 2007 IEP goals were vague and inappropriate and found that the April 2007 IEP goals were comparable to the goals indicated by the student's evaluations and reports (*id.* at pp. 41-43). Moreover, the impartial hearing officer found that the IEP's goals matched all relevant areas of the student's needs including daily living skills, gross motor skills, fine motor skills, sensory processing, oral motor skills, expressive language skills, receptive language skills, pragmatic language skills, social skills, and emotional skills (*id.* at p. 46.).

In addition, the impartial hearing officer found that the April 2007 IEP contained a BIP which accurately described the student's behaviors that interfered with the student's learning (IHO Decision at p. 46). The impartial hearing officer noted that the same techniques employed at the Rebecca school were identified in the April 2007 IEP as the strategies and supports recommended to change the student's behavior; such as teacher intervention, modeling, discussion of appropriate social interactions, removal to a quiet room to relax and calm down when overly agitated and demonstrating out of control behavior, purposeful ignoring, use of prompting, positive reinforcement and use of visual cues, and placement in a very small

¹⁰ This report was prepared after the April 2007 CSE meeting date.

specialized educational setting with intensive supervision and support and related services of OT, PT, counseling and speech-language therapy (id.).

The impartial hearing officer found that the speculation that the student might regress was not a sufficient reason to keep the student in a more restrictive environment (IHO Decision at pp. 45-46, 50). The impartial hearing officer further found that the student's possible regression did not support the contention that the district failed to offer the student a FAPE (id. at p. 46). In addition, the impartial hearing officer found that the failure to include parent counseling and training on the April 2007 IEP did not rise to the level of a denial of a FAPE (id. at pp. 46-47). The impartial hearing officer noted relevant testimony indicating that parent counseling and training was available at the proposed district placement (id.).

The impartial hearing officer also rejected the contention that the district's proposed placement was a "stock placement" (IHO Decision at p. 47). The impartial hearing officer cited the student's April 2007 IEP in support of his finding that the CSE considered "the more restrictive private school placement," but rejected it because they believed that the student's goals could be met in a less restrictive program (id.). In addition, the impartial hearing officer concluded that the student did not require taxi transportation to and from school (id. at p. 48). The impartial hearing officer examined the relevant testimony on this issue, noted inconsistencies, and found that the student was "great" when traveling with the weekend 1:1 aide and that the 1:1 aide had successfully traveled with the student on public transportation, including a bus and train (id.).

The parent appeals the decision of the impartial hearing officer, alleging that the impartial hearing officer erred in finding that the district offered the student a FAPE for the 2007-08 school year. Specifically, the parent contends that the impartial hearing officer erred by finding that the district's failure to provide the student with 1:1 support did not rise to the level of denying the student a FAPE. In addition, the parent contends that the impartial hearing officer incorrectly found that the district's failure to provide parent counseling and training on the April 2007 IEP was not a denial of a FAPE and that there was a "lack of evidence showing a nexus between the need for parent counseling and training as material to the student receiving an educational benefit from the proposed [district] school." The parent further contends that the goals and objectives included in the student's proposed April 2007 IEP were too vague to implement, were insufficient for the student, and that the April 2007 IEP failed to indicate the means of measuring the student's progress and the persons responsible for tracking progress. The parent further contends that the district failed to conduct an FBA and that, therefore, the district was not able to develop a proper BIP and offer a FAPE. Moreover, she alleges that the district's proposed BIP was insufficient for the student and did not include the 1:1 support that the student needed. Additionally, the parent asserts that the related services offered by the district were inappropriate and/or insufficient in that the district erred by offering group OT for the student and the district failed to offer the student services during school breaks, which he needed to ward off potential regression.

In addition, the parent contends that the district impermissibly predetermined the student's program and placement. The parent contends that the impartial hearing officer incorrectly noted in the decision that the CSE considered the Rebecca School. Furthermore, the

parent alleges that the impartial hearing officer erred in finding that the proposed district placement was not a "stock placement" because the 6:1+1 program offered by the district was the district's only available program for a student classified as having autism of the student's age. Moreover, the parent contends that the impartial hearing officer incorrectly found that the CSE was procedurally proper as not all of the CSE members participated for the full CSE meeting. In addition, the parent contends that the district's recommended placement was not appropriate for the student as it lacked sufficiently trained staff members and offered only "scant" supervision, the instruction in the recommended class did not match the student's educational needs and the impartial hearing officer incorrectly declined to find that the teacher's lack of training in floortime did not invalidate the April 2007 IEP. The parent alleges that since the CSE specifically included floortime in the student's BIP, which was part of the April 2007 IEP, the district should have provided floortime. Moreover, the parent contends that the student would not have been a good fit with the other students in the district's recommended class and that the ages of the students in that class exceeded 36 months. The parent also alleges that the recommended placement would not have allowed the student enough 1:1 support and instruction, the recommended district school did not have an adequate "quiet room," and the recommended district school could not accommodate the student's significant sensory needs. The parent also contends that the impartial hearing officer erred in using a "substantial regression" analysis to determine whether a FAPE was offered. Moreover, the parent contends that the impartial hearing officer improperly found that the concern for the student's potential to regress was "speculative." The parent further argues that the student's unilateral educational program and services at the Rebecca School were appropriate and that the equities favored reimbursement.

In its answer, the district asserts that the impartial hearing officer properly found that the district offered the student a FAPE for the 2007-08 school year. The district asserts that a 1:1 paraprofessional was not required to meet the student's needs, and therefore the absence of a 1:1 paraprofessional in the April 2007 IEP did not constitute a failure to offer a FAPE. The district further contends that absence of parent training in the student's April 2007 IEP did not constitute a denial of FAPE; and, in any event, such training was available to the parent in the district's recommended placement. Additionally, the district challenges the parent's assertion that the April 2007 IEP goals were inappropriate. Furthermore, the district contends that the formation of a BIP without a FBA is not improper, as conducting an FBA when the student is not in the recommended placement would have been premature (*id.*). The district further alleges that the Individuals with Disabilities Education Act (IDEA) and the federal regulations preclude funding of "for-profit" schools like the Rebecca School. The district contends that regardless of the parent's eligibility for reimbursement under federal law, she is not eligible for reimbursement because the placement is inappropriate and the equities also preclude reimbursement. The district also contends that several issues raised in the parent's petition were not raised in her due process complaint notice and are improperly raised for the first time on appeal. In its cross-appeal, the district seeks to recoup the funds it paid under the November 20, 2007 pendency order.

The parent filed a reply to the district's answer and an answer to the district's cross-appeal. In her reply to the district's answer, the parent objects to the district's claim that tuition reimbursement cannot be awarded for a "for profit" school and objects to the district's submission of two additional exhibits in support of this argument. The parent asserts that the

district failed to raise this claim at the impartial hearing, that the claim is without merit, and that the additional documents are inappropriate and prejudicial. In her answer to the district's cross-appeal, the parent asserts that the district may not recoup funds that it has paid in educating the student pursuant to the pendency order.

Initially, I will address the district's contention that the parent improperly raised issues on appeal that were not raised in her September 11, 2007 due process complaint notice. In pertinent part, a due process complaint notice shall include a description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem, and a proposed resolution of the problem (20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; see Application of the Dep't of Educ., Appeal No. 08-037; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065).

First, the district asserts that the parent failed to allege in her due process complaint notice that the related services recommended on the student's April 2007 IEP were inappropriate for the student. In her due process complaint notice, the parent alleged that the district failed to offer the student sufficient speech-language therapy services and that the April 2007 IEP did not support the student's need for services outside of the school (Parent Ex. A at p. 3). Accordingly, I find that the parent sufficiently alleged the above referenced issues in her due process complaint notice and the district's request is denied with respect to those issues (*id.*). Second, the district contends that the parent failed to raise concerns that the April 2007 IEP was procedurally flawed in her September 11, 2007 due process complaint notice. I note that, although the parent alleged that the April 2007 IEP was "procedurally" defective (Parent Ex. A at p. 2), the parent did not argue that the CSE was improperly composed and therefore I need not determine the appropriateness of the CSE composition because it was not properly raised below. However, the parent's claim of predetermination and the inconsistencies between services offered on the student's April 2007 IEP and placement letter were properly raised in the September 11, 2007 due process complaint notice and accordingly the district's request is denied.¹¹ Third, the district contends that the parent failed to raise the contention that the recommended public school placement was inappropriate. While the district's contention may have merit, I have nonetheless reviewed the appropriateness of the public school program.

I will now address the parent's objection to the additional evidence submitted by the district with its answer. 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 impartial 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;*

¹¹ The testimony indicated that where there is an inconsistency in services between the IEP and placement letter, the IEP is controlling (Tr. pp. 207-08).

Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). I agree with the parent that the district's submission of two additional exhibits in support of the aforementioned defense is improper, as the evidence was available at the time of the impartial hearing and is not necessary in order to render a decision. Accordingly, the two additional documents will not be considered on appeal.

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

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

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

regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion 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.

After an independent review of the hearing record, the impartial hearing officer's decision and the parties' arguments, I concur with the impartial hearing officer's conclusion that the hearing record does not support a determination that there were procedural inadequacies in development of the IEP that denied the student a FAPE (IHO Decision at p. 40). I also agree with the impartial hearing officer that the April 2007 IEP was "reasonably calculated to enable the student to receive educational benefits" (*id.* at p. 44). The impartial hearing officer's decision is thorough and well-reasoned. He conducted the impartial hearing in a manner consistent with the requirements of due process (34 C.F.R. §§ 300.514[b][2][ii]; Educ. Law § 4404[2]). The impartial hearing officer's decision demonstrates that he carefully reviewed the evidence in the hearing record and the parent's allegations, and applied a proper legal analysis. The impartial hearing officer's factual findings are supported by the hearing record and I adopt them. I find that there is no need to modify the determinations of the impartial hearing officer. I find that regardless of which party bore the burden of persuasion, the hearing record amply supports the impartial hearing officer's decision that the student was offered a FAPE. The impartial hearing officer correctly determined that the hearing record demonstrates that the

district offered the student a FAPE for the 2007-08 school year and that a FAPE was offered to the student in the LRE.

I further note that concerning the recommended related services, goals and objectives, I concur with the impartial hearing officer's finding that the recommendations made by the April 2007 CSE were either similar to those made by the student's private providers or reflective of the private services the student was receiving at the time of the CSE meeting (compare Dist. Ex. 1, with Dist. Exs. 6; 12; 13; 23; 24; 25; 27). Although the student's private psychiatrist recommended higher levels of speech-language therapy and OT in her December 2006 summary than what was recommended by the April 2007 CSE, the hearing record reveals that the most recent assessment results contained in the private psychiatric summary were from June 2005 (see Dist. Ex. 27 at pp. 6-9). I also note that the goals and short-term objectives developed by the April 2007 CSE to address the student's social/emotional, communication, and motor skills deficits, comport with identified needs addressed by the student's private providers (compare Dist. Ex. 1 at pp. 6, 7, 13, with Dist. Exs. 12; 13 at p. 2; 23; 24; 25; 26 at p. 2).

Moreover, regarding the parent's allegation that the recommended district placement was not appropriate, I find that this allegation is not supported by the hearing record. The parent contends that the teacher of the recommended district class was not sufficiently trained; however, the hearing record reveals that the teacher was a special education teacher, and had more than four years of experience teaching students with autism and working with students with disruptive behaviors (Tr. pp. 60-61, 79-81).

The parent further alleges that the recommended class was inappropriate because the age range of the students in the class exceeded 36 months. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.6[a][3]); Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102; Application of a Child with a Disability, Appeal No. 03-023; Application of a Child with a Disability, Appeal No. 01-084). State regulations also require that the chronological age range among the students within special classes of students with disabilities who are less than 16 years of age is limited to 36 months (8 NYCRR 200.6[h][5]). However, the chronological age range of the students is not necessarily determinative of whether a FAPE was offered. In prior decisions, a range outside of 36 months has been found not to rise to the level of a denial of a FAPE if the students are appropriately grouped within the class for instructional purposes (see Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-034; Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-023; Application of a Child with a Disability, Appeal No. 06-019; Application of the Bd. of Educ., Appeal No. 06-010); Application of a Child with a Disability, Appeal No. 05-102; Application of a Child with a Disability, Appeal No. 00-065; see also Application of a Child with a Disability, Appeal No. 98-21). The hearing record shows that the student was twelve years old for most of the school year and would have fallen in the middle of the 10 to 14 year age range of the class (Tr. p. 68; Dist. Ex. 4). Although the chronological age range of the students may have exceeded 36 months, the evidence does not support a finding that this would have impacted his program such that it constituted a denial of FAPE. I note that the teacher of the proposed class

testified that the student would have been functionally grouped in the recommended class when appropriate (Tr. pp. 69-70). Based upon the foregoing, there is sufficient evidence that the recommended program and placement was reasonably calculated to enable the student to receive meaningful educational benefit. Accordingly, I concur with the impartial hearing officer that the hearing record supports a finding that the recommended placement was appropriate (IHO Decision at p. 52).

Having determined that the district offered the student a FAPE in the LRE I need not reach the issue of whether the Rebecca School was appropriate for the student, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

Turning next to the parties' arguments with regard to reimbursement of the district for the funds paid pursuant to the November 20, 2007 pendency order, it is well established that the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the district otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; see 34 C.F.R. § 300.518; 8 NYCRR 200.5[m]). In addition, during the pendency of administrative and judicial proceedings, a student remains at his current educational placement, "unless the State or local educational agency and the parents or guardian otherwise agree" (20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). Furthermore, in order to comply with State and federal law pendency provisions, a district's responsibility to maintain a student's pendency placement includes funding that placement (see Murphy v. Arlington Cent. Sch. Dist., 297 F.3d 195 [2d Cir. 2002]; Bd. of Educ. v. Schutz, 290 F.3d 476 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; see also 20 U.S.C. § 1415[j]; 34 C.F.R. § 300.518; Educ. Law § 4404[4][a]; 8 NYCRR 200.5[m]).

In appeals previously filed by the district, Application of a Student with a Disability, Appeal Nos. 09-008 & 09-010; Application of the Dep't of Educ., Appeal No. 08-061 and Application of the Dep't of Educ., Appeal No. 08-134, the district sought to recoup payments made pursuant to pendency in light of a determination that the district offered a FAPE to the student.¹² In those appeals, this State Review Officer did not find the district's arguments persuasive and denied the district's request to be reimbursed for the pendency payments (*id.*). In the instant appeal, the district makes the same arguments offered in the previous appeal and fails to offer any new or compelling facts or legal authority to distinguish the present case to warrant a

¹² The district argues that the Second Circuit has not "squarely" addressed the issue of recovery of payments made pursuant to pendency, and again argues that I should adopt the reasoning of the First Circuit Court of Appeals (see Doe v. Brookline Sch. Comm., 722 F.2d 910 [1st Cir. 1983]; see also Dale M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813 [7th Cir. 2001]; Dale Mayo v. Baltimore City Pub. Sch., 40 F. Supp. 2d 331 [D. Md. 1999]). Although the district asserts that the discussions of the recoupment of pendency costs in court decisions in this circuit are "inapplicable" (see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83, 92 at n.15, *aff'd* 290 F.3d 476 [2d Cir 2002]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 367 at n.9, *aff'd* 297 F.3d 195 [2d. Cir 2002]), I find its arguments favoring the approaches taken by the courts in Brookline and Dale M. to be unpersuasive.

change from the prior holding (see Application of the Dep't of Educ., Appeal No. 08-061; Application of a Child with a Disability, Appeal No. 05-091). Accordingly, the district's cross-appeal is dismissed.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
 March 23, 2009

PAUL F. KELLY
STATE REVIEW OFFICER