



# The University of the State of New York

The State Education Department  
State Review Officer  
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No. 09-053

**Application of the [REDACTED] DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

## **Appearances:**

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

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

## **DECISION**

Petitioner (the district) appeals from a decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for the student's tuition costs at the Rebecca School, related services costs, and transportation costs during the 2008-09 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending the Rebecca School (Parent Ex. LL at p. 1). The Rebecca School is a private school which 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 proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The hearing record reveals that the student has been described as having significant cognitive delays and has been diagnosed with a pervasive developmental disorder, not otherwise specified (PDD/NOS) (Dist. Ex. 1 at p. 3). In September 2005, the student began attending preschool and received occupational therapy (OT) and speech-language therapy (Parent Ex. JJ at p. 15). In fall 2006, the student began attending the Rebecca School (Parent Exs. F at p. 1; G at p. 1; JJ at p. 18). She has attended the Rebecca School since that time (Tr. p. 272).

A speech-language therapy progress report dated December 2007 revealed that at that time the student was receiving three 30-minute sessions of speech-language therapy per week consisting of two individual sessions and one session in a dyad (Parent Ex. O at p. 1). The report reflected that the therapy addressed the student's ability to be engaged and communicate with others, her ability to remain focused, and her ability to remain organized and calm (id.). The speech-language therapist noted that the student had begun to initiate and respond to social greetings, made requests for her favorite foods and books, and expressed her intentions with gestures, facial expressions, words, and phrases (id. at p. 2). The report noted that the student understood basic prepositions, had an understanding of object descriptors, and had the ability to answer yes/no questions (id.). The student was able to understand many two-step directives over a variety of contexts, was able to identify body parts, many familiar objects, and clothing items (id.). However, the student had difficulty understanding pronouns, difficulty with "wh" questions, particularly "when" and "why" questions, and understood verbs that were meaningful to her (e.g., jump, open, push, stir, etc.) (id.). The report also noted that when the student became frustrated, she hit her head or bit her hand (id. at p. 1). The report also indicated that as the student's ability to communicate improved, these behaviors had decreased (id. at p. 3).

An OT progress report dated December 18, 2007 reported that at that time the student was receiving three 30-minute individual sessions of OT per week and one 30-minute session of OT in a group per week (Parent Ex. N at p. 1). The therapist reported that the student had sensory processing and modulation challenges and needed verbal and emotional supports to demonstrate capacities of engagement and to stay attentive and regulated (id.). The report further noted that the student was easily distracted by external stimuli, became over-stimulated in noisy environments, and often sought out proprioceptive, vestibular and tactile stimuli (id. at pp. 1-2). The report also noted that the student attempted to regulate herself in excessively noisy environments by applying pressure to herself, rubbing her hands or head, or requesting sensory gym, rubs, or squeezes (id.). The therapist described the student as being in constant motion while in class, which the therapist surmised might have been the student's strategy to self-regulate when confined in an overly stimulating classroom (id. at p. 2). The report indicated that the student was most engaged when she was involved in a preferred vestibular, proprioceptive, or tactile activity (id. at p. 3). The report also noted that when the student was playfully obstructed, she became resistant and anxious, then as she became more frustrated, she became emotionally and then sensorily dysregulated (id.).

A January 2, 2008 OT progress report from the student's private occupational therapist reported that the student was receiving two 60-minute sessions of individual OT (Parent Ex. L at p. 1). The student demonstrated delays in fine motor and visual motor skills (id. at p. 2). The report noted that the student was inconsistent in her ability to match colors and had decreased hand strength (id.). However, the therapist reported that the student's fine motor skills had improved through the use of hand-over-hand assistance and repetition (id. at pp. 1, 2). The report indicated that the student was able to problem solve to get what she wanted independently, but had difficulty allowing others to help her (id. at p. 4). The report indicated that the student was beginning to demonstrate the ability to create symbols and ideas, for example using a book as a hat (id. at pp. 4-6). The student was also reported to be able to negotiate all equipment in the sensory gym with good safety awareness and balance reactions (id. at p. 1).

A January 2008 progress report from the student's Rebecca School teacher reported that the student found it difficult to transition from her favorite activities and would become dysregulated when she could not have something that she wanted (Parent Ex. J at pp. 1-2). The teacher also reported that the student had difficulty remaining engaged in two-way communication and needed support to maintain this type of engagement (id. at pp. 2-3). Although the student was able to communicate when motivated, her communication often revolved around repetitive things (id. at p. 3).<sup>1</sup>

A January 28, 2008 classroom observation report from the district's school psychologist reported observations of the student at lunch, during reading time, and during handwriting time (Dist. Ex. 3). During the lunch portion of the observation, the psychologist noted that the student required constant redirection to encourage her to continue to eat and to remain seated (id. at p. 1). During reading time, the student required verbal prompts and cues to answer a question posed by the teacher (id.). During handwriting time, the student required physical prompts to cut along a line and verbal prompts to name colors and ask for tape (id.). The psychologist reported that with verbal prompts the student was able to follow a routine (id. at p. 2). However, the student required frequent redirection to focus her attention on the task at hand and prompting to engage in conversation with other students (id.).

A speech-language progress report dated February 6, 2008 from the student's private speech-language pathologist revealed that the student's therapy was focused on improving her ability to process linguistic information, expanding her play skills, improving her social skills, and improving her pragmatic language skills (Parent Ex. I at p. 1). Expressively, the student's vocabulary was reported to be approximately 350-500 words (id.). She was also able to ask for help and used two to three word phrases to request objects/toys (id.). The report also noted that the student needed maximum cues to follow simple novel directions, required verbal cues to maintain eye contact, and responded to "what" and "where" questions with decreasing verbal/visual cues 60 percent of the time (id. at pp. 1-2). The report also indicated that intervention continued to focus on improving her ability to respond to "when" and "why" questions and that the student was beginning to take turns with minimal verbal cues (id.).

An OT progress report dated March 30, 2008 reported that the student was receiving three individual sessions of OT per week and one 30-minute group session per week (Parent Ex. H at p. 1). The therapist reported that the student had made progress in her attention skills, her sensory processing and self-regulation skills, and in her ability to sustain interest in and interactions with a peer (id.). The therapist reported that the therapy and classroom activities focused on encouraging the student to participate in novel sensorimotor activities to allow her to respond to challenges (id.). The report noted that the student was able to utilize sensory strategies to express frustration and was also able to request specific sensory inputs in place of biting her hands or hitting her head (id. at p. 2). In relation to her motor skills, the student was

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<sup>1</sup> The Rebecca School developed math, writing, and reading goals for the student on or about January 8, 2008 (Parent Ex. K). The math goals included identifying numbers, basic shapes, and colors, being able to rote count to 10, being able to count with 1:1 correspondence, understanding the concept of more versus less, and being able to complete simple patterns (id. at p. 1). The writing goals included writing horizontal, vertical, and diagonal lines, writing capital letters, writing her name and writing numbers 1-10 (id.). The reading goals included identifying letters and letter sounds, and filling in the blanks in familiar books and poems (id.).

reported to be able to independently trace vertical, horizontal, and diagonal lines, and could trace many of the uppercase letters (id.).

A private speech-language therapy report dated April 2008 reported that the student's therapy was focused on increasing the student's ability to sustain a state of shared attention with others, engage with others, and participate in communications to convey her intentions, interests, and needs (Parent Ex. G at p. 1). The therapist also reported that she was working on the student's ability to identify objects within the same category, produce verb-object phrases, use adjectives, and respond to "what," "where," and "who" questions (id. at pp. 2-3). The therapist further reported that the student was able to interact with adults for about 10-15 minutes and that the student had begun to use spontaneous language during pretend play (id. at pp. 1-2). The therapist also reported that the student initiated interaction with various teachers and clinicians verbally, and through the use of facial expressions and silly noises (id. at p. 1). The therapist further reported that the student had increased the length of time during which she maintained back and forth interactions with adults (id.).

On April 30, 2008, the Committee on Special Education (CSE) convened for a review and to develop an individualized education program (IEP) for the student's 2008-09 school year (Dist. Ex. 1 at p. 1). Attendees included the student's mother, a special education teacher who also acted as the district representative, a school psychologist, a district regular education teacher, an additional parent member, a Rebecca School teacher, and a Rebecca School social worker (Dist. Exs. 1 at p. 2; 5). The CSE recommended that the student receive a 12-month 6:1+1 special class program in a specialized school (Dist. Ex. 1 at p. 11). The CSE also recommended the following related services: four 30-minute sessions of 1:1 OT per week, three 30-minute sessions of individual speech-language therapy per week, one 30-minute session of 3:1 speech-language therapy per week, one 30-minute session of individual counseling per week, and one 30-minute 2:1 session of group counseling per week (id. at pp. 11, 13). The IEP reflected that the CSE considered a 12:1+1 special class program in a community school, but determined that it would not be appropriate because the student required a 12-month program to address her delays and to achieve her IEP goals (id. at p. 12). The CSE also determined that the student's social limitations, her developmental delays in speech-language, and her academics precluded her from participating in a general education environment (id. at p. 11). The CSE advised the parents by letter dated April 30, 2008 that they would receive a Final Notice of Recommendation (FNR) notifying them of a specific site placement on or before June 15, 2008 (Dist. Ex. 4).

By letter dated May 8, 2008, the district informed the student's mother that the student had been recommended for placement in a 6:1+1 special class at a specific district specialized school with related services (Dist. Ex. 2). In May or June 2008, the student's mother visited the proposed placement with a social worker from the Rebecca School (Tr. pp. 240-42).

By letter dated May 22, 2008, the student's mother advised the district that she had visited the recommended placement and found the program and services to be inappropriate (Parent Ex. MM at p. 2). The letter advised the district that the parents were interested in seeing other available programs (id.). The letter further advised that if the district was not able to offer an appropriate program and placement, then the parents would keep the student at the Rebecca

School and would seek reimbursement for the Rebecca School as well as for the additional services obtained for the student (id.).

A May 2008 progress report from the student's Rebecca School teacher reported that the student had made gains in her awareness in the classroom, her ability to attend to more structured tasks, and in expanding her symbolic play (Parent Ex. F at pp. 1, 3, 4). However, the teacher reported that the student had difficulty engaging with other students in play (id. at p. 2). The teacher also reported that the student was able to stay self-regulated for days at a time, was more aware of her peers in her class, was able to enter into a two-way purposeful communication, was able to label her emotions and the emotions of her peers, and had started to answer "wh" questions (id. at pp. 1-4). Academically, the student was working on following directions, identifying letters, blending sounds to make words, writing lowercase letters, identifying numbers, her ability to count, and her ability to understand basic measuring concepts (id. at pp. 5-6).

By letter dated June 25, 2008, the parents advised the CSE chairperson that the student would remain at the Rebecca School for the 2008-09 school year and that the parents would seek reimbursement for the costs associated with her 12-month Rebecca School program, as well as for the costs associated with the student's additional Developmental Individual Difference Relationship-based (DIR/Floortime) therapy, her additional speech-language therapy, her "Throwback Sports" program, and her transportation (Parent Ex. MM at p. 1).

By due process complaint notice dated June 27, 2008, the parents' attorney advised the district's impartial hearing office that the parents were requesting an impartial hearing for the 2008-09 school year (Parent Ex. A at p. 1). In their due process complaint notice, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE), that the placement and program that they had secured for the student was appropriate, and that there were no equitable circumstances that would preclude or diminish a reimbursement award (id. at pp. 1-2). The parents also asserted that the district should implement the student's pendency placement based on a previous impartial hearing officer's decision on pendency dated February 14, 2008 that directed the district to fund the student's Rebecca School program, related services, and the student's supplemental related services that she was receiving in addition to the Rebecca School curriculum (id. at p. 2; see Parent Ex. B at p. 3). The parents requested reimbursement for the student's 2008-09 tuition at the Rebecca School, transportation to and from the school, additional after-school speech-language therapy, additional after-school community-based DIR/Floortime therapy, and the after-school program entitled Throwback Sports (Parent Ex. A at p. 3).

The impartial hearing began on July 28, 2008 (Tr. p. 1). On that day, the parties addressed the student's pendency placement (Tr. pp. 1-7). On August 4, 2008, the impartial hearing officer issued an interim pendency order which ordered the district to pay for and fund all tuition, travel, and costs at the Rebecca School including related services (IHO Interim Order on Pendency at p. 2). The interim pendency order also ordered the district to pay for four hours per day, five days per week of "Floortime therapy" (id.). Neither party appealed this interim decision on pendency.

While the impartial hearing was proceeding, the student's after-school DIR/Floortime therapist prepared an educational progress report dated August 29, 2008 (Parent Ex. FF at p. 1).<sup>2</sup> The therapist reported that he had been working with the student since April 2005 (*id.*). The therapist stated that he had initially used Applied Behavioral Analysis (ABA) therapy with the student for approximately one year, but that it had resulted in little success (*id.*). Thereafter, in May 2006, the therapist began utilizing the DIR/Floortime methodology (*id.*). The therapist reported that once he started the DIR/Floortime therapy, the student made progress in all areas (*id.*). The therapist reported that since he had begun using the DIR/Floortime methodology, the student was more consistently initiating interactions with others and was able to communicate most of her needs and feelings (*id.*).

By amended due process complaint notice dated September 19, 2008, the parents, through their attorney, amended the claims that they had previously asserted in their June 27, 2008 due process complaint notice (Parent Ex. HH). In their amended due process complaint notice, the parents alleged that: (1) the April 30, 2008 CSE meeting occurred without a proper evaluation and assessment of the student; (2) the CSE unduly relied on teacher estimates; (3) a school social worker was not present at the April 30, 2008 CSE meeting; (4) the district failed to develop a transition plan for the proposed change in placement from the Rebecca School to the district school; (5) the goals and objectives were not developed at the time of the April 30, 2008 CSE meeting; (6) the goals and objectives were unclear and failed to indicate the method of measurement; (7) the placement recommendation did not occur at the April 30, 2008 CSE meeting; (8) the staff at the proposed placement were not properly trained or supervised; (9) there were no extended-day services for the student; (10) the district failed to recommend an adequate level of 1:1 teaching for the student; (11) the district failed to develop a behavioral intervention plan (BIP) and to conduct a functional behavioral assessment (FBA); (12) the district failed to offer sufficient speech-language therapy in accordance with State regulations; (13) the district failed to offer or recommend parent training or counseling; and (14) the district engaged in predetermination and denied the student an individualized program (*id.* at pp. 2-4). The parents also amended the pendency claims that they had previously asserted in the June 27, 2008 due process complaint notice to assert that the district should implement the student's pendency placement based on a final, unappealed impartial hearing officer decision dated June 19, 2008 (*id.* at p. 2; *see* Parent Ex. C at p. 19).<sup>3</sup> In their amended due process complaint notice, the parents requested reimbursement for the student's 2008-09 tuition at the Rebecca School, reimbursement for the costs and expenses associated with the student's transportation to and from the Rebecca School, two hours of after-school speech-language therapy, 20 hours of after-school community-based DIR/Floortime therapy, and the after-school program entitled Throwback Sports (Parent Ex. HH at p. 4).<sup>4</sup>

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<sup>2</sup> The hearing record contains two educational progress reports dated August 29, 2008 and November 17, 2008, as well as a multidisciplinary progress report dated December 12, 2008, which were prepared after the impartial hearing had begun (Parent Exs. FF; KK; LL). These documents were received into evidence during the course of the impartial hearing (Tr. pp. 10, 173, 322).

<sup>3</sup> The June 19, 2008 decision and order directed the district to reimburse the parents for the student's Rebecca School tuition and for the student's outside community-based DIR/Floortime therapy, as well as provide transportation services to the student (Parent Ex. C at pp. 19-20).

<sup>4</sup> By letter dated September 23, 2008, the parents' attorney correct several clerical errors in the amended due process complaint notice (Parent Ex. II).

The impartial hearing resumed on September 25, 2008 and concluded on January 6, 2009, after four additional days of hearings (Tr. pp. 8, 14, 164, 320, 439).

During the time period that the impartial hearing was proceeding, the student's Throwback Sports instructor prepared an educational progress report dated November 17, 2008 (Parent Ex. KK). The instructor reported that the student was attending the Throwback Sports after-school group sports program every Friday from 12:30 p.m. to 3:00 p.m. during the school year (*id.* at p. 1). The report indicated that the program goals for the student were: (1) to teach the student to enjoy active play and sports; (2) to develop interpersonal communication with peers; (3) to learn to participate in group activities; (4) to learn rules; (5) to be able to follow instructions cooperatively and independently; (6) to improve hand-eye coordination, strength, stamina, and movement capabilities; (7) to improve spatial judgment; and (8) to improve the student's ability to organize herself in space, in concert with other children, and within the flow of an organized movement activity (*id.* at pp. 1-2). The report also noted that the student was engaged in sensory activities that facilitated her physical development by calming her or alerting her body (*id.* at p. 2). The report noted that the student had made significant progress since starting the program in September 2006 and exhibited more interaction with her coaches and peers, showed an understanding for rules, and was able to follow directions on a more regular basis (*id.*).

A multidisciplinary progress report from the Rebecca School, dated December 12, 2008, detailed the student's progress relative to her functional emotional development, sensory processing, motor development, and speech-language development (Parent Ex. LL at pp. 1-6). The report indicated that with the proper support, the student was able to pay attention in most circumstances, was able to stay engaged in group activities, and was able to remain regulated during highly emotional situations (*id.* at p. 1). With verbal support, the student was able to use strategies to regulate herself (*id.*). The report noted that the student could become dysregulated when she did not receive proper sensory supports (*id.* at pp. 1, 3). Additionally, when the student became over-stimulated she was difficult to redirect and was almost impulsive in her manner (*id.*). The report noted that the student's sensory play ended with a cool down session in which she would receive proprioceptive and tactile input to calm her (*id.*). However, the report also noted that the student was able to utilize balloon breaths and bear hugs to calm herself (*id.* at p. 5). She also used a "chewy tube" to provide oral input and to assist with her regulation (*id.*).

The report further indicated that the student engaged and related to adults, but that her capacity for engagement with adults was dependent upon whether she had chosen the activity (Parent Ex. LL at pp. 1-2). With adult mediation, the student showed signs of emerging capacities to engage with peers (*id.* at pp. 1-2, 5). To engage with peers, the student needed maximum verbal support (*id.* at pp. 1, 4). The report indicated that the student initiated interaction by drawing attention to herself and that she was able to open and close "fifty plus" circles of communication if she was interested and regulated (*id.* at p. 2). She had difficulty staying in a continuous flow of communication when novel ideas were introduced (*id.*). She also required support to expand her general routine and play ideas or to engage in a novel activity (*id.* at p. 1). The student was able to create symbols, but required greater flexibility in her play (*id.* at p. 2).

The report indicated that the student's English language arts instruction was focused on her development of phonic skills (Parent Ex. LL at p. 9). She was working on connecting sounds to letters, becoming familiar with sight words, and building her reading vocabulary (id.). In relation to her math skills, the report noted that the student had shown proficiency in comparing quantities (to 9), ordering quantities and numerals (to 9), counting backwards (from 9), describing a quantity as two groups, showing the parts of a total in different ways, and combining two groups (id. at p. 8). The student was working on solving simple logical problems, differentiating a pattern from a non-pattern, and identifying and naming shapes (id.). The report noted that the student required vestibular and proprioceptive inputs before she could sit and work on math (id. at p. 9).

The report also noted that the student received speech-language therapy (Parent Ex. LL at p. 4).<sup>5</sup> The report indicated that the student was able to use verbalizations to communicate her wants and needs, used two to four words to communicate, and could produce up to five word utterances (id.). The student's receptive language skills were noted to have improved and she was able to answer "what," "where," and "why" questions independently (id.). Additionally, with verbal support, the student was able to follow up to three-step related commands (id.). The report noted that the student's pragmatic skills had also improved (id.). The student was able to independently greet familiar adults and peers by name and she was able to make requests (id.). The student also received individual OT to address her visual-spatial processing deficits, gross and fine motor skills deficits, and to work on her sensory integration needs (id. at p. 3).<sup>6</sup>

On March 24, 2009, the impartial hearing officer rendered his decision (IHO Decision at p. 38). The impartial hearing officer determined that the district failed to offer a "suitable" program for the student because the district failed to complete an FBA and to provide a BIP, failed to provide parent training and counseling, failed to prepare a transition plan, and because the district's proposed placement lacked a sensory gym (id. at pp. 31-32, 37). He also found that the district's procedure of recommending a program at the April 30, 2008 CSE meeting, but not a specific school placement did "not lend itself to appropriate placement" (id. at p. 31). The impartial hearing officer also found that the parents succeeded in showing that the Rebecca School program, the community-based DIR/Floortime therapy, the private speech-language therapy, and the Throwback Sports program were appropriate for the student (id. at p. 32). He found that the Rebecca School program together with the private services resulted in progress in the student's ability to regulate her sensory needs, in her ability to engage with peers, with adults and in activities, and in her language and communication abilities (id. at pp. 35-37). The impartial hearing officer found that there were no equitable impediments to the parents' request for relief, indicating that the parents had complied with every request for evaluation or assessment, had given appropriate and timely notice of the student's placement at the Rebecca School, and had cooperated and participated with the district (id. at p. 38). The impartial hearing officer ordered the district to reimburse the parents for the cost of the student's Rebecca School tuition for the 2008-09 school year; the costs associated with the student's weekly Throwback Sports program, the student's weekly sessions of private speech-language therapy, and five

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<sup>5</sup> A portion of the speech-language therapy included oral motor exercises to strengthen, stimulate, and provide oral awareness (Parent Ex. LL at p. 5).

<sup>6</sup> The report noted that the student had difficulty copying basic pre-writing designs (horizontal and vertical lines) and that she was able to trace, but not copy a design (Parent Ex. LL at p. 3).

sessions of community-based DIR/Floortime therapy; and reimburse the parents for the student's transportation costs (id. at pp. 43-46).

The district appeals and asserts that the impartial hearing officer erred in determining that the procedural system utilized by the district in making a placement recommendation is inappropriate. The district asserts that it is not required to offer a specific school at a CSE meeting. The district also asserts that its alleged failure to offer parent training and counseling, failure to conduct an FBA and to provide a BIP,<sup>7</sup> failure to provide a transition plan,<sup>8</sup> and failure to provide a sensory gym did not constitute a denial of a FAPE.<sup>9</sup> The district also asserts that the parents failed to prove that their program is appropriate because they failed to put forth any evidence of the student's academic curriculum at the Rebecca School, failed to show how the student allegedly progressed, and failed to show how the additional Throwback Sports therapy program, the additional after-school speech-language therapy, and the additional after-school community-based DIR/Floortime therapy were necessary. The district asserts that the parents' position is not supported by the equities because the parents opted to pursue litigation and did not fully cooperate at the April 30, 2008 CSE meeting.<sup>10</sup> The district also asserts that the student's mother's testimony at the impartial hearing revealed that she would not consider a program that did not have a sensory gym or a program that utilized ABA. The district further asserts that the parents' letters reflecting disagreement with the proposed placement failed to explain any rationale for the rejection. According to the district, the parents should be barred from obtaining tuition reimbursement because the Individuals with Disabilities Education Act (IDEA) and its implementing regulations bar for-profit schools such as the Rebecca School from obtaining reimbursement monies. Finally, the district asserts that, if it is successful in this appeal, then it is entitled to recoup the funds it paid for the student's pendency placement.

In their answer, the parents assert that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE. The parents assert that the district was legally required to offer a specific placement in the student's IEP. The parents also assert that the impartial hearing officer's decision regarding parent training and counseling was correct because the district's failure to offer parent training was a violation of State regulations.<sup>11</sup> The parents further assert that the impartial hearing officer was correct to determine that the district failed to conduct an FBA and develop a BIP, failed to consider a transition plan, and failed to prove that its sensory room was adequate to address the student's significant sensory needs. The parents

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<sup>7</sup> The district asserts that the student did not require an FBA and a BIP. The district argues that not only did the student not have a BIP at the Rebecca School, but the April 30, 2008 CSE determined that the student's behavior could have been sufficiently addressed by the classroom teacher.

<sup>8</sup> The district asserts that transition plans are only required for post-school activities and not for transition between schools.

<sup>9</sup> The district asserts that the proposed placement had a sensory room, the student's IEP had goals and objectives to address the student's sensory issues, and the student would have been provided with a sensory diet for the classroom.

<sup>10</sup> The district also asserts that the student's mother never raised the issue of a transition plan during the April 30, 2008 CSE meeting.

<sup>11</sup> The parents also assert that parent training was neither mentioned in the April 30, 2008 IEP, nor did the district prove at the impartial hearing that the parents would receive this training.

assert that the services they secured for the student were appropriate and were reasonably calculated to provide meaningful educational benefits. According to the parents, equitable considerations support their position because they acted in good faith, cooperated, gave proper notice of their placement of the student at the Rebecca School, and because they notified the district of their concerns with the proposed placement. The parents also assert that it was the district that failed to reconvene a CSE to propose remedial action to the parents' rejection of the proposed placement and that the district failed to offer the student a FAPE in prior years.

In their answer, the parents also dispute the district's argument that tuition reimbursement is only available for not-for-profit schools. The parents assert, among other things, that the district should be barred from raising this defense because they failed to raise this issue at the impartial hearing below. According to the parents, even if the Rebecca School is a for-profit school, the school is operating at a deficit and has not yet made a profit. The parents also assert that the district is not entitled to recoupment of pendency costs.

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]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252-53 [2d Cir. 2009]; R.R. v. Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at \*9 [S.D.N.Y. May 15, 2009]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]; see also E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any

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

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The 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; therefore it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

Returning to the instant case, I will initially address the district's assertion that the impartial hearing officer erred in determining that the district failed to offer the student a FAPE because it did not develop a BIP and conduct an FBA (see IHO Decision at p. 31).

In the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*8 [S.D.N.Y. July 3, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120).<sup>12</sup> In addition to the federal requirement, State regulations require that the CSE include an FBA for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][v]).<sup>13</sup> Additionally, under State regulations when considering more restrictive programs or placements as a result of the student's behavior, a CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]).<sup>14</sup>

In his decision, the impartial hearing officer indicated that he disagreed with the assessment of the district's special education teacher that the student did not require an FBA or a BIP because her behavior could be addressed by the classroom teacher (IHO Decision at p. 31).<sup>15</sup> At the impartial hearing, the district's special education teacher testified that at the time of the development of the April 30, 2008 IEP, the CSE considered whether a BIP and an FBA should be developed, but decided not to prepare them because the student's Rebecca School teacher indicated at the CSE meeting that the student's behavior could be addressed sufficiently by the

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<sup>12</sup> In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, State regulations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

<sup>13</sup> In New York, an FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]).

<sup>14</sup> In New York, a BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; see 8 NYCRR 201.2[a]).

<sup>15</sup> The hearing record reveals that the student exhibited self-injurious behavior such as biting her hand and hitting herself (Tr. p. 45; Parent Ex. H at p. 2).

classroom teacher (Tr. pp. 46-47, 98; see Dist. Ex. 1 at p. 4). As such, instead of preparing a BIP, the CSE opted to recommend counseling and to develop goals to provide for the student's sensory and emotional needs (Tr. pp. 46-47; Dist. Ex. 1 at pp. 1, 4, 9-10, 13).<sup>16</sup> Testimony from the student's Rebecca School teacher confirmed that it was the student's sensory issues that needed to be addressed, not her behavior (Tr. p. 312).<sup>17</sup>

The hearing record reveals that the decision of the April 30, 2008 CSE to proceed without an FBA and a BIP was made after the CSE had considered the student's behavioral issues and had weighed the opinion of the student's Rebecca School teacher who participated at the CSE meeting (Tr. pp. 46-47, 98, 312). As such, I find that the decision of the CSE not to develop an FBA or a BIP did not rise to the level of a denial of a FAPE to the student (see A.C., 553 F.3d at 172). The hearing record also does not show that the lack of an FBA or a BIP impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or 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]; see E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419; see also K.Y. v. New York City Dep't of Educ., 2008 U.S. Dist. LEXIS 89827, 51 IDELR 78 [E.D.N.Y. July 2, 2008]).

I now turn to the district's assertion that the impartial hearing officer erred in determining that the district denied the student a FAPE because parent counseling and training were not specifically provided for on the student's IEP (see IHO Decision at p. 31).

State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]).

In this case, the hearing record demonstrates that the district's recommended placement offered parent training that was consistent with 8 NYCRR 200.13(d). At the impartial hearing, the assistant principal of the proposed placement testified that the school offered parent training on an as need basis (Tr. p. 195). The assistant principal testified that the school invites parents to the school for presentations by speakers, and parents are also welcome to come in if they want to learn more about a specific program or methodology (id.).<sup>18</sup> The assistant principal further

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<sup>16</sup> Testimony from the assistant principal of the proposed placement also revealed that if the student had attended the proposed placement, the occupational therapist would have further addressed the student's sensory needs by providing a sensory diet for the teacher to utilize in the classroom (Tr. p. 193).

<sup>17</sup> The speech-language therapy progress report dated December 2007 indicated that the student's negative behaviors had "noticeably decreased" as her ability to effectively communicate her wants and needs improved (Parent Ex. O at p. 1).

<sup>18</sup> Some of the recent topics covered at the school parent training sessions were ABA training, "PECS" training, and "parents rights" (Tr. p. 195).

testified that this parent training is conducted by a related service provider, the parent coordinator, the school's instructional support person, or by herself (Tr. pp. 196, 233). According to the assistant principal's testimony, the school offers transportation and babysitting services to ensure that parents are able to participate in training programs (Tr. p. 233). During her tour of the proposed placement, the student's mother was advised that the school had parent training lectures (Tr. p. 246).

Although parent counseling and training was not specifically set forth in the April 30, 2008 IEP, in light of the evidence presented in the hearing record regarding the available services for parent training at the proposed placement, I find that the district's failure to include these services on the April 30, 2008 IEP did not result in the denial of a FAPE to the student (see K.Y., 2008 U.S. Dist. LEXIS 89827, 51 IDELR 78; Application of the Dep't of Educ., Appeal No. 08-140; Application of the Dep't of Educ., 07-049; Application of a Child with a Disability, Appeal No. 07-030; Application of a Child with a Disability, Appeal No. 07-010). However, the district is cautioned to ensure its compliance with State regulations 8 NYCRR 200.4(d)(2)(v)(b)(5) and 200.13(d).

Next, I turn to the district's assertion that the impartial hearing officer erred when he concluded that the failure to offer a specific site placement at the time of the April 30, 2008 CSE meeting did not "lend itself to an appropriate placement" (IHO Decision at p. 31).

The IDEA requires that a valid IEP be in effect "at the beginning of each school year" and a school district's delay does not violate the IDEA so long as the school district "still has time to find an appropriate placement ... for the beginning of the school year in September" (20 U.S.C. § 1414[d][2]; Tarlowe, 2008 WL 2736027, at \*6, quoting Bettinger v. New York City Bd. of Educ., 2007 WL 428560, at \*8 n.26 [S.D.N.Y. Nov. 20, 2007]). The assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; K.Y., 2008 U.S. Dist. LEXIS 89827, 51 IDELR 78; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]). The United States Department of Education (USDOE) has noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).<sup>19</sup>

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<sup>19</sup> The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room? (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); 8 NYCRR 200.4(d)(2)(v)(b)(7).

This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]; Application of a Child with a Disability, Appeal No. 07-049).

In this case, at the April 30, 2008 CSE meeting, the district offered the student a service along the continuum, a 6:1+1 special class in a specialized school (see 8 NYCRR 200.6[h][4]). There is no evidence in the hearing record that the student's mother was denied participation in that decision, as evidenced by the fact that she raised concerns at the CSE meeting about the student's speech-language therapy and the need for counseling and both of these concerns were addressed by the CSE with recommendations for additional speech-language therapy and additional counseling services (Tr. p. 252; see K.Y., 2008 U.S. Dist. LEXIS 89827, 51 IDELR 78). Additionally, the parents were involved in the selection process for the school at which the student's IEP would be implemented, in that the CSE also advised the parents in the May 8, 2008 placement notice that they retained the right to discuss the recommendation of a specific school, and could arrange a meeting with respect to the recommendation (Dist. Ex. 2). The parents' participation in the placement process was also evidenced by the fact that the student's mother sent a letter objecting to the specific site proposal (Parent Ex. MM at p. 2). Additionally, the hearing record reflects that the district offered the proposed placement in early May 2008 and as such the parents were afforded ample opportunity to visit the proposed placement, which they did (Tr. pp. 240-44; Dist. Ex. 2; see also Tarlowe, 2008 WL 2736027, at \*6). Under the facts of this case, I find that the district did not deny the student a FAPE by not determining at the April 30, 2008 CSE meeting the specific district school that the student was recommended to attend and at which her IEP would be implemented. Furthermore, I find that the failure to identify a specific school at the time of the CSE meeting did not impede the student's right to a FAPE, significantly impede the parents' meaningful participation in the CSE process, or cause 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]; see E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419).

I now turn to the district's assertion that the impartial hearing officer erred in concluding that the district failed to offer a FAPE to the student because it did not provide a transition plan for the proposed change from her current private placement at the Rebecca School to the district's proposed public placement (IHO Decision at p. 32).

I note that the impartial hearing officer did not provide a rationale for why the absence of a transition plan prior to the student's proposed transfer resulted in a denial of a FAPE and the hearing record does not support his conclusion. I also note that the issue of an absence of a transition plan was not raised by the parents or the student's teacher at the time of the April 30, 2008 CSE meeting, when the parents visited the proposed placement, or when the parents rejected the placement prior to the commencement of the school year (Tr. pp. 247, 266, 302; see Dist. Exs. 2; 5; Parent Ex. MM at p. 2). Moreover, testimony from the assistant principal of the district's proposed placement revealed that the district's school ensures that there is communication between the two schools and/or the parent to ensure a smooth transition for transferring students (Tr. pp. 193, 227). She further indicated that there is collaboration and conversation that takes place to identify what "we need to carry over" and what the student can "can do and [] can't do" and that a transition plan is created when the student arrives at the school

(*id.*). While neither federal nor State law require that a transition plan be identified on a student's IEP pertaining to the movement of a student from one school to another, there should be appropriate services identified and offered if a particular student's needs require such services. Here, although transition services were not identified on the student's IEP, the hearing record shows that support services pertaining to the student's transition to the public school would have been discussed and the proposed school would have been responsive in addressing any transition needs related to her enrollment at the school. Under the circumstances of this case, I find that the lack of specified services on the IEP to assist the student in transitioning from the Rebecca School to the public school program did not impede the student's right to a FAPE, significantly impede the parents' meaningful participation in the CSE process, or cause 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]; see E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419).

I now turn to the district's assertion that the impartial hearing officer erred in concluding that the district failed to offer an appropriate placement because the proposed placement did not have a sensory gym (IHO Decision at p. 37). Initially, I note that the parents did not allege in either of their due process complaint notices that the absence of a sensory gym at the proposed placement rendered the district's placement inappropriate (see Parent Exs. A; HH). However, the difference between the district's proposed sensory room and the Rebecca School's sensory gym was extensively discussed at the impartial hearing (Tr. pp. 89, 145-46, 193, 198-202; 243, 253, 273, 288-91). The impartial hearing officer also deemed the sensory gym "necessary" for the student (IHO Decision at p. 37). Consequently, I find that this issue is properly before me as it was raised at the hearing below.

The teacher from the Rebecca School testified that the school has three sensory gyms and equipment within the classrooms (Tr. pp. 289, 291, 310). The student has access to swings, ball pits, trampolines and jump pads (*id.*). The assistant principal of the proposed placement testified that the sensory room in the district's school contains multiple stations within the room (Tr. p. 194). The room contains a scent area, a bubble center, a ball area, a construction area, an art area, and an area containing different tactile textures such as velvet, sandpaper, and shaving cream (Tr. p. 199). The central difference between the sensory gyms at the Rebecca School and the sensory room at the district's proposed placement is that the district's sensory room has no suspended equipment (Tr. pp. 200-02). The assistant principal of the district's proposed placement testified that its sensory room did not have suspended equipment because the room was inappropriate for such equipment and suspended equipment would pose a safety hazard (*id.*). Moreover, the assistant principal testified that for students with sensory difficulties, the school's occupational therapist would develop a sensory diet to be implemented in the classroom (Tr. pp. 193-94). The district's development of a specific goal to address the student's sensory processing needs, the recommendations of OT and counseling for the student, and the availability of the sensory room at the proposed placement all support the conclusion that the district's program was sufficiently personalized to appropriately address the student's sensory issues such that educational benefits could be conferred (Dist. Ex. 1 at pp. 9, 11, 13; Rowley, 458 U.S. at 203; Walczak, 142 F. 3d at 130, 132; Grim 346 F. 3d at 379; Cerra, 427 F. 3d at 195).

I now turn to whether the specific components of the district's program and proposed placement were reasonably calculated to confer educational benefits to the student.

The evidence in the hearing record establishes that the recommended special education program, the recommended related services, and the recommended placement were all reasonably calculated to confer educational benefits to the student. The hearing record reflects that the April 30, 2008 CSE considered, and relied upon the student's Rebecca School reports and the reports of the student's related service providers for an accurate assessment of her functioning, academic levels, and needs (Tr. pp. 41, 44-45, 47; Dist. Ex. 1 at pp. 3, 5).<sup>20, 21</sup> In developing academic goals and objectives, the April 30, 2008 CSE considered input from the student's Rebecca School teacher and the student's mother input on what the student needed (Tr. pp. 47-50, 55-56, 57-62, 63, 86, 251-52, 301; see Dist. Ex. 1 at pp. 6-10, 11, 12). The hearing record reveals that the April 30, 2008 CSE also considered less restrictive class settings, but determined that the student's speech-language delays and her social limitations required a 12-month 6:1+1 setting (Tr. pp. 102-03; Dist. Ex. 1 at pp. 11, 12).

The hearing record also reveals that the April 30, 2008 CSE recommended appropriate related services and developed goals and short-term objectives to develop the student's skills in her identified deficit areas (Dist. Exs. 1 at pp. 2, 6-11, 13; 5). To address the student's significant language and communication deficits, the CSE recommended three individual 30-minute sessions of speech-language therapy and one 30-minute session of 3:1 speech-language therapy per week (Tr. p. 44; Dist. Ex. 1 at pp. 11, 13). The recommendation for individual speech-language therapy was increased from two times per week to three times per week based on a request from the student's mother (Tr. p. 252; Dist. Ex. 1 at p. 2). The CSE also developed three goals and twelve corresponding short-term objectives to specifically address the student's receptive, expressive, and pragmatic language skills (Tr. p. 48; Dist. Ex. 1 at pp. 8-9). These goals were derived from the student's speech-language therapist's reports (Tr. pp. 48, 252; compare Parent Ex. O at pp. 2-3, with Dist. Ex. 1 at pp. 8, 9). During the impartial hearing, the speech-language therapist agreed that the skills outlined in the IEP were areas that the student needed to work on (Tr. pp. 426-27).

To address the student's significant social skills and social-emotional development needs, the April 30, 2008 CSE recommended individual and group counseling (Tr. pp. 46, 48-50; Dist. Ex. 1 at pp. 4, 13). The group counseling component was added to the student's IEP in response to a request for additional counseling from the student's mother (Tr. p. 252; Dist. Ex. 1 at p. 2). The CSE also provided a social-emotional goal with five corresponding short-term objectives to target the deficit areas identified by the student's Rebecca School teacher (Dist. Ex. 1 at p. 10; Parent Exs. J at pp. 5-6; JJ at pp. 24-26).

To address the student's deficits in sensory processing and fine motor skills, the April 30, 2008 CSE recommended four 30-minute sessions of individual OT per week (Dist. Ex. 1 at p. 13). The two goals and the six corresponding short-term objectives recommended by the CSE targeted the student's sensory processing and regulatory skills and her motor planning and sequencing skills and reflected that the CSE considered the recommendations of the student's

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<sup>20</sup> Additionally, it appears that the student underwent a psychological evaluation in January 2007, and although the report was not introduced into evidence at the impartial hearing, the CSE considered this report in fashioning its program and placement (Tr. p. 41; Dist. Ex. 1 at p. 3).

<sup>21</sup> The CSE specifically noted that the student responded to visual and verbal prompts, repetition, and manipulation of concrete objects and recommended the use of such techniques (Dist. Ex. 1 at p. 3).

private school occupational therapist (Tr. pp. 48, 338; compare Parent Ex. N at pp. 3-4, with Dist. Ex. 1 at pp. 9-10).

With respect to academics, the April 30, 2008 CSE developed three goals with ten corresponding short-term objectives to specifically address the student's decoding skills, her comprehension skills, and her prewriting skills (Dist. Ex. 1 at pp. 6, 7). The CSE also provided one math goal and five corresponding short-term objectives to develop the student's math skills (id. at p. 7).

Based on the above, I find that the April 30, 2008 IEP accurately reflected the student's needs at the time of the CSE meeting and was designed to confer educational benefits upon the student.

The hearing record also establishes that the district's recommended 6:1+1 special class placement would have met the student's needs. The assistant principal of the proposed placement testified that the recommended school provides specific programs for students with autism and students with emotional disturbances (Tr. p. 179). The school offers several classroom class settings including 12:1+1, 8:1+1, 6:1+1, and inclusion classrooms (id.). The school has three 6:1+1 classes (id.). The school also offers related services on-site (Tr. pp. 179-80). The assistant principal testified that the related service providers have experience working with autistic students and collaborate with classroom teachers (Tr. p. 180). Students are assessed by teacher observation and by utilizing a "Brigance Assessment" (Tr. pp. 191, 235, 238). The school also utilizes several different teaching methodologies, including the Treatment and Education of Autistic and Related Communication Handicapped Children methodology (TEACCH), ABA, and DIR/Floortime (Tr. pp. 186, 191, 208). For students with sensory regulations difficulties, the school provides a sensory room (Tr. pp. 194, 198-99). Additionally, the school's occupational therapist conducts an evaluation and provides a personalized sensory diet for the classroom teacher to implement (Tr. p. 193).

The assistant principal further testified that because the student was recommended for a 12-month school year, had she attended the proposed placement, she would have been placed in one 6:1+1 classroom for the summer months of July and August and a different 6:1+1 classroom starting in September 2008 (Tr. p. 184). The assistant principal testified that the summer 2008 6:1+1 class contained five students, two of whom were at a reading and math readiness level and three of whom had reading and mathematics levels between 0.5 and 1.5 (Tr. pp. 182-83; Dist. Ex. 6 at pp. 1-2). All of the students were classified as having autism and they ranged in age from five to seven years of age (Tr. p. 183; Dist. Ex. 6 at p. 2). All of the students in the class received speech-language therapy, four of the five received OT, and two of the students received physical therapy (Dist. Ex. 6 at p. 2).

The September 2008 6:1+1 classroom contained five students, all of whom were on the preprimer level for reading and math (Tr. p. 188; Dist. Ex. 7 at p. 1). The class was composed of four six year olds and one seven year old and all of the students were classified as having autism (Tr. pp. 187-88; Dist. Ex. 7 at p. 2). This class utilized the TEACCH methodology and ABA (Tr. pp. 186, 191). According to the assistant principal, the TEACCH methodology has proved to be particularly effective with students because it encourages the students to be independent and build upon the skills they have learned (Tr. pp. 185-86, 190-91). The workstation model of the

TEACCH methodology also allows the teacher time to focus individually on students who are having difficulties (Tr. p. 186). The assistant principal testified that the classroom teacher utilizes ABA, "Handwriting Without Tears," or other individualized interventions while the other students are at their TEACCH workstations (*id.*). The teacher also utilizes Picture Exchange Communication System (PECS) symbols and conducts a "Brigance Assessment" at the beginning of the school year to inform her instruction (Tr. pp. 189, 191, 235). The assistant principal opined that the student's IEP could have been implemented in this 6:1+1 program (Tr. p. 196).

In conclusion, I find that the district's recommended program was reasonably calculated to confer educational benefits to the student in the LRE (*Viola v. Arlington Cent. Sch. Dist.*, 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006] citing to *J.R. v. Bd. of Educ. of the City of Rye Sch. Dist.*, 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]; see *Cerra*, 427 F.3d at 195; see also *Mrs. B.*, 103 F.3d at 1120; *Application of a Student with a Disability*, Appeal No. 08-029; *Application of a Child with a Disability*, Appeal No. 06-112; *Application of a Child with a Disability*, Appeal No. 06-071; *Application of the Bd. of Educ.*, Appeal No. 06-010; *Application of a Child with a Disability*, Appeal No. 05-021). I further note that 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). Therefore, I find that the April 30, 2008 CSE offered the student a FAPE for the 2008-09 school year.

Having determined that the April 2008 IEP offered the student a FAPE for the 2008-09 school year, I need not reach the issue of whether the parents' placement was appropriate, and the necessary inquiry is at an end (*Mrs. 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).

Finally, I turn to the district's assertion that the parents should be ordered to reimburse the district for payments made pursuant to pendency.

The IDEA and the New York State Education Law require that a student remain in his or her current educational placement, unless the student's parents and the board of education 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]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see *Student X v. New York City Dep't of Educ.*, 2008 WL 4890440, at \*20 [E.D.N.Y. Oct. 30, 2008]; *Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea*, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; *Application of the Dep't of Educ.*, Appeal No. 08-061; *Application of a Student with a Disability*, Appeal No. 08-050; *Application of the Dep't of Educ.*, Appeal No. 08-009; *Application of a Student with a Disability*, Appeal No. 08-003; *Application of a Student with a Disability*, Appeal No. 08-001; *Application of a Child with a Disability*, Appeal No. 07-095; *Application of a Child with a Disability*, Appeal No. 07-062). 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]).

The district asserts that public policy and fairness considerations dictate a recoupment of these payments (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]). I find the district's arguments favoring the approaches taken by the courts in Brookline and Dale M. to be unpersuasive. Therefore, I decline to order the parents to reimburse the district for costs incurred by the district in maintaining the student's pendency placement, an expense it was required to pay in order to comply with the pendency provisions of State and federal law (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. § 300.51[8]; Educ. Law § 4404[4]; 8 NYCRR 200.5[m]).

I have examined the parties' remaining contentions and find that they are either without merit, or that it is unnecessary for me to address them in light of the determinations made herein.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision is hereby annulled.

**Dated:** Albany, New York  
June 26, 2009

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