



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-112

**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]**

### Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel.

### DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which denied her request for her son to attend a private school at district expense for the 2009-10 school year with concurrently provided home-based applied behavioral analysis (ABA) instruction. The appeal must be sustained in part.

At the time of the impartial hearing, the student attended a 12-month 6:1+1 special class at a district 75 middle school and received related services of speech-language therapy, occupational therapy (OT), physical therapy (PT), counseling, and adapted physical education (Dist. Ex. 2 at p. 1).<sup>1</sup> The student's eligibility for special education programs and 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 is sparse regarding the student's early educational history. According to the parent, the student attended a district elementary school from September 2002 through June or September 2007 (see Dist. Exs. 1 at p. 1; 7 at p. 1; Tr. p. 75). The hearing record reflects that the student transferred to another district elementary school in September 2007 and enrolled in a district middle school at the beginning of the 2008-09 school year (see Tr. p. 9; Dist. Exs. 1 at p. 2; Parent Exs. A; G at pp. 17, 18; Tr. pp. 53, 75, 128; Answer ¶ 1).

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<sup>1</sup> The student also received home-based special education teacher support services (SETSS) pursuant to a resolution agreement (Tr. p. 106; Dist. Ex. 9; Parent Exs. E; F).

The district conducted a reevaluation of the student on June 19, 2006, due to the parent's concerns about the student's educational progress and his behavioral difficulties at school and home (Dist. Ex. 8 at p. 1). The resulting "Review of Psycho-Educational and Social-Emotional Functioning" report indicated that the purpose of the evaluation was to define placement for the student and to review duration, frequency, or further needs for all related services (*id.*). The report indicated that a June 6, 2005 administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ score of 44, which was described as being in the moderately deficient range (*id.* at pp. 2-3).<sup>2</sup> At the time of the June 19, 2006 evaluation, administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) yielded scores in the "extremely low range" of academic functioning (beginning pre-kindergarten grade level) (*id.* at p. 2). At that time, the student did not write phrases or sentences, he misspelled his first and last names, and he did not add or subtract one digit numbers without regrouping (*id.*). The student was described as knowing his name but not knowing his mother's name, his address, or telephone number (*id.*). He was able to verbally spell the words "one, two and yoyo" (*id.*). The student recognized numbers and was able to put them in order, and could write the numbers seven and three (*id.*). The district school psychologist who conducted the evaluation indicated in the report that there was no discrepancy between the student's intellectual abilities and his actual academic performance (*id.*). The report indicated that the student had a positive attitude toward tests, but at times exhibited oppositional behavior and difficulty sustaining attention for extended periods of time (*id.*). Projective testing reflected that consistent with testing performance, the student displayed impulsivity and anxiety (*id.* at pp. 2-3). The student was unable to draw a person, a tree, or a house (*id.* at p. 3). The report reflected that a parent interview and observations of the student raised concerns about the student's personality and emotional functioning (*id.*). The report noted that it could be difficult for the student to relate to peers and to respect school rules and authorities (*id.*). However, when in an unstructured environment for a short period of time, the student was described as having the ability to relate to adults (*id.*). The report indicated that at the time of the June 19, 2006 evaluation, the student needed an emotionally supportive and nurturing environment that provided him with opportunity to experience success in the classroom (*id.*). The report further noted that the student would benefit from behavior modification techniques that included verbal praise, positive reinforcement, and contracts, as well as a crisis management specialist's involvement on a daily basis (*id.*).

A private agency assessed the student over six sessions in September and October 2006, in response to the parent's referral for "diagnostic consultation and recommendations," which sought "a comprehensive assessment and recommendations for treatment intervention and educational strategies and approaches" (Dist. Ex. 7 at p. 1). The resultant private assessment report indicated that the student had previously received a diagnosis of a pervasive developmental disorder (PDD) from a neurologist and that the student's mother expressed concerns at that time about the student's behavior and his reading and writing skills (*id.*).

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<sup>2</sup> The "Review of Psycho-Educational and Social-Emotional Functioning" report indicated that the student was previously evaluated in June 2005, but the hearing record does not include that evaluation report (Dist. Ex. 8 at p. 1).

The private assessment report also indicated that concerns regarding the student's social development, speech-language development, and behavior initially arose when he was between two and three years of age (Dist. Ex. 7 at p. 1). The assessment report noted that developmentally, the student "usually" demonstrated differential attachment, responsiveness to his name, and he understood at least 10 words, but "rarely" responded readily to anticipatory gestures, demonstrated motor and vocal imitation, exhibited interest in other children, used gestural communication, demonstrated imaginative or social imitative play, used single word speech, demonstrated joint attention, or eye contact (id. at pp. 1-2). At the time of the private assessment, the student's mother described him as being "somewhat" verbal (id. at p. 2). The student used gestures occasionally and spoke to make requests (id.). The student was also noted to have speech articulation difficulties and was understood with effort by those familiar with him (id.). The assessment report noted that the student's mother described his speech as having irregular rhythm (cadence) (id.). Medically, the student was noted to be in good health (id.). Administration of a variety of standardized diagnostic tools yielded results consistent with a school-aged child with serious delays in cognitive and adaptive functioning, qualitative impairment in social reciprocity, and in pragmatic and semantic communication (id. at pp. 2-11). The private assessment report indicated that the student did not seem to understand fundamental aspects of social interaction, intent, and judgment (id. at p. 11). His thought processing was described as concrete and literal, and interfered with social comprehension of figurative language (id.). The student's responses to environmental stimuli were described as "unusual" and the range and nature of preferred activities as "restricted" (id.). The student was further noted to demonstrate significant speech-language delays and impairments, with particular deficits in pragmatics and semantics (id.). The student's developmental profile was described as indicative of an autism spectrum disorder, secondary language impairments, and a mild to moderate impairment in intellectual functioning (id.). The student was further described as a "minimally verbal boy whose nonverbal cognitive ability falls within the mild to moderate range of mental retardation" and whose executive functions deficits, anxiety, and autism-related social and behavioral impairments resulted in significant limitations in sustained attention and motivation (id.). The student's ability to understand abstract information appeared very limited (id.). Fine motor and visual motor abilities were described as well under age expectations (id.). In addition, the report indicated that "[m]ultiple challenging behaviors impact on educational performance, and appear to have both impulsive and more volitional components, the latter seeming at times to serve attention-getting and avoidant functions" (id.). The student's positive qualities and attributes included an engaging nature, attachment to family members, and an interest in engaging in joint attention and social referencing on topics of strong personal interest (id. at p. 12). The private assessment report indicated diagnoses including a pervasive developmental disorder-not otherwise specified (PDD-NOS), a developmental language disorder, and mental retardation (moderate) (id.).

Recommendations included 12-month educational programming, a discrete trial approach to initially learn skills in addition to more naturalistic teaching methods, provision of an autism consultant for school-based behavior and academic curriculum modifications and in-home parent training, a modified curriculum to include functional communication and adaptive living skills, academic expectations consistent with ability level, provision of both school and community-based social skills programming, and OT services that emphasized environmental processing and use of visual supports to develop compensatory strategies regarding the student's functioning,

and tolerance for change, stimulation, and task demands (Dist. Ex. 7 at p. 12). Specific recommendations for educational procedures and curricula were also included in the assessment report relative to the student's functional communication, development of replacement behaviors, social interest, functional play skills, functional academic skills, and adaptive behavior skills (id. at pp. 12-13). Among other things, the private assessment report recommended the incorporation of ABA principles and procedures, visual schedules, repetition, prompting, graphic visual cues, use of a TEACCH<sup>3</sup> approach, behavioral contingencies and reinforcement, an augmentative communication evaluation, and consideration of medication to address the student's behavior (id. at pp. 12-20).

On February 7, 2007 a district school psychologist conducted a social history update with the student's maternal grandmother acting as informant (Dist. Ex. 6 at pp. 1, 3). The social history update report indicated that the parent was requesting reevaluation of the student and was interested in a possible private school or district special school placement that offered an ABA oriented instructional program (id.). The grandmother described the student as a boy who loved to do things in a "certain way" (id. at p. 2). She indicated that the student could be stubbornly insistent and that in order to avoid resistant or problematic behaviors, adults appeared to give into the student's wishes (id.). She noted that the student would go through periods where he would throw himself on the floor if he did not get his way (id.). Furthermore, the grandmother, who was described as "speak[ing] in one voice with her daughter," described her dissatisfaction with the student's lack of progress in acquiring academic skills commensurate with his age stating, "he's in fourth grade and still doesn't know how to read" (id.). The report indicated that despite the grandmother's positive feelings toward the student's school, teachers and providers, she hoped that another public or private school that used ABA might help the student learn more effectively (id.).

The hearing record reflects that a behavior support plan was initiated in October 2007 that addressed the student's tendency to move away from the work area/group lessons (see Parent Ex. G at p. 17). The behavior support plan identified alternative behaviors to teach the student, proactive strategies and supports to use with the student, specific details on how to implement the proactive strategies and supports, and the criteria for termination of the behavior support plan (id.).

A notice from the district dated October 29, 2007, advised the parent of an annual review scheduled for November 13, 2007 to discuss the student's educational needs (Parent Ex. G at p. 21). According to the resultant individualized education program (IEP), the Committee on Special Education (CSE) found the student eligible for special education services as a student with autism and recommended a special class placement (6:1+1) in a specialized school in district 75 with related services of individual and small group speech-language therapy, small group PT, small group OT, individual counseling, a special transportation paraprofessional, and adapted physical education (id. at pp. 1, 14-15).

The hearing record includes a district notice dated November 29, 2007 relating to the November 13, 2007 annual review recommendations (see Parent Ex. G at pp. 19-20). The notice

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<sup>3</sup> The hearing record reflects that TEACCH is an acronym for "treatment and education of autistic and related communication for handicapped children" (Tr. p. 22).

advised the parent that if she had any questions about the IEP recommendations developed at the November 13, 2007 CSE meeting, the CSE chairperson would meet with her (*id.* at p. 19). The notice also informed the parent of her right to request a review by the CSE, mediation, or an impartial hearing, and stated that if the district did not hear from the parent, the recommended changes would be implemented on November 29, 2007 (*id.* at pp. 19-20).

A December 27, 2007 pediatric neurology follow-up report noted the student's diagnosis of a PDD and recommended continuation of PT, OT, and speech-language therapy at a special school (Parent Ex. D). The neurology follow-up report also noted that the student was "doing well" and that there were no new complaints or "aggressive/violence" (*id.*).

The district and the parent entered into a mediation agreement dated March 19, 2008 (Parent Ex. A).<sup>4</sup> The mediation agreement set forth that: (1) the "parties agree that a new behavior plan will be written and implemented within two weeks;"<sup>5</sup> (2) the assistant principal of the student's school "agrees to provide a para to give Discrete Trial Teaching 2 – 3 times a week, if possible;" and (3) the parties "agree to meet during the week of April 14-19, 2008" (*id.*). Consistent with State regulations, the mediation agreement set forth that the CSE "must immediately meet to amend the student's IEP to be consistent with [it]" (*id.*; *see* 8 NYCRR 200.5[h][3]).

In a due process complaint notice dated May 12, 2008, the parent requested an impartial hearing (Answer Ex. 2). The parent stated that the student had attended a district school for five years from September 2002 through June 2007 (*id.* at p. 1). The parent alleged that the student's "IEP[s] always had the same goals and they were never filled out properly" (*id.*). The parent also contended that the student "was also not being taught academically," that the student was not being given any "academically challenging work," that the parent wrote several letters to the district regarding these issues and asked for "extra tutoring to make up for [the student] not being taught," and that the district never responded (*id.*).

The parent further alleged that she attended CSE meetings for the student on February 12 and June 22, 2007 and that at the June 2007 meeting, the parent requested an educational placement with "an appropriate ABA program" (Answer Ex. 2 at p. 1). The parent asserted that her requests were "supported by recommendations and evaluations made by professionals," but that the district "rejected" them (*id.*). The parent further set forth that the student currently attended a district school where he had made "some progress, but not enough to justify continued placement" (*id.*). The parent contended that the student needed to be in a school environment that provided more ABA services "to make up for all the years of appropriate education that he was denied" (*id.*). The parent further contended that the district's recommendations directly contradicted the evaluations provided to the IEP team prior to the meeting (*id.* at p. 2).

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<sup>4</sup> Federal and State regulations describe the mediation process at 34 C.F.R. § 300.506 and 8 NYCRR 200.5(h), respectively.

<sup>5</sup> The hearing record includes a behavior support plan with a "date initiated" of March 2008 (Parent Ex. G at p. 18).

The parent specifically alleged that the "proposed IEP" and prior district school placement was "defective and inappropriate" in a number of respects including, but not limited to the following: (1) no additional parent member was present at "most of the IEP meetings;" (2) despite the student's interfering behaviors, the district failed to conduct a functional behavioral assessment (FBA) and failed to develop a behavioral intervention plan (BIP); (3) the IEP failed to indicate that the parent produced outside professional recommendations for an appropriate ABA program and failed to explain why these recommendations were denied; (4) the IEP's present levels of performance were "inadequate and too ambiguous" to create any baseline for assessment of the student's needs; and (5) the IEP's goals and objectives were vague and immeasurable (Answer Ex. 2 at p. 2). The parent requested that an impartial hearing officer "order the [district] to provide payment for [the student] to attend a private school for September 2008 and ABA services at home to compensate for the lack of progress that [the student] made due to the school systems [sic] neglect" (*id.*).

The hearing record indicates that the parent's May 12, 2008 due process complaint notice was resolved by a resolution agreement dated June 4, 2008 (Dist. Ex. 9; see 20 U.S.C. § 1415[f][1][B]; 34 C.F.R. § 300.510; 8 NYCRR 200.5[j][2]). The parties' June 4, 2008 resolution agreement set forth that the district and the parent agreed that 10 hours per week of home-based SETSS would be added beginning June 2008 and that such agreement was "the complete settlement of all claims" contained in the parent's impartial hearing request (Dist. Ex. 9 at pp. 1, 2).

The hearing record reflects that a behavior support plan was initiated in October 2008 to decrease the student's disruptive behaviors of yelling, touching others, and "silly talk" to gain attention of staff members (Tr. p. 14; Dist. Ex. 3). The behavior support plan identified the proactive strategies and supports to use with the student and when they should be used, specific instructions on the "interventions" to be used when the student exhibited the inappropriate behaviors, and the criteria for termination of the behavior support plan (Dist. Ex. 3).

The hearing record includes an IEP dated November 21, 2008, for the one year period December 15, 2008 to December 15, 2009 (Dist. Ex. 2 at pp. 1-2). The November 2008 IEP indicated that annual review attendees included the student's mother and grandmother, the student's special education classroom teacher who was also the district representative, the student's speech-language pathologist, a vocational education teacher, and a "QSAC" clinical supervisor (*id.* at p. 2).<sup>6</sup> The hearing record reflects that the assistant principal of the student's school also attended the November 2008 CSE meeting, but did not sign in at the time of the meeting, and that two of the November 2008 CSE members may have appeared by telephone (Tr. p. 22-24; see also Dist. Ex. 2 at p. 3). The resultant November 2008 IEP indicated that for the 2008-09 school year, the CSE recommended a 12-month program in a 6:1+1 special class in a specialized school within district 75, with related services of individual and small group speech-language therapy, individual PT, individual OT, and counseling in a small group (Dist. Ex. 2 at p. 19).<sup>7</sup> The November 2008 IEP also indicated that the CSE recommended termination

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<sup>6</sup> "QSAC" is identified in the hearing record as the agency that provided the student with home-based SETSS (see Parent Exs. E; F).

<sup>7</sup> The November 2008 IEP introduced into evidence by the district at the impartial hearing contained present

of the student's special transportation paraprofessional (id.). In addition, the November 2008 IEP indicated that the CSE recommended adapted physical education for the student and participation in alternative assessment (id. at pp. 1, 19). Additionally, the IEP indicated that the student would be assessed using the ABLLS and a social skills assessment (id. at p. 19).<sup>8</sup> The November 2008 IEP further indicated that the student would participate in lunch, assemblies, and trips with general education students (id.).

The district sent the parent a copy of the November 2008 IEP under cover of a notice dated December 5, 2008 (Dist. Ex. 2 at p. 2; see also Dist. Ex. 4). The December 5, 2008 notice indicated that if the parent had questions about the IEP recommendations made at the student's November 2008 annual review meeting, the CSE chairperson would meet with her (Dist. Ex. 4 at p. 1). Additionally, the notice explained the parent's right to request a review by the CSE, mediation, or impartial hearing (id.). The hearing record also reflects that the district had provided the parent with a "notice of parental rights" at or about the time of the November 2008 CSE meeting (id. at p. 3).

A December 19, 2008 quarterly educational progress note from the student's home-based SETSS provider indicated that the student received 10 hours per week of SETSS, initiated in September 2008 (Parent Ex. E at p. 1). The student was described as displaying "great joy" by communicating with neighbors (id.). Although he had no social contact with children in his community, the progress note reflected that two months prior, the student began attending a recreational center weekly where he interacted with other children (id.). The student continued to display delays in self-help skills such as tying his shoes, zipping, and buttoning (id.). He "toe walked" and frequently exhibited verbal scripts, body gestures and flipped the pages of books for sensory purposes (id.). According to the SETSS provider, the student had recently begun spitting to escape/avoid tasks and had also begun yelling while people were talking around him (id.). Frequent prompting was necessary for the student to engage in activities (id.). The report noted that the student had begun to show interest in playing a card game, which helped him to generalize numbers and colors (id.). Although the student's communicative language was described as "improved," the progress note indicated the student required continued programming to articulate words, express feeling/emotions, and to communicate using phrases/sentences (id.). The student was able to identify colors, letters, shapes, and answered some "wh" questions (id.). He displayed delays in receptive/expressive communication skills, identifying basic sight words, and adding/subtracting single digit numbers (id.). The progress report described the student as friendly and interested in meeting new people and children (id.). When prompted, the student would initiate conversations and ask people their name, shake their

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levels of performance as well as annual goals and short-term objectives for the student's home-based SETSS (see Dist. Ex. 2; see also Tr. p. 106). At the impartial hearing, the parties agreed that the SETSS annual goals and short-term objectives were not a part of the November 2008 IEP but were given to the student's classroom teacher by the SETSS provider for the purpose of communication between the teacher and the home-based provider (Tr. pp. 24-29).

<sup>8</sup> The hearing record reflects that "ABLLS" stands for the "[A]ssessment of [B]asic [L]anguage and [L]earning [S]kills" (Tr. p. 12). Testimony by the district's unit coordinator indicated that the ABLLS assesses "anything from text and grammar, play and leisure, social interactions, group instruction, classroom routines and also reading and math, verbal requests, motor imitation, receptive language and visual performance; a couple other areas as well" (id.).

hand, and state, "[h]ave a nice day" (id.). The progress report included annual goals and short-term objectives that addressed graphomotor imitation and receptive phonics identification (id. at p. 2).

A March 30, 2009 quarterly educational progress note from the student's home-based SETSS provider stated that the student had been receiving five hours per week of SETSS since September 2008<sup>9</sup> (Parent Ex. F at p. 1). At the time of the March 2009 progress note, the student was working on various "programs" including emotions, social responses, cutting, answering various "wh" questions, sequencing numbers, receptively identifying attributes, receptively telling time, and expressively identifying actions (id.). The progress report indicated that the student had acquired 83 short-term objectives, which was an increase of 27 objectives since the December 2008 progress report (id. at pp. 1-4). Within the social/emotional domain, the student exhibited eye contact but frequently gazed off and stared, requiring redirection and prompting to be refocused (id. at p. 1). The report indicated that the student's aggressive behavior had increased and the student had started to kick people including his mother (id.). He continued to spit and flip pages for self-stimulating purposes (id.). Within the communication domain, the student was described as a "very communicative person when it comes to neighbors, strangers and providers," although he lacked receptive/expressive communication skills (id.). The student knew a few sight words and could read the calendar with verbal and physical prompting (id.). Deficits were noted in decoding by analogy (id.). Although the report indicated the student liked to talk, he lacked articulation and proper social responses, and repeated prior conversations heard in school and at home (id.).

By due process complaint notice dated May 11, 2009, the parent requested an impartial hearing (Dist. Ex. 1). The parent's May 11, 2009 due process complaint notice repeated verbatim many of the allegations raised in her May 12, 2008 due process complaint notice, including her allegations with respect to the February 12 and June 22, 2007 CSE meetings and the specific allegations regarding the "proposed IEP" and prior school placement (compare Dist. Ex. 1 at pp. 1-2, with Answer Ex. 2 at pp. 1-2). The only new allegations raised in the parent's May 11, 2009 due process complaint notice related to the March 19, 2008 mediation agreement (Dist. Ex. 1 at p. 1). Specifically, the parent alleged that the CSE never met and did not put discrete trial teaching 2-3 times per week on the IEP, consistent with the terms in the mediation agreement (id.). The parent further contended that she did not know if the student had ever received any discrete trial teaching (id.). The parent further alleged that the student's "proposed IEP" had "several discrepancies" and specifically stated the same alleged deficiencies that she had enumerated in her May 11, 2008 due process complaint notice (compare Dist. Ex. 1 at p. 2, with Answer Ex. 2 at p. 2). The parent requested that an impartial hearing officer order the district to provide payment for the student to attend a private school for September 2009 and ABA services at home "to compensate for the lack of progress that [the student] made due to the school system's neglect" (Dist. Ex. 1 at p. 2).

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<sup>9</sup> The hearing record does not indicate whether the statement that the student was receiving five hours per week of service was a typographical error or whether he had been receiving fewer services than the 10 hours per week of services referenced in the December 2008 quarterly report and provided for in the June 4, 2008 resolution agreement (see Dist. Ex. 9; Parent Ex. E).

The impartial hearing took place on July 28, 2009. The impartial hearing officer rendered a decision dated August 19, 2009 (IHO Decision at p. 8). The impartial hearing officer found that the district "satisfied its burden of proving the appropriateness of [the student's] educational program" and denied the parent's request for placement in a private school and home-based ABA services (id. at p. 7). In particular, the impartial hearing officer found that the student's program was "consistent with the recommendations" provided in the student's private comprehensive assessment report evaluation completed in September and October 2006 (id., see Dist. Ex. 7). The impartial hearing officer also concluded that the student had made progress in reading and math, although not at the rate the parent would like to see; that he had made progress in language and in attending through the use of a behavior support plan; and that he had made progress in his "adaptive living skills" (IHO Decision at p. 7). With respect to the student's home-based SETSS, the impartial hearing officer noted that the parent testified that the SETSS provided little benefit, "since the student was tired at the end of his long school day" (id.). The impartial hearing officer further found that the parent had "expressed valid concerns about the absence of goals for telling time, counting money, and learning to read through phonics," and that the parent had "also expressed concern about [the student's] inability to write his address or telephone number" (id.). The impartial hearing officer noted that the district had acknowledged that the student was due for a triennial reevaluation by September 2009 and advised that this evaluation "should include specific recommendations as to what are appropriate reading, writing and math goals" for the student (id. at pp. 6, 7).<sup>10</sup>

On the basis of her findings, the impartial hearing officer ordered that: (1) the parent's request for placement in a private school, and for home-based ABA services be denied; (2) the CSE "conduct a complete re-evaluation of [the student] by September 30, 2009, including, at a minimum, psychological and educational testing" and that the evaluation "include specific recommendations for appropriate reading, writing and math goals," and (3) the CSE "meet by October 15, 2009, to review the results of the evaluation, and to review [the student's] IEP goals" (IHO Decision at p. 8)

The parent, appearing pro se, appeals and contends that the district schools the student attended from September 2002 through 2007, did not "touch academic subjects" and "never made" an FBA or BIP. The parent asserts that the student was denied an appropriate education from that school as he was not taught academic subjects. The parent also alleges that the student's subsequent placement at the district's middle school the student was assigned to attend from September 2007 through the date of the impartial hearing involved "only teaching a very limited amount of academic subjects." The parent requests that the student be placed "in a private school with more academic subjects" in order "to make [] up for all the years he was denied academic subjects." The parent further alleges that the impartial hearing officer erred in finding that the student's program during the 2008-09 school year was appropriate. The parent contends that there is no documentary evidence that the student is receiving ABA or discrete trial teaching and that documentary evidence in the hearing record suggests that the student is not

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<sup>10</sup> The impartial hearing officer did not address the parent's claims relating to the absence of an additional parent member at IEP meetings, the conducting of an FBA and the preparation of a BIP, the appropriateness of the IEPs' present levels of performance, and the contention that the annual goals and short-term objectives were "vague and immeasurable" (see Dist. Ex. 1 at p. 2). The impartial hearing officer only addressed the parent's claims relating to the 2008-09 school year.

receiving ABA and/or is just receiving instruction in the TEACCH program. The parent also asserts that she asked the student's current school for records of discrete trial teaching and ABA and did not receive them prior to the impartial hearing. The parent disagrees with the amount of progress testified to by the district's witness and asserts that she does not believe that the student is receiving ABA, based on his "minimal progress in his school work." The parent also contends that medical documentation and the student's 2006 private assessment support the student's need for ABA and that the student's prior district school placement agreed that he would be taught with ABA. The parent further alleges that the student did make "some progress" with home-based SETSS and references program reports she submitted into evidence.

Additionally, among other things, the parent specifically asserts that: (1) the parties did not meet as provided for by the March 19, 2008 mediation agreement and, further, that the CSE did not meet and amend the student's IEP to include the provisions of the mediation agreement with respect to the student's receipt of discrete trial teaching; (2) the assistant principal, who was a member of the November 2008 CSE forgot to sign the student's IEP; (3) there were no additional parent members at the district's "annual reviews;" (4) IEP goals, including those prior to September 2007, were "vague and immeasurable;" (5) the district changed the student's IEP prior to the impartial hearing without notifying the parent; (6) the November 2008 IEP did not include goals from the student's home-based SETSS; and (7) the student did not receive the speech-language therapy to which he was entitled by his IEP. The parent also contends that the impartial hearing officer "was only interested in the current program, which was 10 months," but that "[a]ccording to the parents rights, the [impartial] [h]earing [o]fficer should have went back two (2) years." The parent states that the student is five to six years behind academically and because of this, requests that the student be placed in a private school and receive "extra tutoring at home."

The district answered the parent's petition, contending that the impartial hearing officer's decision was correct that the district provided the student with a free appropriate public education (FAPE)<sup>11</sup> for the 2008-09 school year. The district asserts that: (1) the November 2008 CSE was duly constituted; (2) the CSE reviewed sufficient documents; (3) the student's teacher drafted appropriate, measurable annual goals and short-term objectives and discussed them with the CSE members, including the parent; (4) the CSE determined an appropriate program; and (5) the recommended program was consistent with the parent's 2006 private comprehensive assessment report evaluation. The district asserts further that although the impartial hearing officer did not address the parent's concerns with respect to the 2007-08 school year, the parent has failed to demonstrate that the student was denied a FAPE during that school year such as to warrant compensatory education; that the parent has not established an entitlement to compensatory services; and that the parent is not seeking compensatory services

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<sup>11</sup> The term "free appropriate public education" means special education and related services that--  
(A) have been provided at public expense, under public supervision and direction, and without charge;  
(B) meet the standards of the State educational agency;  
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;  
and  
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.  
(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

but an educational program. Lastly, the district alleges that although the impartial hearing officer did not address the parent's concerns with respect to the 2006-07 school year, the parent's claims for that school year are barred by the statute of limitations.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; 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] ); Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). 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 Second Circuit Court of Appeals has viewed compensatory education as instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It may be awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 2008 WL 3474735, at \*1 [2d Cir. Aug. 14, 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). While compensatory education is a remedy that is available to students who are no longer eligible for instruction, State Review Officers have awarded "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (see Newington, 546 F.3d at 123 [stating "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and we have held compensatory education is an available option under the Act to make up for denial of a free and appropriate public education"]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to student's under the age of twenty-one]; Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of the Bd. of Educ., Appeal No. 09-054; Application of a Student with a Disability, Appeal No. 09-025; Application of the Bd. of Educ., Appeal No. 08-060; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054.

In 2007, 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 statute took effect for impartial hearings commenced on or after October 14, 2007 (L 2007, ch. 583, § 3); therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

The district has not appealed the impartial hearing officer's order that the CSE conduct a complete triennial reevaluation of the student by September 30, 2009, including, at a minimum, psychological and educational testing; that such evaluation "include specific recommendations for appropriate reading, writing and math goals;" and that the CSE meet by October 15, 2009, to review the results of the evaluation and to review the student's IEP goals (see IHO Decision at p. 8). Therefore, that portion of the impartial hearing officer's determination is final and binding upon the parties and will not be reviewed on appeal (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Turning to the parent's appeal, at the outset, I will address the parent's contentions raised for the first time in her petition that: (1) the assistant principal, who was a member of the November 2008 annual review CSE, forgot to sign the IEP, (2) the district changed the student's November 2008 IEP without notifying the parent, (3) the November 2008 IEP did not include goals relative to the student's home-based SETSS; and (4) the student did not receive the speech-language therapy to which he was entitled by his IEP. The parent's May 11, 2009 due process complaint notice did not raise any of these issues (Dist. Ex. 1). Moreover, while there was some testimony relating to these issues at the impartial hearing, I note that the district did not agree that such areas were or should be a proper subject of the impartial hearing. Moreover, the impartial hearing officer did not address any of these issues in her decision. 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 is amended prior to the impartial hearing per permission given by the 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]; 8 NYCRR 200.5[i][7][b]). I find that these contentions, which are raised for the first time on appeal, are outside the scope of my review and therefore, I will not consider them (see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at \*9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at \*6-\*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal Nos. 09-008 & 09-010; Application of the Dep't of Educ., Appeal No. 08-122; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Student with a Disability, Appeal No. 08-008; Application of a Child with a Disability, Appeal No. 07-122; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-008; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 05-080;

Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024).

Next, regarding the parent's allegations relative to prior school years, I have reviewed the parent's prior May 12, 2008 due process complaint notice (Answer Ex. 2), the resolution agreement dated June 4, 2008 that addressed the claims raised in the May 12, 2008 due process complaint notice (Dist. Ex. 9), and the parent's May 11, 2009 due process complaint notice that is at issue on appeal (Dist. Ex. 1). I find that the parent's claims raised on appeal that she previously raised in her May 12, 2008 due process complaint notice regarding prior school years and IEPs are precluded by virtue of the parties' June 4, 2008 resolution agreement because such resolution agreement was in "complete settlement of all claims" raised in that impartial hearing request (Dist. Ex. 9 at p. 2; see 8 NYCRR 200.5[j][2][iv]; see also 20 U.S.C. § 1415[f][1][B]; 34 C.F.R. § 300.510[d]). State regulations provide that "if, during the resolution process, the parent and school district reach an agreement to resolve the complaint, the parties shall execute a legally binding agreement that is signed by both the parent and a representative of the school district," and further that "such agreement shall be enforceable in any State court of competent jurisdiction or in a district court of the United States" (8 NYCRR 200.5[j][2][iv]). Here, the parties entered into a resolution agreement resolving the claims raised in the parent's May 12, 2008 due process complaint notice relative to prior school years that the parent attempts to raise again in her nearly identical May 11, 2009 due process complaint notice that is at issue in this case and on appeal (see Dist. Exs. 1; 9; Answer Ex. 2). State regulations provide that the resolution agreements are "legally binding" and may be enforced in a State or federal district court (20 USC § 1415[f][1][B][iii]; 34 C.F.R. § 300.510[d][2]; Educ. Law § 4404[b]; 8 NYCRR 200.5[j][2][iv]).

Therefore, the parent's claims relating to (1) the instruction the student received at the prior district school he attended from 2002 through September 2007; (2) the adequacy of the goals in the student's IEPs during those years, (3) the February 12 and June 22, 2007 IEP meetings and the district's educational placement recommendations made at those meetings; (4) the adequacy of the FBAs and BIPs; and (5) the student's initial placement during the 2007-08 school year at his current district school and his instruction and programming during that school year, were resolved by the resolution agreement and will not be reviewed here (compare Dist. Ex. 1, with Answer Ex. 2).

Moreover, there is no authority for the filing of multiple due process complaint notices on the same issue. To allow parties to file multiple due process complaint notices on the same issues would undermine the interests of judicial economy, create unnecessary duplication of time, expense, witnesses, exhibits and other resources, and place an unwarranted burden on families and school districts (see Application of a Student with a Disability, Appeal No. 08-125; Application of a Student with a Disability, Appeal No. 08-076; Application of a Child with a Disability, Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 04-061). Permitting multiple due process complaint notices on the same issue is also inconsistent with the extensive due process provisions of the IDEA that are intended to provide the parties with an inexpensive and expeditious method for resolving disputes (see generally Does v. Mills, 2005 WL 900620, at \*8 [S.D.N.Y. April 18, 2005] [The IDEA contemplates and concurrent federal and State regulations have been enacted relating to the "efficient, expeditious administration of IDEA benefits"]); Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child

with a Disability, Appeal No. 03-018; Application of a Child with a Disability, Appeal No. 97-11).

Based on the above, the parent's claims relating to the school years prior to the 2008-09 school year reviewed by the impartial hearing officer, to the extent they are raised on appeal, are dismissed.

Next, the parent alleged in her March 11, 2009 due process complaint notice and alleges on appeal that the district did not comply with a March 19, 2008 mediation agreement. The district denies non-compliance with the terms of the mediation agreement (Ans. ¶ 4). The parent concedes in her petition that a mediation agreement is not enforceable at an impartial hearing. Federal and State regulations provide that "all discussions that occurred during the mediation process shall remain confidential and may not be used as evidence in any subsequent due process hearing" and that a written, signed mediation agreement is enforceable in any State court of competent jurisdiction or in a district court of the United States (20 U.S.C. 1415[e][1][F][iii]; 34 C.F.R. § 300.506[b][6],[7]; Educ. Law § 4404-a[5]; 8 NYCRR 200.5[h][1][iv]). Therefore, this claim is outside of the scope of my review.

I next address the parent's assertions with respect to the student's November 2008 IEP and the student's 2008-09 program resulting from that IEP.<sup>12</sup> The parent asserted in her May 2009 due process complaint notice and asserts in her appeal that there was no parent member present at that November 2008 CSE meeting. The district asserts that all members required by the IDEA were present at the annual review. The impartial hearing officer did not address this issue in her decision.

Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.344), New York State law requires the presence of an additional parent member on the committee that formulates a student's IEP (Educ. Law § 4402[1][b][1][a][viii]; 8 NYCRR 200.3[a][1][viii]; see R.R. and D.R. v. Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at \*8 [S.D.N.Y. May 15, 2009]; Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-105; Application of the Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). New York State law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a][viii]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]). However, an additional parent member is not a required member of a subcommittee on special education (see Educ. Law § 4402[1][d]; 8 NYCRR 200.3[c][2]).

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<sup>12</sup> Although the May 2009 due process complaint notice asserts various deficiencies with the "proposed IEP," it does not specify which IEP the parent is referring to (Dist. Ex.1 at p. 2). For purposes of this decision, I have reviewed the parent's claims relative to the November 2008 IEP.

In this case, the hearing record indicates that an additional parent member did not attend the November 2008 CSE meeting and the IEP indicated that it was an annual review (Dist. Ex. 2 at p. 2; see also Tr. pp. 13, 87, 104, 117).<sup>13</sup> Furthermore, there is no parental waiver of the additional parent member contained in the hearing record. While the lack of an additional parent member, absent a proper waiver, is a procedural error and contrary to State law and regulations, I am not persuaded by the evidence in the hearing record in this case that the absence of an additional parent member was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, 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]; E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419). The parent does not allege that the absence of an additional parent member at the November 2008 CSE meeting was a procedural error that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits. I note further that the parent has made no claim that the absence of the additional parent member was responsible for, or the cause of, any particular defect in the November 2008 IEP. Moreover, the parent testified that she was able to participate in the CSE meeting, that she spoke "a little bit" about the student's annual goals and expressed her concerns relative to them, that the district listened to her, and that the district "always listens" (Tr. pp. 97-98).

I will next address the parent's contention in her May 2009 due process complaint notice and raised on appeal that the annual goals set out in the November 2008 IEP were "vague and immeasurable." The district contends that the goals were appropriate and measurable. The impartial hearing officer did not address this issue in her decision. An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). The hearing record shows that student's November 2008 IEP contained annual goals and corresponding short-term objectives specific to the student's multiple deficit areas that were consistent with the student's needs as identified in the present levels of performance and addressed his deficits in math, reading, vocational education, handwriting/fine motor, communication, self management/ADL, social/emotional and play skills, computer use, and gross motor and physical fitness (see District Ex. 2 at pp. 9-15). Upon a careful review of the hearing record, I find that the annual goals and short-term objectives in the November 2008 IEP were adequately specific and measurable (see generally M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]).

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<sup>13</sup> The November 2008 IEP did not indicate whether it was developed by a full CSE or a subcommittee on special education.

I will next address the parent's contentions regarding the student's educational program for the 2008-09 school year. For the reasons discussed below, I find that, based on my review, the student's program for the 2008-09 school year was appropriate.<sup>14</sup>

The hearing record demonstrates that the student's November 2008 IEP included recommendations that were made in the 2006 private comprehensive assessment report obtained by the parent, and further reflects identification of the student's needs as determined from the results of administration of the ABLLS. Consistent with the recommendations in the private 2006 comprehensive evaluation report, the student's November 2008 IEP reflected that the CSE recommended that the student receive 12-month programming in a 6:1+1 special class in a specialized school within district 75; related services of individual speech-language therapy two times per week for 30 minutes as well as in a small group (2:1) one time per week for 30 minutes, individual PT two times per week for 30 minutes, individual OT two times per week for 30 minutes, and counseling in a small group (3:1) one time per week for 30 minutes (Dist. Ex. 2 at pp. 1, 19). In addition, the CSE recommended adapted physical education (*id.* at p. 1). The CSE also recommended that the student participate in alternative assessment because he was unable to participate in the general curriculum, and indicated that he would be assessed using the ABLLS and social skills assessment (*id.* at p. 19). The November 2008 IEP further noted that the student would be able to participate in lunch, assemblies, and trips with general education students (*id.*).

The November 2008 IEP indicated that the student was assessed using the ABLLS (Tr. p. 12; Dist. Ex. 2 at p. 4). Although the instructional levels for decoding, reading comprehension, listening comprehension, writing, computation, and problem solving were noted as "AGLI," which was not defined in the hearing record, the description of the student's present academic performance and learning characteristics was clearly detailed (*see* Tr. p. 36; Dist. Ex. 2 at p. 4). The November 2008 IEP indicated that the student could count objects, but had difficulty with the concept of addition (Dist. Ex. 2 at p. 4). The student had a sight word vocabulary of approximately 30 words and could write all upper and lower case letters (*id.*). The student was described as fairly independent in the classroom (*id.*). He often responded to questions quickly, but incorrectly due to his speed of responding (*id.*). The November 2008 IEP indicated that the student exhibited readiness skills in reading and math as measured by a computer assessment program called "Stages," (*id.*). The November 2008 IEP further reflected that the student exhibited weakness in spatial concepts such as "above/below" (*id.*). The student was able to initiate and participate in multiple verbal exchanges, although he required a lot of repetition and redirection to stay on task and topic (*id.* at p. 5). Socially, the IEP reflected that the student often engaged adults in social language and made statements to peers (*id.* at p. 7). The November 2008 IEP indicated that the student was able to complete some simple activities of daily living (ADL), such as washing his hands and putting on his jacket, but he displayed difficulty with zipping (*id.* at p. 8). Regarding the student's gross motor skills, the IEP reflected that he walked with a prominent tiptoe and wide base and negotiated stairs in a reciprocal pattern (*id.*). His major joints were described as "moveable" and standing balance was described as "fair" (*id.*). The November 2008 IEP indicated that in adapted physical education, the student

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<sup>14</sup> I note that the parent requests that the student be placed "in a private school with more academic subjects." The parent has not requested that the student be placed at a specific private school nor does she seek funding for the placement of the student at any such school.

demonstrated very good gross motor and manipulative skills, as well as agility and coordination, strength, flexibility, and endurance (id.).

The November 2008 IEP further reflected that the student's academic management needs would be met in a small structured class with a classroom paraprofessional, and by related services of speech-language therapy, OT, PT, and counseling (Dist. Ex. 2 at p. 4). Consistent with the description of his academic performance and learning characteristics as discussed above, the November 2008 IEP indicated that the student would learn to use a calculator to assist him with his difficulty with the concept of addition (id.). To address his sight word vocabulary in reading comprehension, the student would use the "Edmark Reading Program Level 1" (id.).<sup>15</sup> The student would practice writing upper and lowercase letters using the capital "Printing Power" book from the "Handwriting Without Tears" program (id.). To address the student's need for increased independence, the student would complete classroom chores (id.). To address the student's ability to respond to questions, the student would learn to appropriately respond to "wh" questions (id.). The November 2008 IEP noted that the student required repetition and redirection to stay on task and topic when participating in verbal exchanges (id. at p. 5). The November 2008 IEP indicated that the student required verbal praise, positive reinforcement, and a small and structured classroom environment to address his social/emotional management needs (id. at p. 7). The IEP reflected that he also needed to strengthen his social ability by asking and responding to social questions from peers (id.). The IEP indicated that the student's behavior required "highly intensive supervision" and that a behavioral intervention plan (BIP) was developed (id.). In regard to PT, the student needed to work on gross motor skills such as "jumping over" (id. at p. 8). In adapted physical education, the student needed to improve his core body strength (id.). I note also that these recommended program elements were consistent with, and reflected, the student's needs at the time of the November 2008 CSE meeting (see Dist. Exs. 7; 8; Parent Ex. D).

Regarding the classroom that the student attended for the 2008-09 school year, the district's unit coordinator at the school testified that in addition to the teacher, there were two paraprofessionals in the classroom (one of these paraprofessionals was assigned to another student), for a total of three adults (Tr. p. 54). She further testified that small group student to staff ratios in the class were never more than 2:1 or 3:1 (id.). The unit coordinator reported that the student functioned "right in the middle" of the class and that all of the students in the class had IEPs (Tr. pp. 17, 55-56). She further testified that during math, the entire class would be working on their individualized math goals (Tr. p. 56). She described the student as "very social" and able to verbally request things (Tr. p. 17). Although the student displayed difficulty attending to work such as reading and math, she testified that he fit with the other students in his class (id.). The unit coordinator's testimony indicated that the student was appropriately placed, his needs were being met in his classroom, and that he could continue to make progress in his current setting (Tr. p. 18).

The parent contends that there is no documentary evidence in the hearing record suggesting that the student was receiving ABA or discrete trial teaching in his class during the 2008-09 school year. I find that the hearing record shows that the student was receiving such

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<sup>15</sup> The hearing record reflects that the "Edmark Reading Program" is a sequential, repetitive sight word approach that does not teach spelling (Tr. p. 30).

instruction in his classroom placement. Testimony by the district's unit coordinator indicated that the student's class was an ABA classroom, where ABA was incorporated in the curriculum throughout the day (Tr. pp. 10-11, 15). Discrete trials were provided for one hour, three times per week functioning on the student's goals (Tr. pp.10-1, 47). The unit coordinator explained that ABA involves not only discrete trials, but also behavior management and a reinforcement system that was incorporated into the student's program (Tr. p. 15). She further testified that at the beginning of the 2008-09 school year, the classroom conducted a reinforcement inventory with parent input to come up with different ideas of what the student "really like[d]" (*id.*).

In addition, the unit coordinator testified regarding the classroom that it was set up utilizing a TEACCH structure, whereby each student had an individual schedule that allowed the student to know the flow of the day and makes transition easier (Tr. p. 11). The unit coordinator testified that the TEACCH classroom contained an area where the teacher could do individual instruction such as ABA discrete trials, workstations where students independently reviewed (under supervision) and practiced skills already learned, and some opportunity to do group lessons (Tr. pp. 11, 22; 53). She testified that the classroom followed a functional curriculum (Tr. p. 53). Community outings incorporated skills such as looking both ways before crossing the street and practicing communication skills (*id.*). The unit coordinator noted, "it's always about making choices," and she explained how the student's communication skills were targeted during the day (Tr. p. 54).

A review of the hearing record also reflects that the November 2008 IEP indicated that the student's behavior required highly intensive supervision (Dist. Ex. 2 at p. 7). The hearing record includes an articulation form completed by his teacher for the 2008-09 school year (Dist. Ex. 5 at p. 1). Regarding the student's behavior, the articulation form indicated that the student's, inappropriate behaviors were loud vocalizations, screaming, touching others, grabbing others, and defiance at times (*id.*). The teacher indicated on the form that these behaviors were precipitated by the student to gain attention from others or when an undesirable task was presented (*id.*). The student enjoyed rewards involving "Mega blocks," snacks, praise, cars, and a "pop tube" (*id.* at p. 2). The hearing record also includes an October 2008 "behavior support plan"<sup>16</sup> that addressed disruptive behaviors of yelling, touching others, and "silly talk" to gain attention of staff members (Dist. Ex. 3). Proactive strategies and supports included use of a token board throughout the day for the student to earn chosen reinforcement by exhibiting desired behaviors, attention from staff when he was not engaging in disruptive behaviors, and verbal praise (*id.*). Suggested intervention indicated that disruptive behaviors should be ignored by staff; if the student grabbed another student or staff member his hand should be placed on the table without eye contact or verbal language; if the student engaged in disruptive behavior during the delivery of a token, the token should not be given; and no verbal language should be used (*id.*). The criterion for termination of the plan was that the student would engage in no more than one disruptive behavior during the day (*id.*).<sup>17</sup>

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<sup>16</sup> I also note that the hearing record includes additional behavior support plans dated October 2007 and March 2008 (Dist. Ex. 6 at p. 17; Parent Ex. E at p. 18).

<sup>17</sup> The parent does not raise a claim on appeal pertaining to the FBA or BIP developed for the 2008-09 school year (Tr. pp. 82-83).

The parent further asserts that the impartial hearing officer erred in determining that the student had made progress in the district's 2008-09 program. For the reasons set forth below, I agree with the impartial hearing officer that the student made progress during the 2008-09 school year. The annual goals contained in the November 2008 IEP reflected that the student's progress was measured in February and June 2009 by teacher made materials, teacher/provider observations, the ABLLS, or class activities (Dist. Ex. 2 at pp. 9-15). That IEP indicated that the student was "making progress, goal not yet met" for all annual goals (id.). The IEP also noted that it was anticipated the student would meet all of these goals, but that more time was needed to address them (id.). Further, testimony by the unit coordinator indicated that the student did well in cooperation and reinforcement, visual performance, receptive language, motor imitation, vocal imitation, requesting, and labeling (Tr. p. 12). At the same time, the student continued to need improvement in social interactions, reading and math, and play and leisure skills (id.).

The May 2009 articulation form completed by the student's teacher in May 2009 showed that, among other things, in September 2008 the student was working at "level 1 lesson 71" of the print version of the reading Edmark program (Dist. Ex. 5 at p. 3). By May 2009, the student was working at "level 1 lesson 84" (id.). The unit coordinator testified that based on the student's progress within the Edmark Reading Program, the student began with lesson 1 in October/November 2008, and at the time of the impartial hearing, the student had reached lesson 88 (Tr. pp. 45-46). The unit coordinator indicated that each lesson usually included three new words to learn (Tr. p. 46).

The unit coordinator testified that at the time of the November 2008 CSE meeting, the student was functioning at a kindergarten level (Tr. p. 36). She testified that by the end of the 2008-09 school year, the student was still functioning at a kindergarten level in reading and math, but was a " little bit higher" from where he was at the beginning of the school year (id.). Specific to his IEP math goals, the student was able to identify an equal sign, a plus sign and the "clear" buttons on a calculator, and had mastered adding the numbers zero to five with a calculator (Tr. p. 37). In reading, the student had learned 30 new sight words in addition to those he already knew (Tr. p. 38). The unit coordinator testified that while "[t]he student] is a very slow learner ... he is a steady learner " (Tr. p. 18). The unit coordinator also noted that similar to the student's slow rate of learning when worked with individually, he also learned slowly within a group (Tr. p. 55). In regard to the student's discrete trial teaching, the unit coordinator indicated that the student made improvements in visual performance, classroom routine, grammar, and fine motor skill areas (Tr. pp. 47-48).

The hearing record also shows that the student made progress in the area of speech-language. Testimony by the student's speech-language pathologist indicated that since September 2008, she saw the student three times per week to work on the speech-language goals in his IEP that included spatial relations and prepositions and staying on task (Tr. pp. 61-63). She noted that although goal acquisition was slow because he was easily distracted, the student made steady progress (Tr. p. 63). At the time of the impartial hearing, the speech-language pathologist testified that the student had made progress on all of his goals (id.). She testified that the student had achieved a goal regarding spatial relations and pictures, and was working on involving objects in his environment (Tr. pp. 63-64, 68). She further testified that he spontaneously used the concepts of "on," "behind," "under," and "in front of" (Tr. p. 68). The

speech-language pathologist testified that the student's attention to task improved using a token board in the speech room and with the teacher in the classroom, whereby if the student attended and completed his work he received a token on his board (Tr. p. 64). When he received five tokens, the student was given a choice of a number of reinforcing items or activities (*id.*). At the time of the impartial hearing, the student was able to focus on a task for ten minutes with visual and verbal prompts as needed in a structured situation (Tr. p. 68). The speech-language pathologist testified that the student demonstrated progress in his attending abilities because initially, prompts regarding the student's attention were general, but were now more specific and clue oriented (Tr. pp. 68-69). The speech-language pathologist testified that she kept data regarding the student's performance for targeted goals in her session notes so that she knew whether the student was improving or whether there was a need to change the goal (Tr. pp. 64-65). She stated that the student's progress has been "steady, but slow" (Tr. p. 65). The speech-language pathologist testified that she implemented discrete trials to address the student's spatial goals (Tr. p. 69). In the student's group sessions, she often played games that targeted the student's goals (Tr. p. 70). The speech-language pathologist testified that she made sure she had any visual cues needed and that the students in the group played the game together (*id.*). She focused on the student's specific goal as well as on language and social communication skills between the student and his peers, including turn taking, vocabulary, participating in multiple verbal exchanges, initiating appropriately by gaining partners attention, and responding appropriately by staying on topic (*id.*). Regarding the student's progress in speech-language, the parent testified that within the last year the student answered "what," "where," and "why" questions (Tr. pp. 67, 79) and she indicated that she was "happy" the student had speech-language therapy, PT, and OT in school (Tr. p. 78).

Based upon the evidence in the hearing record, I agree with the impartial hearing officer and find that the district's proposed 6:1+1 special education class program and related services provided in the November 21, 2008 IEP met the student's needs during the 2008-09 school year, and were reasonably calculated to confer educational benefits to the student in the LRE (Viola, 414 F. Supp. 2d at 382 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]). I therefore find that the district offered the student a FAPE for the 2008-09 school year.

Having determined that the challenged IEP offered the student a FAPE for the 2008-09 school year, 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).

Lastly, I concur with the order of the impartial hearing officer that a reevaluation of the student should take place. In addition, I will modify the impartial hearing officer's order to include, that as part of the reevaluation and as recommended by the 2006 comprehensive assessment report, consideration be given to conducting an augmentative communication evaluation of the student and to providing parent counseling and training<sup>18</sup> "to assist the family in better understanding the student's profile of strengths and weaknesses, how to further develop his adaptive skills at home, and maintain a consistent approach between home and school" (*see* Dist.

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<sup>18</sup> See 8 NYCRR 200.1(kk).

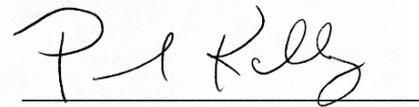
Ex. 7 at pp. 8-10, 15). Moreover, consideration should be given by a CSE to the parent's request for "extra tutoring" for the student.

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

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

**IT IS ORDERED**, that unless the parties otherwise agree, in addition to the evaluations and CSE meeting ordered by the impartial hearing officer, the district shall convene a CSE meeting within 30 days from the date of this decision to consider conducting an augmentative communication evaluation of the student, providing parent counseling and training, and to consider the parent's request for "extra tutoring."

**Dated:**           **Albany, New York**  
**October 28, 2009**

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