



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-141

Application of a STUDENT WITH A DISABILITY, by his parents, 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, Tracy SiligmueLLer, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the McCarton School (McCarton) and for his privately obtained home and community based services for the 2009-10 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that it failed to demonstrate that it had offered an appropriate educational program to the student for that year. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing, the student was attending a 1:1 special education program at McCarton and receiving 12 hours per week of home and community based applied behavior analysis (ABA) services (Tr. pp. 50, 51; see Parent Exs. C-6; D-1; D-10). McCarton 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 hearing record reflects that the student has received diagnoses of an autistic disorder and Landau-Kleffner Syndrome (Tr. pp. 485-87; Parent Exs. A-1 at pp. 1, 3; A-3 at p. 67). The student's IQ is judged to be "low" and he demonstrates communication and motor delays (Tr. pp. 458, 757; Dist. Ex. 8 at pp. 5, 6). The student has difficulty sustaining attention and engaging in social interaction (Tr. pp. 305, 436, 490-92; Dist. Ex. 8 at p. 5). He demonstrates challenging behaviors including whining/crying, flopping to the floor, and aggression (Dist. Ex. 8 at p. 27; Parent Ex. D-1 at p. 7). The student's eligibility for special education programs and services as a

student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]; see Tr. pp. 11, 31-32).

At age three, the student received a diagnosis of an autistic disorder (Tr. p. 485; Parent Ex. A-1 at pp. 1, 3). He was classified by the district's committee on preschool special education (CPSE) and attended an 8:1+1 special class for preschool (Tr. pp. 487-88). Despite receiving speech-language therapy, the student's language skills began to decline (Tr. p. 487). According to the student's father, the student began to receive private ABA services after school and, later, at the preschool (Tr. pp. 488-89, 579). The student's father reported that in summer 2001, it became clear to the preschool staff as well as to the parents that the preschool was not an appropriate setting for the student and that he required a more behavioral approach to education (Tr. pp. 488-89, 586-87). In November or December 2001, at age four, the student transitioned to a 40 hour per week 1:1 home-based program where he received behavioral therapy, speech-language therapy, and occupational therapy (OT) (Tr. pp. 489, 490). Around that same time, the student reportedly received a diagnosis of Landau-Kleffner Syndrome, in addition to his previous diagnosis of autism (Tr. pp. 485-87; see Parent Ex. A-3 at p. 67). In September 2002, the student began attending a center-based program at McCarton (Tr. pp. 490, 577). In addition, he received home and community based ABA services (Tr. p. 607). The student has continued to attend McCarton and has received home-based ABA services since that time (Tr. pp. 577, 601).

For the 2008-09 school year, McCarton developed an "individual education plan" (McCarton Plan) for the student that included educational goals related to improving expressive and receptive language skills, learning new skills for career development, improving academic skills, improving social and leisure skills, improving activities of daily living, and increasing on-task/attending skills while decreasing challenging behaviors (Parent Ex. D-1 at pp. 1-7).¹ During the 2008-09 school year, the student received individual OT 5 times per week for 45 minutes (Parent Ex. D-6 at p. 1). In addition to educational goals, the McCarton Plan included OT goals related to demonstrating increased frustration tolerance and developing effective self-coping skills; improving motor planning, bilateral coordination, muscle strength and endurance for increased control and stability; increasing fine motor and visual motor skills; developing basic prevocational skills; and increasing independence in activities of daily living (Parent Ex. D-1 at pp. 10-11). The student also received speech-language therapy individually four times per week for 60-minute sessions and one time per week for 60 minutes with a peer and individual support (Parent Ex. D-2 at p. 1). The McCarton Plan included speech and language goals related to improving the student's receptive and expressive language, pragmatic language skills, speech sound production, oral-sensory-motor and feeding skills, and play skills (Parent Ex. D-1 at pp. 12-17). With respect to behavior, the McCarton Plan defined the student's challenging behaviors, which included whining/crying, aggression, and flopping to the ground (id. at pp. 7-8). The McCarton Plan detailed preventative strategies and interventions to be used to prevent or respond to the student's challenging behavior and indicated that the behaviors would be recorded on a daily basis (id. at p. 7). In instances of aggression, the plan indicated that the therapist would give the student a verbal prompt while physically placing his hands down by his side (id.

¹ The staff at McCarton refer to the plan as an "individual education plan" (Parent Ex. B-2). To avoid confusing the McCarton "individual education plan" with the "individualized education program" (IEP) developed by the Committee on Special Education (CSE), I will refer to the McCarton version as the "McCarton Plan."

at p. 8). If the student exhibited a second instance of aggression within one minute, the plan indicated that a non-exclusionary time out would be implemented (id.).

During the course of the 2008-09 school year, the McCarton Plan for the student was reviewed by his McCarton teacher and therapists. In a January 2009 educational progress report, the student's teacher at McCarton indicated that the student required highly individualized instructions based on the principles of ABA to acquire and maintain skills (Parent Ex. D-4 at p. 1; Dist. Ex. 3 at p. 1). According to the teacher, the student's educational program was characterized by fast-paced instruction, frequent repetition, visual support, a predictable routine, a dense schedule of reinforcement, physical guidance, and systematic generalization of acquired skills across people, materials, and environments (Parent Ex. D-4 at p. 1). The teacher stated that the student continued to have difficulty with attention, speech and communication, task engagement, social interaction and behavioral control, which affected the student's daily functioning and learning (id.). The teacher noted that the student exhibited challenging behaviors as a result of his varying functional communication skills (id.). She reported that the prevention strategies and intervention procedures detailed in the student's McCarton Plan were being employed and that during the current evaluation period the student had exhibited a weekly average of 64 instances of aggression, 11 episodes of crying/whining, and 17 instances of flopping to the ground (id.).

In a January 2009 speech-language progress report from McCarton, the student's speech-language therapist indicated that the student's attention to task was affected by external distractions (Parent Ex. D-2 at p. 1). She further indicated that the student exhibited attention seeking behaviors and aggression toward staff, behaviors which interfered with the student's ability to perform and complete tasks (id.). The therapist reported that the student relied heavily on his daily schedule and the structure of routine tasks (id.). She opined that the student benefited from a proactive approach to discussing novel events/activities and that if the student was not prepared for changes in his environment or routine he demonstrated an increase in "behaviors" (id.). The therapist reported that positive verbal praise facilitated the student's task compliance (id.).

According to the student's teachers and speech-language therapist at McCarton, between September 2008 and January 2009, the student mastered objectives relating to the following skills, among others: following written three-step directions; selecting pictures representing emotions; selecting non-examples; selecting pictures of social interactions; labeling an item when told one of its features; identifying obvious problems; attending to structured language-based tasks in a group; demonstrating understanding of specific sequence words (first, then, next, last); maintaining appropriate eye contact during communication; demonstrating appropriate volume during a 5-word utterance; and carrying out two different leisure activities with a peer (Dist. Ex. 2; Parent Exs. D-2 at pp. 2-3; D-4 at pp. 2-4; D-5). The student's occupational therapists reported that although the student had yet to meet his short term objectives, he had demonstrated improvement in his sensory processing skills, ability to attend to table-top activities, gross motor skills, fine motor skills, and visual motor skills (Parent Ex. D-6 at pp. 1-3).

During the 2008-09 school year, the district conducted two observations of the student at McCarton (Dist. Ex. 6; Parent Ex. D-19). The first observation took place on March 10, 2009 and was conducted by a special education teacher from the district (Parent Ex. D-19). The district's special education teacher observed the student during a scheduled break on the treadmill, and in the classroom working on spelling, number identification, and reading tasks (id.). As an initial observation, the district's special education teacher noted that the student transitioned from the treadmill back to the classroom with his teacher without incident (id. at p. 1). Following the student's return to the classroom, the district's special education teacher described the student's performance on a spelling test in which the student complied, with prompting, to his teacher's requests to spell words from his reading text using a keyboard (id.). He was rewarded with a symbolic dollar as part of his token plan (id.). The district's special education teacher further reported that following the spelling test, the student chose a numbers activity and complied when prompted to get a calculator (id.). The district's special education teacher noted that the student made some reversal and inversion errors during the numbers activity, but was able to self-correct with prompts and was rewarded with another dollar (id.). According to the district's special education teacher, following the numbers activity the student was asked to get a box, but instead he stated three times that he wanted a shapes game and began to cry (id.). The McCarton teacher told the student to sit nicely and quietly and showed the student a choice of three snacks that he could work for as a reward (id.). The student chose a desired snack (id.). The district's special education teacher reported that the student then read a list of words in a soft voice with low volume (id.). She noted that the student "miscued three words" and was prompted to self-correct, which he did (id.). The district's special education teacher observed that during the reading activity the student started to rock back and forth and that he was distracted when a timer went off for another student (id.). The McCarton teacher was able to bring the student back to task and when the student completed the lesson he earned his chosen snack reward (id. at pp. 1-2). The student also earned another dollar (id. at p. 2). Subsequently, the student was given a choice of activities and chose to e-mail his mother (id.). The district's special education teacher observed that with prompting from the McCarton teacher, the student wrote what he wanted to say on paper (id.). According to the district's special education teacher, the student then used the written draft to type a message to his mother, typing letter by letter rather than by word grouping or sentence (id.). The district's special education teacher noted that teacher prompts were required throughout the exercise (id.). In addition to observing the student, the district's special education teacher interviewed the student's lead McCarton teacher, who provided her with estimates of the student's level of academic functioning (id.).

A second observation of the student at McCarton was conducted by the district's school psychologist on April 28, 2009 (Dist. Ex. 6). The second observation detailed the student's work with his speech-language therapist, which included a sequencing activity and engaging in conversation (id. at pp. 1-2). Notably, the observation also included a description of several incidents in which the student grabbed the speech-language therapist's arm and was subsequently put in a "hold" by the therapist (Tr. p. 218; Dist. Ex. 6 at p. 2). The psychologist observed that on the way back to the classroom following a bowling activity, the student reportedly grabbed the speech-language therapist's arm (Dist. Ex. 6 at p. 2). The psychologist reported that without saying anything the speech-language therapist seated the student facing the wall, crossed his hands, held his wrists and leaned her body against the student's back, applying pressure (Tr. p.

202; Dist. Ex. 6 at p. 2). The psychologist noted that this procedure was referred to as a "wrap" and that according to the speech-language therapist "on Monday [the student] was wrapped 9 times" (Dist. Ex. 6 at p. 2). The psychologist observed that the student pushed against the speech-language therapist and that she pushed back against him (*id.*). According to the psychologist, the student then bent over and flailed back screeching (*id.*). The psychologist stated that the speech-language therapist eased her touch (*id.*). The student then sat calmly looking at the district's psychologist and the speech-language therapist released him (*id.*). According to the psychologist, the speech-language therapist then showed the student words and asked him to read the words and spell them (*id.*). The student complied (*id.*). The psychologist reported that at snack time the speech-language therapist stated that the student did not get a snack choice and would get an undesirable snack because he had touched her inappropriately (Tr. pp. 218-19; Dist. Ex. 6 at p. 2). The psychologist observed that the student was subsequently "wrapped" again for attempting to grab the speech-language therapist (*id.* at pp. 2-3). The psychologist reported that during the second wrap the student bent over and the speech-language therapist pushed her body against the student (*id.* at p. 3). The psychologist stated that the student put his forehead against the wall and pushed against the speech-language therapist and pinched her arms (*id.*). She noted that the therapist's body weight was keeping the student bent over and that his head was against the wall (Tr. pp. 201-02; Dist. Ex. 6 at p. 3). According to the psychologist after the student was released from the hold, the speech-language therapist showed him cards and asked him to read and spell the words (Dist. Ex. 6 at p. 3).

In a notice dated May 14, 2009, the student's parents were informed that a Committee on Special Education (CSE) review had been scheduled for the student for May 22, 2009 (Dist. Ex. 7). In a letter to the CSE chairperson dated May 14, 2009, the student's mother "reconfirmed" that the student's CSE meeting for the 2009-10 school year was scheduled for June 1, 2009 (Parent Ex. B-4). The student's mother also noted that for the past three years the student's individualized education program (IEP) had been "adjudicated at impartial hearings" (*id.*). She enclosed copies of previous impartial hearing officers' decisions and requested that the district staff who were scheduled to attend the student's CSE meeting read the decisions in advance of the meeting (Tr. pp. 518-19; Parent Ex. B-4).

In preparation for the CSE meeting, the student's McCarton teachers and therapists reviewed the student's progress toward the goals and objectives contained in his 2008-09 McCarton Plan (Tr. pp. 393, 418; Parent Exs. D-8; D-9). McCarton staff indicated that between December 2008 and May 2009, the student had mastered educational objectives related to following directions, requesting information, receptively labeling items, answering "where" questions, spelling words on a computer, quantifying a verbal response, and imitating other students (Parent Ex. D-9 at pp. 1, 2, 4). In addition, the student had mastered speech-language objectives related to demonstrating understanding of specific spatial concepts, sequencing familiar and novel events, using the past tense of regular and irregular verbs, naming an object given defining characteristics, responding to "when" questions, telling sequenced events, demonstrating improved sustained airflow volume, demonstrating the appropriate rate of speech, demonstrating appropriate turn-taking skills, and using appropriate phrases during a game (Parent Ex. D-8).

The CSE convened on June 1, 2009, for a meeting that lasted approximately 5 hours (Tr. pp. 213, 226, 341, 342, 522; Dist. Ex. 8). Present at the meeting were the student's father; the school psychologist, who was also the district representative; a special education teacher from the district; and an additional parent member (Tr. pp. 183-84; Dist. Ex. 8 at p. 2). Participating in the meeting via teleconference were the educational director of McCarton, who was also a clinical psychologist, and the student's speech-language therapist, occupational therapist, and case manager from McCarton (id.). The IEP generated as a result of the June 1, 2009 CSE meeting described the student's present levels of performance taking into account information provided by McCarton, the district, and the student's father (Tr. pp. 184-85, 188, 396-97; compare Dist. Ex. 8, with Dist. Exs. 1; 2; 3; 5; 6; 9; and Parent Exs. B-5; D-2; D-4; D-5; D-6; D-7; D-8; D-9). According to the IEP, the student's word identification and decoding skills were estimated to be at a first grade level (Dist. Ex. 8 at p. 3). The IEP indicated that the student had a fund of 100 sight words and that he could also read c-v-c words with all the short vowels in the medial position (id.). With respect to reading comprehension, the IEP indicated that the student could answer a "who" question after reading 2-3 sentences if he was given a picture cue and provided that the material was familiar (id.). According to the IEP, the student's reading fluency, although somewhat improved, remained "challenging" (id.). The IEP indicated that the student's spelling skills were at an early first grade level, that he could spell 20 sight words and some c-v-c words, and that he was able to self-correct spelling errors or ask for assistance with spelling (id.). The IEP noted that the student's graphomotor skills interfered with his writing (id.). It further noted that the student typed 3-word sentences on familiar topics and that he completed worksheets using a multiple choice format (id.). According to teacher estimate, the student's math skills were at a pre-kindergarten level (id.). The IEP reflected the student's ability to demonstrate 1:1 correspondence up to 5, rote count to 20, and enter numbers up to 30 on a calculator (id.). The IEP noted that the student was able to label coins and dollar bills, but not identify their value and that he could not perform basic math computation or complete simple word problems (id.).

The IEP further indicated that according to the student's McCarton speech-language therapist, the student's receptive language skills had improved; more specifically his ability to understand opposites, subject pronouns, sequencing words, and the sequencing of pictured events in the appropriate order (Dist. Ex. 8 at p. 3). The IEP stated that within structured activities, the student responded to his name by turning his head and making eye contact with the speaker (id.). The IEP noted, however, that the student had difficulty responding to group directed demands and questions (id.). According to the IEP, the student required maximum verbal models, repetition, and visual prompts to engage in reciprocal conversations (id.). The student was working on participating in play activities with peers (id.). The IEP detailed the following academic management needs, demonstrated by the student: a highly structured setting; clear and consistent expectations; visual supports/representations/reinforcement; modeling by the teacher; verbal prompting and redirection; a consistent positive reinforcement schedule; repetition, review and functional application; frequent breaks to improve ability to persevere and attend; material chunked into manageable units; a step-by-step approach to learning; manipulatives to help visualize; systematic generalization of skills across people, materials, settings and contexts; a 1:1 behavior management paraprofessional; and speech-language therapy (id. at p. 4).

According to the IEP, the student's McCarton teacher reported that the student had difficulty with social interactions and due to his varying functional communication skills the student exhibited challenging behaviors such as grabbing, hitting, biting, pinching and kicking, as well as yelling and crying (Dist. Ex. 8 at p. 5). The student's difficulty with attention, speech and communication, and task engagement, as reported by his teacher, were also noted on the IEP (id.). The IEP indicated that the student enjoyed and participated in group work, but that he had difficulty attending for longer periods of time (id.). The IEP noted that although the student did not often initiate interaction with others, he consistently responded to adults and peers when approached (id.). It further noted that the student's spontaneous comments in the context of known group play activities had increased (id.). According to the IEP, the student was able to follow a written leisure schedule (id.). For self-care skills, the student required assistance for thoroughness (id.). The IEP stated that the student's safety awareness was limited due to his distractibility, but that when the setting was familiar the student stayed with his instructor with little prompting (id.). As noted on the IEP, the student's behavior seriously interfered with instruction and required additional adult supervision (id.). The following social/emotional management needs were reflected in the student's IEP: clearly stated classroom routines and rules; visual and verbal supports; positive reinforcement; physical and verbal prompts; redirection; and a behavior management paraprofessional (id.).

The IEP indicated that with respect to health and physical development, the student continued to demonstrate difficulties in sensory processing and delays in gross motor, fine motor, and self-care skills (Dist. Ex. 8 at p. 6). According to the IEP, the student's decreased strength, motor planning, trunk control, and balance continued to interfere with the student's ability to negotiate his environment and complete fine motor tasks (id.). The IEP indicated that the student required OT and adapted physical education (id.).

The IEP further indicated that a behavior intervention plan had been developed for the student (Dist. Ex. 8 at p. 5). The plan, which was attached to the student's IEP, identified the following behaviors as interfering with the student's learning: whining, dropping to the floor, and aggressive behaviors such as touching, grabbing, pinching, and encroaching on someone else's space (id. at p. 27). McCarton indicated that they provided the CSE with their behavior intervention plan, which was reviewed in "tremendous detail" at the CSE meeting (Tr. p. 398). The behavior intervention plan indicated that the student's behavior was expected to change in that he would engage in on task behavior; indicate his wants and needs using words and gestures, without whining; develop increased frustration tolerance; remain seated at his desk when working in the classroom; refrain from dropping to the floor; refrain from acting out in an aggressive manner; and not encroach upon someone else's space (Dist. Ex. 8 at p. 27). According to the behavior intervention plan, when the student became frustrated while trying to communicate, he would be told to slow down and use his words or told "show me what you mean;" when the student dropped to the floor he could be physically picked up and returned to his seat (id.). The behavior intervention plan stated that for dropping to the floor or engaging in aggressive behavior, the student could be redirected to school tasks and positively reinforced for on-task behavior (id.). Additional strategies suggested to address the student's interfering behaviors included showing the student a schedule, clearly stating rules, developing class routines, and positively reinforcing the student throughout the day for on task behaviors (id.). The behavior intervention plan indicated that the following supports would be employed to help

the student change his behavior: a small class setting with a low teacher-to-student ratio (6:1+1); a behavior management paraprofessional; and collaboration between home and school (id.).

The recommended IEP included goals and objectives related to improving the student's word recognition and decoding skills; improving the student's reading comprehension, written expression, math skills, receptive language skills, expressive language skills and speech pragmatics; developing prevocational skills; improving play skills; improving fine motor skills; improving bilateral coordination and muscle strength and endurance; increasing independence in activities of daily living; increasing strength in teacher led aerobic activities; and improving functioning within the classroom environment (Dist. Ex. 8 at pp. 7-23).

Subsequent to the CSE discussion of the student's performance levels and goals and objectives, the district's school psychologist suggested that the student's needs could be met in a 6:1+1 special class with a behavior management paraprofessional (Tr. pp. 214, 536; Dist. Ex. 9 at p. 5; Parent Ex. B-5 at p. 8). The student's father objected to the proposed class ratio, stating that the student required 1:1 instruction (Tr. pp. 536-37; Dist. Ex. 9 at p. 5). Likewise, the educational director from McCarton opined that a 6:1+1 special class would be inappropriate for the student and suggested that in a 6:1+1 class, the student's IEP would be "null" because staff would just be dealing with his behavior (Tr. pp. 259-62, 342-44, 537; Dist. Ex. 9 at p. 5). Despite the parents' objections, the CSE recommended that the student be placed in a 6:1+1 special class in a specialized school with related services of individual speech-language therapy three times per week, speech-language therapy in a dyad two times per week, individual OT five times per week, and a full-time behavior management paraprofessional (Dist. Ex. 8 at p. 26). As noted above, the proposed IEP included a behavior intervention plan that described the student's interfering behaviors, as well as proposed strategies for dealing with the interfering behaviors (id.). The student's need for home and community based services was not discussed at the June 1, 2009 CSE meeting (Tr. pp. 268-69; see Dist. Ex. 9; Parent Ex. B-5).

A final notice of recommendation (FNR) dated June 11, 2009 identified the specific school location for the placement recommended by the June 1, 2009 CSE (Tr. p. 538; Parent Ex. C-2). The FNR also advised the parents that the recommendations would be put into effect if the district "did not hear from [the parents] before June 25, 2009" and advised them of their rights regarding CSE review, mediation, and impartial hearing (Parent Ex. C-2). According to the FNR, a copy of the IEP was also mailed as an attachment (id.).

On June 25, 2009, the student's father visited the proposed district placement along with a board certified behavior analyst (BCBA) who served as a consultant to the parents (Tr. pp. 539, 542, 619; Parent Ex. E-2 at p. 3). After touring the proposed school, meeting with the assistant principal, and observing the two 6:1+1 special classes housed in the school, the BCBA concluded that the district's recommended program was inappropriate for the student (Tr. pp. 621-28, 674-75; Parent Ex. E-2 at pp. 3-6). The BCBA indicated that the student continued to present with significant interfering behaviors and that his educational program continued to require the support of a trained behavior analyst to monitor and intervene when necessary (Parent Ex. E-2 at p. 6; see Tr. p. 629). She noted that the district placement did not have "that type" of staff available (Tr. p. 629). In addition, the BCBA noted that that the student did not yet demonstrate the capacity to learn novel instructional material in a group and stated that the

proposed placement did not include a 1:1 staffing ratio (id.; Parent Ex. E-2 at p. 6). Based on the tour, the student's father also determined that the district's proposed placement was not an appropriate placement for the student (Tr. p. 545). In July 2009, the BCBA observed the student's home and community based program, as well as his program at McCarton, and strongly recommended that the student continue in those programs (Tr. pp. 630-46; Parent Ex. E-2 at pp. 6-18).

On July 1, 2009, the student's mother filed a due process complaint notice wherein she requested an impartial hearing and asserted that the district's proposed placement and program were inappropriate for her son (Parent Ex. C-6). She indicated that the student's father had presented ample documentation to the CSE that the student needed, among other things, to be taught in a 1:1 student to teacher ratio with related home and community based ABA services and that there was no documentation or information to the contrary (id. at p. 1). The student's mother further noted that she had provided CSE representatives with the impartial hearing decision from the 2008-09 school year, which found that the 1:1 instruction at McCarton was appropriate to meet the student's needs (id.). She also noted that the student's father had visited the district's recommended placement and determined that it was not appropriate (id.). As relief, the student's mother requested an order of pendency and reimbursement for her son's tuition at McCarton, as well as reimbursement for the privately obtained related services of speech-language therapy, OT, and home and community based ABA therapy (id. at p. 2).

In a response dated July 16, 2009, the district outlined the student's classification, recommended placement, and asserted that the recommended placement was reasonably calculated to enable the student to obtain meaningful educational benefits (Parent Ex. C-7). On July 28, 2009, the student's mother signed an enrollment contract with McCarton for the 2009-10 school year (Parent Ex. D-10; see Parent Ex. D-17).

The parties proceeded to an impartial hearing on August 14, 2009 that concluded on September 24, 2009, after three hearing dates.² In a decision dated November 5, 2009, the impartial hearing officer first determined that the district failed to offer the student a free appropriate public education (FAPE) (IHO Decision at pp. 8-9).³ The impartial hearing officer determined that the CSE met for five hours without reviewing any psychological or educational evaluations, and that the hearing record demonstrated that the district did not attempt to conduct a psychological or educational evaluation, nor did it request a copy of these evaluations that may have been conducted by McCarton (id. at p. 8). The impartial hearing officer also noted that the district's recommended placement, at the time it was recommended, was on the Commissioner of

² On the first day of the impartial hearing, the parties agreed that the student's pendency placement was at McCarton and included up to 15 hours per week of privately obtained home and community based ABA therapy (Tr. pp. 49-52).

³ 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, 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).

Education's list of "persistently dangerous" schools under the No Child Left Behind (NCLB) Act and no other option was given to the parents (id.).

The impartial hearing officer then determined that the parents failed to demonstrate that McCarton was an appropriate placement for their son. In making her determination, the impartial hearing officer noted that: (1) the parents did not sustain their burden in demonstrating that the student required an intensive 1:1 learning environment in order to receive educational benefits; (2) the 1:1 learning environment at McCarton was not the least restrictive environment (LRE) for the student; (3) the McCarton staff's use of the "wrapping" technique constituted the use of aversives, and as such, was prohibited by State regulations; and, (4) the privately obtained home and community based services were not educational in nature (IHO Decision at pp. 10-14). Finally, the impartial hearing officer determined that equitable considerations did not favor the parents with respect to an award of tuition reimbursement, noting that it was unlikely that the parents would have consented to placing their son in any program that was not a 1:1 placement (id. at pp. 14-15).

The parents appeal, asserting that McCarton is an appropriate placement for their son because it provides a highly structured environment with a lot of repetition and individualized attention in order to learn, and that McCarton staff properly address their son's behavior. The parents further maintain that at the time the district made its recommendation, the proposed placement was listed as a "persistently dangerous" school. The parents also assert that equitable considerations require an award for tuition because they fully cooperated with the district and participated in the CSE process. The parents request that a State Review Officer set aside the impartial hearing officer's decision, find that McCarton and the privately obtained home and community based services are appropriate for their son, and accordingly award reimbursement for both.

In its answer and cross-appeal, the district asserts the affirmative defense that the parents' petition for review should be dismissed as insufficient, because it does not clearly state all of the reasons for challenging the impartial hearing officer's decision. The district also asserts that the parents' memorandum of law contains arguments not raised in the petition, and those arguments should not be addressed by a State Review Officer. The district cross-appeals that part of the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2009-10 school year. Specifically, the district asserts that the impartial hearing officer impermissibly raised *sua sponte* the issue that the CSE did not have proper psychological or educational evaluations of the student during the June 1, 2009 CSE meeting. The district also alleges that the impartial hearing officer's finding with respect to the lack of evaluations is without merit; that the district is not required to conduct evaluations for every IEP review and even if it were, the alleged procedural error did not rise to the level of a deprivation of a FAPE, and that the CSE had sufficient information regarding the student's functioning levels to create an appropriate educational program. The district further asserts that, contrary to the impartial hearing officer's findings, the placement offered to the student was not designated as a persistently dangerous school under the NCLB for the 2009-10 school year.

In addition, the district alleges that the interventions used at McCarton were inappropriate, that McCarton was not the student's LRE, and McCarton did not provide the

necessary related services for the student. The district further notes that the parents' petition makes no arguments concerning the home-based program. Lastly, the district alleges that the impartial hearing officer properly found that the equities weighed against the parents. As relief, the district requests that a State Review Officer dismiss the parents' petition in its entirety, vacate that portion of the impartial hearing officer's determination that found that the district failed to offer the student a FAPE for the 2009-10 school year, and make a determination that the district offered the student a FAPE for the 2009-10 school year.

In their reply and answer to the district's cross-appeal, the parents assert, among other things, that the petition clearly states that they were challenging the impartial hearing officer's determination as to the home and community based services. The parents also reiterate the assertions found in their petition that the impartial hearing officer failed to consider certain record evidence that supports their claims; that McCarton was an appropriate placement for their son; and that equitable considerations do not bar reimbursement.

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 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 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 first address the district's cross-appeal. The district argues that the impartial hearing officer erred to the extent that she found a deprivation of a FAPE based on her determination that the recommended placement was designated a persistently dangerous school under the NCLB during the prior school year. The NCLB does not alter the standard of review in regard to determining whether the student was offered a FAPE under the IDEA (see Fisher v. Stafford Township Bd. of Educ., 2007 WL 674304, at *13 [D.N.J. 2007]; Leighty v. Laurel Sch. Dist., 457 F. Supp. 2d 546, 561 [W.D. Pa. 2006]; Kirby v. Cabell County

Bd. of Educ., 2006 WL 2691435, at *6 [S.D.W.Va. 2006]; see also J.N. v Pittsburgh City Sch. Dist., 536 F. Supp. 2d 564, 576-79 [W.D. Pa. 2008]). As such, the impartial hearing officer erred by finding a deprivation of a FAPE based on NCLB requirements.⁴

Next, I will address the district's contention on cross-appeal that the impartial hearing officer erred by finding a deprivation of a FAPE, in part, on an issue that she raised and decided *sua sponte*. The party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (34 C.F.R. §§ 300.508[b],[d][3], 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7], [j][1][ii]). The parents did not assert in their due process complaint notice that the district failed to conduct a psychological or educational evaluation of the student (Parent Ex. C-6), nor did they seek to amend their due process complaint notice or raise the issue of a lack of evaluations during the impartial hearing. A review of the hearing record shows that the impartial hearing officer questioned both the district's and parents' witnesses regarding whether a psychological evaluation of the student had been conducted and whether an IQ score had been obtained for the student (Tr. pp. 146-47, 165-67, 458-59, 683-84, 730-31, 756-58). The impartial hearing officer then relied on this testimony and the lack of any other evidence indicating that the district conducted or reviewed psychological or educational testing to conclude, among other reasons, that the district failed to offer the student a FAPE (IHO Decision at p. 8). Although an impartial hearing officer has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the impartial hearing officer to raise issues that were not presented by the parties and then base his or her determination on the issues raised *sua sponte*. The impartial hearing officer should have confined her determination to issues raised in the parents' due process complaint notice (see 20 U.S.C. § 1415[c][1], [c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[b], [d][3], 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7], [j][1][ii]; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060). Accordingly, I find that the impartial hearing officer exceeded her jurisdiction by basing her decision, in part, on an issue that she herself raised *sua sponte* at the impartial hearing that was not identified in the parents' due process complaint notice.

Notwithstanding the above finding, the hearing record demonstrates that the June 1, 2009 CSE had adequate information of the student's needs to generate an IEP. The hearing record

⁴ According to district witnesses, the placement offered to the student for the 2009-10 school year occupied a "little wing" of a building that housed five schools (Tr. pp. 78, 80, 279). A school that had been deemed persistently dangerous and that was in the process of being "phased out" was housed in the same building as the school offered to the student (Tr. pp. 80, 283, 291-92). According to the principal of the recommended school, the recommended school had not been designated as persistently dangerous (Tr. p. 283). The principal reported that students in her school arrive on different busses and use a separate entrance (Tr. p. 286). The principal further testified that she had no concerns about safety at the school and she was not aware of any safety incidents at the other schools in the building (Tr. pp. 281, 293-94, 295). The assistant principal testified that she was not aware of any dangerous activities occurring in the building, that monthly safety meetings took place, and that video cameras were being installed throughout the building (Tr. pp. 151, 161-62).

demonstrates that the June 1, 2009 CSE was properly composed and that the student's father, as well as McCarton staff, had the opportunity to participate in the nearly five hour CSE meeting (see 34 C.F.R. § 300.321; 8 NYCRR 200.3; Tr. pp. 213, 217-18, 226, 341-42; Dist. Ex. 8 at p. 2; see also Dist. Ex. 9; Parent Ex. B-5). In addition, all members of the CSE had a copy of the reports being reviewed, as well as a copy of the McCarton Plan (Tr. pp. 189-90). The student's present levels of performance as described in the June 1, 2009 IEP reflect information provided by McCarton, the district, and the student's father (Tr. pp. 184-89; compare Dist. Ex. 8, with Dist. Exs. 1; 2; 3; 5; 6; 9, and Parent Exs. B-5; D-2; D-4; D-5; D-6; D-7; D-8; D-9). The hearing record shows that the goals and objectives contained in the proposed IEP were generated by McCarton staff and discussed in detail by CSE members (Tr. pp. 189, 192, 237-38, 240, 396, 529-34). Moreover, there is no indication in the hearing record that a procedural inadequacy 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]; A.C., 553 F.3d at 172; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

Having found no procedural error that rose to the level of a denial of a FAPE, I now turn to whether the IEP substantively provided the student a FAPE. The parents assert that the student requires 1:1 instruction and the additional home and community based support of ABA therapy. The district contends that the CSE's recommended placement of the student in a 6:1+1 special class with a 1:1 behavior management paraprofessional and related services would have provided the student with a FAPE.

To address the student's academic, attending, and behavioral needs the CSE, over the parents' objections, recommended that the student be placed in a 6:1+1 special class with a 1:1 behavior management paraprofessional (Tr. pp. 214, 272-73; Dist. Ex. 8 at pp. 1, 4, 26). As detailed above, the CSE also identified numerous modifications and accommodations that would have been provided to the student to address his academic management needs (Dist. Ex. 8 at p. 4). The IEP included academic goals related to improving the student's word recognition and decoding skills, reading comprehension, written expression, and math skills (id. at pp. 7-10). The IEP also included goals aimed at developing the student's prevocational skills and increasing his independence in activities of daily living (id. at pp. 17, 21). To address the student's speech-language needs, the CSE recommended that the student receive individual speech-language therapy for three 60-minute sessions per week and speech-language therapy in a dyad for two 60-minute sessions per week (id. at p. 26). The IEP included speech-language goals related to improving the student's receptive and expressive language skills and improving the student's speech pragmatics and social communication skills (id. at pp. 11-16). To address the student's motor delays and sensory processing weaknesses, the CSE recommended that the student receive individual OT for five 45-minute sessions per week (id. at p. 26). The IEP included OT goals related to improving the student's fine motor skills and improving the student's motor planning, bilateral coordination, muscle strength, and endurance (id. at pp. 19-20). The student's IEP also included goals related to improving the student's play skills and a goal for adapted physical education (id. at pp. 18, 22). The hearing record indicates that McCarton staff shared its behavior plan with the June 1, 2009 CSE and that the student's behavior was discussed in detail at the CSE meeting, including the private school's use of a "wrapping technique" (Tr. pp. 206,

398-99, 405-06; Dist. Ex. 9; Parent Ex. B-5). Attached to the June 1, 2009 IEP was a behavior intervention plan, which reflected major elements of the CSE's discussion and detailed the student's interfering behaviors, including whining, dropping to the floor, and aggressive behaviors (Dist. Exs. 8 at p. 27; 9; Parent Ex. B-5). The plan included strategies and supports that would have been employed to help the student change his behavior (Dist. Ex. 8 at p. 27). The plan did not include the "wrapping technique" employed by McCarton, but the district's IEP and behavior intervention plan otherwise adopted numerous behavioral strategies employed by the private school (compare Dist. Ex. 8 at pp. 4, 5, 27, with Parent Ex. B-2 at p. 7).

The hearing record indicates that the district's proposed program employed TEACCH as an instructional strategy/methodology (Tr. p. 88; Parent Ex. E-2 at p. 3).⁵ According to the assistant principal of the recommended program, TEACCH helps children with autism develop independence and promotes communication and socialization skills (Tr. p. 69). The TEACCH classrooms in the recommended district school, as described by the assistant principal, included a group area, as well as a clearly defined 1:1 area and workstation (Tr. p. 88). The assistant principal testified that in the 6:1+1⁶ classroom, 45-minute instruction blocks were divided up into 15-minute periods that could be structured as 1:1 time, workstation or group time, depending how the teacher structured her classroom (Tr. p. 114). The assistant principal reported that the recommended program included the use of color coded baskets with start and finish labels, as well as individualized, color coded schedules (Tr. pp. 88-89). She indicated that students received 1:1 instruction from either the teacher or the educational assistant and noted that when a student had achieved a skill, the student then worked independently in the workstation to maintain the skill (Tr. pp. 118, 132; Parent Ex. E-2 at p. 4).

Moreover, the assistant principal opined that both of the 6:1+1 classes in her school would have been appropriate for the student based on her review of the IEP (Tr. p. 98). She reported that the teachers for both classes had experience working with students with autism and seizure disorders, and that they had experience working with students with significant behavioral difficulties that required constant redirection (Tr. pp. 99, 102).⁷ According to the assistant principal, the teachers in the 6:1+1 classrooms had received "extensive" training in TEACCH and, if requested, would be provided with autism coaches (Tr. pp. 122, 163). The assistant principal indicated that there was no part of the proposed IEP that her staff was not capable of implementing (Tr. p. 120).

Turning to the parents' assertion that the student requires 1:1 instruction, the hearing record shows that the student had been receiving 1:1 instruction for seven years at McCarton and that McCarton staff indicated that the student continued to require 1:1 instruction in order to learn new skills and make meaningful progress (Tr. pp. 303, 686; Parent Ex. D-4 at p. 4).

⁵ TEACCH stands for "Treatment and Education of Autistic and related Communication-handicapped Children" (Parent Ex. E-2 at p. 3).

⁶ The parents' consultant BCBA reported that according to the assistant principal, the class staffing ratios were 6:1+1 but that there was an extra paraprofessional in each class (Parent Ex. E-2 at p. 3).

⁷ The assistant principal further indicated that for summer school, the student would have been placed in class with a certified special education teacher with experience working with students with autism, seizure disorders, and significant behavioral difficulties (Tr. pp. 101-02).

Testimony regarding the student's need for 1:1 instruction focused on the amount of time the student spent engaged in group versus individual instruction and the qualifications of the McCarton staff providing the instruction (Tr. pp. 215-17, 358-362, 440-443, 465-66, 670-73; Dist. Ex. 9 at p. 5; Parent Ex. B-5 at pp. 7-8). The impartial hearing officer found that although McCarton referred to the 1:1 support people at McCarton as "instructors," all of the evidence and testimony at the impartial hearing established that the instructors functioned as paraprofessionals supporting the instruction of a teacher or therapist and that the instructors' 1:1 work was supervised by a teacher (IHO Decision at pp. 10-11). As explained in greater detail below, the hearing record supports the impartial hearing officer's conclusion that because some of the instructors at McCarton were qualified to be teachers does not mean that the student received or needed full time 1:1 instruction by a teacher (id. at p. 11).

The hearing record reflects that the student participated in numerous group instructional activities at McCarton where one staff member would lead the activity and a second staff member would provide the student with support, such as gestural prompts or implementation of the student's behavior plan (Tr. pp. 452-53, 635-36, 664-70, 687-91; Parent Ex. E-2 at pp. 10-13, 14-15). At other times, McCarton staff members would provide instruction to the student under the supervision of the head teacher or a BCBA (see Tr. pp. 362, 374-75, 443-44). The student rotated between instructors throughout the day and teachers and teaching assistants were responsible for collecting data during 1:1 sessions (Tr. pp. 419-20). Although the parents' consultant BCBA reported that the student received 3 hours and 45 minutes of individual academic instruction daily, she later clarified that some of the individual work sessions were conducted in dyads (Tr. pp. 671; Parent Ex. E-2 at pp. 16-17).⁸

The hearing record reflects that the student would have been provided with a similar level of support in the district's recommended program. In the CSE recommended placement, the student would have been taught by a special education teacher with the assistance of a classroom paraprofessional and provided with 1:1 support by a full time behavior management paraprofessional (Tr. pp. 214-15). The assistant principal of the recommended placement reported that there was constant collaboration between the teacher and the classroom paraprofessional, and the school psychologist testified that the behavior management paraprofessional would have been with the student throughout the day in order to deal with behaviors or assist the student with focusing (Tr. pp. 95, 272). The hearing record indicates that the recommended 6:1+1 class included individual instruction and that students' 1:1 therapy sessions were incorporated into their schedules (Tr. pp. 119, 132). The assistant principal testified that to insure students' goals were met during 1:1 instruction, the classroom teacher developed lesson plans based on students' IEPs and objectives for each lesson were written on a data collection sheet (Tr. p. 114). Staff working with the student collected data which was then used to drive instruction (Tr. pp. 115-118; see Dist. Ex. 12). Based on the hearing record, I find

⁸ In the sample daily schedule outlined in the BCBA's report, the BCBA designated certain times of the day as "work (individual)" (Parent Ex. E-2 at pp. 16-17). Based on these designated "work (individual)" times, the BCBA estimated that the student was receiving individual academic instruction for a minimum of 3 hours and 45 minutes daily (Tr. pp. 670-72; Parent Ex. E-2 at pp. 16-17). The BCBA's observation of the student during one of these time periods indicated that the student was working in a small group (dyad) led by the speech-language therapist, playing a game with another student, and participating in a reading group with three other children (Parent Ex. E-2 at pp. 10-15). The student was provided with 1:1 support during these activities (id. at pp. 10-15).

that the district's proposed class including the 1:1 behavior management paraprofessional assigned to the student would have provided the student with the necessary support for instruction. Furthermore, consistent with the impartial hearing officer's findings, the hearing record shows that the district's paraprofessionals would have performed tasks similar to those performed by the instructors at McCarton.

In addition to asserting that the student requires 1:1 instruction, the parents suggest that the student requires the intervention of someone with ABA training to address the student's challenging behaviors (Pet. ¶¶ 21, 22). The director of McCarton testified that the techniques that a crisis intervention person might use, who did not have ABA training, may be more "disinhibiting" to the student (Tr. pp. 335-36). She opined that the student needed a very structured system with a lot of repetition and breaking down of tasks and that data needed to be taken on the student's behaviors (Tr. pp. 336-38). The director testified that in her experience, crisis management paraprofessionals were not ABA trained and she could not be sure that they would know how to appropriately respond to the student's behaviors (Tr. p. 343). The parents' consultant BCBA testified that the student required a great deal of repetition presented in a systematic format that would be consistent with ABA and that the student's behaviors needed to be tracked (Tr. p. 629). She opined that the student had behaviors that required monitoring by someone who was specifically trained in conducting a functional behavioral analysis and preparing and monitoring the student's performance, and in using a behavior intervention plan (Tr. p. 629). Although the district did not identify its proposed placement as an ABA program, the hearing record shows that the district's program would have employed many of the same behavioral strategies and principles that were recommended by McCarton. The student's IEP called for the use of step-by-step instruction, repetition, verbal and physical prompts, positive reinforcement and the systematic generalization of skills across materials, settings and contexts (Dist. Ex. 8 at pp. 4, 5). In addition, the proposed program employed a system of data collection and review and its staff were trained in the development and implementation of behavior intervention plans (Tr. pp. 94-96).

The student's father testified that over the years, the student's aggressive behavior has been highly variable (Tr. pp. 501, 561). As noted above, the parties agree that the June 1, 2009 CSE meeting included extensive discussion regarding the student's interfering behaviors, as well as strategies used to address those behaviors (Tr. pp. 206-11, 398-99, 405-06; Parent Ex. B-5; Dist. Ex. 9). The district's school psychologist testified that based on the CSE's discussion the district created a behavior intervention plan (Tr. p. 212). The district's IEP and behavior intervention plan adopted numerous prevention and intervention strategies used by McCarton; however, it did not include the use of physical restraint (Tr. pp. 399-400, 403-04; compare Dist. Ex. 8 at p. 27, with Parent Ex. D-1 at pp. 7-8). To address the student's whining, the district's plan indicated that the student would be prompted to slow down and use his words or would be told: "Show me what you mean" (Dist. Ex. 8 at p. 27). If these strategies did not work, the behavior intervention plan called for the student to be redirected (id.). If the student dropped to the floor, the district's plan called for the student to be physically picked up and returned to his seat (id.). The behavior intervention plan further indicated that the student could be redirected to school tasks and positively reinforced for on task behavior (id.). Similarly, in response to aggressive behavior, the district's behavior intervention plan indicated that the student should be redirected and positively reinforced for on task behavior (id.). The behavior intervention plan

further called for the use of a schedule as well as clearly stated rules and class routines (id.). The behavior intervention plan indicated that the student should be positively reinforced throughout the day for appropriate behaviors (id.). The student's IEP reflected additional strategies, similar to those employed by McCarton, to help manage the student's behavior including use of visual supports; a consistent, positive reinforcement schedule; and verbal and physical prompts (id. at pp. 4, 5).

In addition to employing the behavior intervention plan, district staff testified that the structure of TEACCH would allow staff to deal with the student's challenging behaviors. The assistant principal testified that TEACCH was a highly structured program but also noted that within TEACCH, staff had the flexibility to change an independent work area to a 1:1 work area and vice versa (Tr. pp. 102, 106). The assistant principal stated that based on the student's IEP, the student benefited from constant refocusing (Tr. pp. 102-03). She suggested that if the student suddenly presented with an aggressive episode he would be in a 1:1 area with his paraprofessional redirecting him in order to de-escalate him (Tr. p. 103). The assistant principal reported that she was told that walking on a treadmill helped the student and that the school would try to do something like that to see if it helped the student (id.). According to the assistant principal, if the student was slowly escalating then staff would have an opportunity to de-escalate him using the strategies contained in the behavior intervention plan (id.). The assistant principal reported that restraint was not used at her school (Tr. p. 104). Knowing that there were instances in the past where staff working with the student felt the need to restrain him, the assistant principal stated that staff at her school would structure an activity for whatever the student's baseline was and then give him the choice of an activity (Tr. pp. 104-05). She indicated that the student's instructional time would gradually be extended (Tr. pp. 104-07). The assistant principal indicated that TEACCH would "lend itself" to modifying the student's schedule and that staff would be able to accommodate the student if he presented with multiple episodes of aggressive behaviors in one day (Tr. p. 105).

The assistant principal indicated that she did not have any concerns regarding the appropriateness of the recommended district program with respect to the student's behavior (Tr. p. 126). She noted that the school had worked with students with behavioral concerns, including kicking, pushing, and biting (id.). According to the assistant principal, the student would have been assigned a paraprofessional who had experience working with students with behavior problems (Tr. pp. 96-97, 107-09). The assistant principal reported that her staff was trained in developing and implementing behavior intervention plans (Tr. p. 94). She testified that it was mandatory to review students' behavior plans once per year, but that the paraprofessional and teacher would review the data once per month or once every two weeks to determine if the plan was working or if strategies needed to be changed (Tr. pp. 95-96). In addition, the assistant principal reported that the behavior management paraprofessional would keep a log which the assistant principal would review (Tr. p. 96). The assistant principal testified that she would also speak with the behavior management paraprofessional every two weeks to make sure that everything was okay or to see if she could help her (id.). The assistant principal testified that she would also meet with the teacher twice per week (id.).

The educational director for McCarton opined that the district's behavior intervention plan was missing the step of stabilizing, meaning "wrapping," the student (Tr. pp. 407-08) and

was therefore inappropriate (Tr. pp. 468-69). The school psychologist, who observed the student at McCarton, defended the district's decision not to add the "wrapping" technique to the student's behavior intervention plan. In her testimony, the psychologist distinguished between the use of a wrap in an extreme situation to prevent the student from harming himself or others and the use of the wrap in a punitive manner or to address a certain behavior (Tr. pp. 200-05). The school psychologist reported that she did not observe the student to be aggressive or a danger to himself or others during her observation and opined that use of the wrap was excessive and inappropriate (Tr. pp. 187-98, 201-05, 266-67). Given the lack of verbal warning provided to the student, the school psychologist questioned whether the student was able to make the connection between the wrap and the behavior (Tr. pp. 204, 271-72). She acknowledged that the student had touched the speech-language therapist, but noted that the behavior had ceased and that it was a touch, not the continuation of an action in an aggressive manner (Tr. pp. 205-06, 270). The school psychologist opined that the wrapping program at McCarton was not working for the student (Tr. p. 267). She based her opinion on the increased need for wrapping, as reported by McCarton (Tr. pp. 204-05, 271-72). The school psychologist testified that the district tried to look at a behavior and positively reinforce it (Tr. p. 272). She opined that repeated instances of wrapping, which seem unwarranted, might increase aggressive actions (id.). The school psychologist further indicated that the district's plan addressed the same behaviors as McCarton, but used redirection and positive reinforcement as strategies for addressing the student's challenging behaviors (id.). She noted that if the student fell to the floor, he could be physically lifted up and placed back in his chair but that the district refrained from using wrapping as a technique for changing behavior (id.).

To summarize, the hearing record demonstrates that the 6:1+1 special class, related services, goals, and short-term objectives proposed by the district in the June 1, 2009 IEP targeted the student's identified needs and reflected many of the recommendations made by the McCarton staff who had been working with the student (Tr. pp.187-88; compare Dist. Ex. 8, with Dist. Exs. 1; 2; 3; 5; 6; 9; Parent Exs. B-5; D-2; D-4; D-5; D-6; D-7; D-8; D-9). The student would have been placed in a 6:1+1 class for students with autism that was staffed by a special education teacher and at least one paraprofessional (Tr. pp. 214-15; Dist. Ex. 8 at p. 1; Parent Ex. E-2 at p. 3). In addition, the student would have received the support of a full-time 1:1 behavior management paraprofessional who would have helped manage the student's behavior and assisted the student with focusing (Tr. p. 273). The hearing record indicates that the proposed class would have allowed the student to participate in individual and group instruction (Tr. p. 114). In addition, the IEP developed by the CSE included numerous program modifications designed to address the student's academic and behavioral needs and indicated that the student's related services needs would have been met through the provision of speech-language therapy and OT (Dist. Ex. 8 at pp. 4, 5, 26). The hearing record demonstrates that the district's staff were aware of the student's aggressive behavior and recognized the need to develop a behavior intervention plan for the student (id. at p. 27). The resultant IEP and behavior intervention plan incorporated numerous strategies similar to those used and recommended by McCarton (id. at pp. 4, 5, 27). While the behavior intervention plan did not include the use of a wrapping technique, the hearing record indicates that staff in the proposed program had experience working with students with challenging behaviors and were trained in developing and implementing behavior intervention plans, that the student's behavior management paraprofessional would have kept a log of the student's behaviors, and that the log would have

been reviewed on a regular basis to determine if the behavior intervention plan was working or if strategies needed to be changed (Tr. pp. 94, 95-96, 100, 126).

Based on the foregoing, I find that the June 1, 2009 IEP, and the recommended 6:1+1 placement with a behavior management paraprofessional, would have addressed the student's needs in the LRE, that the recommended special education programs and services were reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2009-10 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having determined that the district offered the student a FAPE, it is not necessary for me to consider the appropriateness of the program that the parents obtained for the student, or whether the equities support their claim for tuition reimbursement and therefore I will dismiss the parents' appeal (see MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). I have also considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated November 5, 2009 which determined that the district failed to offer the student a FAPE for the 2009-10 school year is hereby annulled.

Dated: Albany, New York
March 11, 2010



PAUL F. KELLY
STATE REVIEW OFFICER