



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-023

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:

Friedman & Moses, LLP, attorneys for petitioners, Alicia Abelli, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmuller, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for the cost of their son's supplemental instruction at the Huntington Learning Center (HLC) for the 2008-09 school year.¹ The appeal must be sustained in part.

The hearing record reveals that the student had demonstrated deficits in his cognitive abilities and academic functioning, but at the time of the impartial hearing he demonstrated above average academic skills as well as average verbal cognitive abilities and superior nonverbal cognitive abilities when compared to same age peers (Tr. pp. 335-36, 411; Parent Ex. R at p. 3). The student demonstrated fine motor delays and severe receptive and expressive language delays (Parent Exs. J at pp. 1-2; S at p. 3). The student also exhibited behavioral difficulties including hitting, scratching, and biting (Parent Ex. E at p. 4).

¹ The parents' claims at the impartial hearing and on appeal also relate to the 2007-08 school year; however, the student did not attend HLC during that year (Tr. pp. 679-80).

The student attended a district school for the 2007-08 and 2008-09 school years until November 2008 (Tr. pp. 406, 661). From November 2008 through the end of the 2008-09 school year, the student received supplemental instruction from HLC for five hours per week (Tr. pp. 679-80). The student's eligibility for special education services as a student with a disability is not in dispute in this appeal (Dist. Ex. 1 at p. 1; Parent Exs. B at p. 1; D at p. 1; see 34 C.F.R. § 300.8; 8 NYCRR 200.1[zz]).²

In October 2005, the student underwent psychological, speech-language, and occupational therapy (OT) evaluations to determine his eligibility for early intervention (EI) services (Dist. Exs. 2-4). The evaluations revealed that the student demonstrated significant delays in cognition, social/emotional development, communication, and adaptive behavior, and that he exhibited "behaviors that are consistent with a diagnosis of Autistic Disorder" (Dist. Exs. 2 at p. 4; 7 at pp. 1-2).

A January 2006 educational evaluation was conducted by a licensed psychologist in January 2006 to obtain the levels of the student's functional skills in preparation for his "aging out" of eligibility for EI services (Dist. Ex. 8 at pp. 1-2, 4). The evaluating psychologist indicated that at the time of the educational evaluation, the student was receiving speech-language therapy, physical therapy (PT), OT, and applied behavior analysis (ABA) services (id. at pp. 1-2). Administration of the Developmental Assessment of Young Children (DAYC) yielded age equivalent scores indicating delays greater than 33 percent in all of the developmental domains assessed and as a result, the evaluating psychologist recommended the student be considered for a structured preschool setting for children with autistic disorders (id. at p. 4).

The student's special education teacher from the district completed a progress report in December 2006 when the student was three years 11 months old (Dist. Ex. 6). The special education teacher reported that the student displayed severe cognitive, language and social/emotional delays, which had a negative affect on his academic progress (id. at p. 1). Results of the Brigance Inventory of Early Development indicated that both the student's cognitive skills and social/emotional functioning were at the 24-30 month age level (id.). The special education teacher indicated that the student demonstrated a low frustration tolerance and impulsivity including biting, hitting, kicking, scratching, screaming, and throwing objects at other children (id.). The special education teacher also indicated that the student required constant supervision and recommended that 1:1 paraprofessional services be provided (id.).

A January 4, 2007 speech-language progress report indicated that the student received individual speech-language therapy two times per week for 30 minutes (Dist. Ex. 10). The progress report noted that the student communicated his wants and needs for highly desired items by reaching and grabbing, and protestation by screaming, kicking, and making guttural sounds

² The relevant individualized education programs (IEPs) for the 2007-08 and 2008-09 school years do not provide the student's specific classification; however, the district states that the student was "administratively classified as autistic and has been diagnosed with autism," and the student's May 1, 2008 IEP referenced that the student "is autistic" (Tr. p. 533; Dist. Ex. 1 at p. 1; Parent Exs. B at pp. 1, 17; D at p. 1; see 34 C.F.R. § 300.8[1]; 8 NYCRR 200.1[zz][1]).

(id.). The student was described as able to imitate one to two word utterances to make requests, to verbally label objects and pictures of objects, and to sing (id.). The report described the student's speech as "unclear at times" due to low muscle tone and multiple articulation substitutions (id.). The speech-language progress report indicated that at that time, the student responded to one step directions with physical prompts, he did not respond to yes/no questions, he was able to follow a picture schedule throughout the day but required constant redirection to sit in his seat to complete a task, and he did not play appropriately with peers (id.). The progress report recommended continuing the student's level of speech-language therapy of two times per week on a 1:1 basis for 30 minutes per session. (id.).

A January 11, 2007 OT progress report written by a district occupational therapist indicated that the student attended an 8:1+2³ pre-kindergarten class within the district (Dist. Ex. 9 at pp. 1-2). The OT progress report also indicated that although the student had made "great progress so far" in OT, he continued to demonstrate delays in fine motor and self-care areas (id.). The OT report noted that the student demonstrated delays in gross motor skills, including difficulty jumping off a "1 foot surface," difficulty alternating feet when walking down the stairs, and that the student had been observed to trip when running (id. at p. 2). These delays were described as "impacting [the student's] ability to fully participate to his fullest potential in school activities including gym, the playground and navigating the school environment" (id.). The student's occupational therapist recommended that the student undergo a PT evaluation (id.).

The Committee on Preschool Special Education (CPSE) convened on February 1, 2007 for a CPSE review and determined that the student was eligible to receive services as a preschool student with a disability (Dist. Ex. 1). Attendees included the district representative, a district special education teacher, a district regular education teacher, an additional parent member, and the student's mother (id. at p. 2). The academic performance and learning characteristics portion of the resultant February 1, 2007 individualized education program (IEP) indicated that the student demonstrated pre-kindergarten level skills in reading, math, and writing (id. at p. 3). The student was able to read "many words" and expressively label objects, numbers, letters, shapes, and colors, but he had difficulty using words to communicate his needs (id.). According to the IEP, the student had severe delays in expressive and receptive language and displayed a high activity level, impulsive behavior, distractibility, and noncompliance during individual and group activities (id.). The student also displayed behaviors that interfered with instruction including biting, scratching and kicking other children, and severe tantrums (id.). With regard to the student's social/emotional present levels of performance, the IEP indicated that the student was generally friendly toward adults, preferred to play alone, and had difficulty socializing with other children (id. at p. 4). The IEP also noted that the student demonstrated delays in his fine motor coordination skills, which resulted in decreased pencil control (id. at p. 5). The student was able to write his name and some words, but did not demonstrate a mature grasp in order to use pencils, crayons, and utensils appropriately (id.). The student reportedly often ate with his hands and had difficulty eating with a fork (id.).

The February 1, 2007 CPSE IEP reflected that the student's management needs included a highly structured classroom, 1:1 instruction, small group instruction, redirection and

³ State regulations describe an 8:1+2 special class as consisting of no more than 8 students, 1 special education teacher, and 2 supplementary school personnel (see 8 NYCRR 200.6[h][4][ii][b]).

reinforcement to complete tasks, a "turn taking" board, modeling of imaginative play, and adapted physical education (Dist. Ex. 1 at pp. 3, 4). The February 1, 2007 IEP contained nine annual goals and 28 corresponding short-term objectives related to the student's needs in daily living skills, attention, speech-language, academic readiness skills, play skills, and fine motor skills (id. at pp. 6-10). The CPSE recommended that the student be placed in an 8:1+2 special class on a full-time basis at a district school with a 1:1 crisis management paraprofessional and related services of speech-language therapy two times per week individually for 30 minutes and OT two times per week individually for 30 minutes (id. at p. 14). The IEP indicated effective dates of February 1, 2007 through February 1, 2008 (id. at p. 2).

The February 1, 2007 CPSE IEP included an attached behavioral intervention plan (BIP) (Dist. Ex. 1 at p. 11). The BIP identified the student's behavioral difficulties that interfered with his learning; including low frustration tolerance, impulsivity, screaming, crying, hitting, scratching and biting children and staff members, and crawling on the floor (id.). The BIP indicated expected changes in the student's behavior so that he would be able to play cooperatively in a small group with other children without being aggressive toward them and that he would be able to sit independently during activities for at least five minutes (id.). Recommended strategies to change the student's behavior were for teacher and staff to use ABA along with primary and secondary reinforcement, use visual support including "mayer johnson symbols," and use an individual schedule (id.). The BIP also reflected that all staff, including the teacher, paraprofessionals, the occupational therapist, the speech-language therapist, and the music, computer and gym teachers, would have a copy of the BIP and "employ all strategies to help the student change the behavior" (id.). In addition, the BIP noted that the student's parents would have a copy of the BIP and be given visual supports to help the student across all settings including home (id.).

The hearing record reflects that the special education teacher of the district's 8:1+2 special class that the student attended during the remainder of the 2006-07 school year and the entire 2007-08 school year implemented the "toolbox method" with the student, which included use of ABA discrete trial instruction and the Treatment and Education of Autistic and related Communication Handicapped Children (TEACCH) program that provided the student with opportunities to generalize skills at designated work stations (Tr. pp. 88, 288-90). To promote his independence, a schedule was used with the student throughout the day, as well as visual reminders (Tr. p. 290). The hearing record also shows that the student participated in a 6:1⁴ special class for approximately one hour each day in order to be grouped with peers functioning at an academic level similar to the student (Tr. pp. 179-81).⁵

The district's occupational therapist completed an OT update of the student on October 22, 2007 (Parent Ex. K). She reported that the student's OT sessions addressed fine motor skills, activities of daily living, coordination, sensory processing, visual motor skills, strengthening exercises, and motor planning activities and that the student continued to demonstrate progress in OT (id.). The occupational therapist completed another OT progress report on January 24, 2008

⁴ A 6:1 special class consists of no more than 6 students and 1 special education teacher.

⁵ The special education teacher testified that the student was not placed in the 6:1 special class full time because the class consisted of older students (Tr. p. 181).

in which she indicated that the student demonstrated improvement in the areas of attention, flexibility pertaining to activities, and following directions (Parent Ex. J at p. 1). She also indicated that although the student demonstrated progress in fine motor skills and self care skills, he continued to display delays in these areas (id. at pp. 1-2). The occupational therapist recommended the continuation of OT two times per week for 30 minutes each session (id. at p. 2).

The district's speech-language pathologist completed a progress report on January 28, 2008 (Parent Ex. I). She reported that the student demonstrated articulation errors and delays in his receptive and expressive language, but that he demonstrated progress in his pragmatic language skills (id.). The speech-language pathologist recommended that the student's speech-language services be changed from two times per week individually for 30 minutes to two times per week in a group of two for 30 minutes (id.).

The district's special education teacher completed a progress note on January 29, 2008 (Parent Ex. H). She reported that the student attended an 8:1+2 special class with a 1:1 crisis paraprofessional during the 2007-08 school year and that he demonstrated academic and social progress, but exhibited behaviors that interfered with his learning and social opportunities (id. at p. 1). The special education teacher further reported that the student demonstrated higher cognitive and academic levels when compared to peers his same age (id.). She indicated that he responded well to praise, learned material rapidly, easily retained the learned information, and was able to independently complete work with constant prompts to maintain his attention (id.). The special education teacher reported that the student was able to read several words, independently read stories aloud, recite his name, and identify shapes, number and letters (id.). She further reported that the student had demonstrated "tremendous progress" in his social/emotional development; however, he continued to display behavioral deficits that negatively affected his development (id. at p. 2). According to the special education teacher, the student was noncompliant and needed constant supervision due to his behavior including hitting, scratching, and biting peers and staff (id.). She also indicated that the student had frequent outbursts that resulted in his peers and the school staff being physically hurt (id.). The special education teacher reported that

[i]f put in an environment that is not academically challenging or cognitively at his level of learning, [the student] will exhibit behaviors such as screaming, crying, running, hitting, scratching, throwing objects, destroying objects in his surroundings, and throwing himself on the floor or onto furniture. [The student] requires constant supervision as he can hurt himself or others

(id.).

The special education teacher recommended that the student continue to receive constant supervision in a small structured environment that offered verbal prompts, visual prompts, a structured schedule, and a small class size (id.). She further recommended that the student be placed in a "cognitively challenging" environment which provided opportunities for social/emotional development (id.).

A February 4, 2008 social history update was completed by a district social worker, with the student's father acting as the informant as part of the student's "turning 5" evaluation (Parent Ex. G). The social history report indicated that the student loved school and was excited to go to school every day (*id.*). The student's father reported that the student especially enjoyed drawing trucks (*id.*). The student was reportedly physically active at home and tended to run around the house and jump on beds and furniture, watch Sesame Street on TV, and play with the buttons on the telephone (*id.*). He also tended to cry if he did not get his way (*id.*). The social history report indicated that due process rights were explained to the student's father and that he received a parents' rights booklet (*id.*). The hearing record contains a two page document entitled "Notice of Parental Rights" that was provided to the parents in this matter, which indicates that it was revised on July 25, 1991 (Dist. Ex. 11).⁶

On February 7, 2008, a district social worker completed an observation of the student during his pre-kindergarten class as part of a "turning 5 evaluation" (Dist. Ex. 14). The social worker reported that according to the classroom teacher, the student's behavior had improved but he teased his classmates and would also get very upset when complimented or when he won a game (*id.*).

The CPSE convened on February 25, 2008 for a requested review (Parent Ex. D). Meeting participants included the district representative, a district special education teacher, a district regular education teacher, an additional parent member, a district speech therapist, and the student's father (*id.* at p. 2).⁷ The February 25, 2008 IEP indicated that the student demonstrated pre-kindergarten level skills in reading and writing and that he had delays in expressive and receptive language (*id.* at p. 3). The IEP noted that the student was often noncompliant and impulsive and exhibited behaviors that interfered with instruction including hitting other children (*id.* at pp. 3-4). The IEP also indicated that the student required a highly structured classroom which incorporated discrete trial instruction, group activities with peers, and a 1:1 crisis management paraprofessional (*id.*). The IEP contained ten annual goals and 30 corresponding short-term objectives related to the student's needs in academics, social skills, speech-language, and fine motor skills (*id.* at pp. 6-9, 11-13). The February 25, 2008 CPSE recommended that the student be placed in an 8:1+2 special class with a 1:1 crisis management paraprofessional, and related services of speech-language therapy two times per week individually for 30 minutes and OT two times per week individually for 30 minutes (*id.* at p. 16).

On April 28, 2008, the district's school psychologist conducted a reevaluation of the student to assist in determining educational placement as the student entered into kindergarten in September 2008 (Parent Ex. F). The school psychologist noted that the student was attending an 8:1+2 special class with a crisis management paraprofessional and related services of speech-language therapy and OT (*id.* at p. 1). He reported that a review of the student's records from the past two years indicated that the student demonstrated significant academic potential, but that his

⁶ The district's assistant principal testified that the district typically informed parents of their due process rights at parent-teacher conferences and at CSE meetings (Tr. pp. 360-61). The student's mother testified that she received the "Notice of Parental Rights" from the district, but that she did not remember when she received it (Tr. pp. 739-40; see Parent Ex. 11).

⁷ The hearing record reflects that only the district regular education teacher and the additional parent member participated in person and that the other individuals participated by telephone (Parent Ex. D at p. 2).

impulsivity and hyperactivity negatively affected his academic progress (id.). He further reported that the student was placed in a group of higher functioning students with similar academic skills, which resulted in a decrease in the student's physical aggression but that the student tended to tease the other students (id.). Administration of the Gilliam Autism Rating Scale (GARS), completed by the classroom teacher, yielded an autism quotient (percentile rank) of 72 (2), a standard score (percentile rank) of 4 (2) in stereotypical behaviors, 7 (16) in communication, and 6 (9) in social interaction (id.). The school psychologist opined that the GARS results indicated that the student exhibited a "low level of autism" (id. at pp. 1-2). He indicated that the student's academic skills were a relative strength (id. at p. 2). The school psychologist recommended that the student be placed in a highly structured program with an approximate kindergarten curriculum with inclusion opportunities as the student's behavior improved (id.).

The Committee on Special Education (CSE) convened on May 1, 2008 when the student was five years old⁸ for a requested review and to develop the student's IEP for the 2008-09 school year (Parent Ex. B). Attendees included a district representative who also attended as the district school psychologist, a district social worker, a district special education teacher, a district speech provider, another related service provider or special education teacher,⁹ and an additional parent member (id. at p. 2). The student's father participated by telephone (Tr. p. 669). The May 2008 IEP did not specify a classification of the student's disability, but the body of the IEP indicated the student was "autistic" and that he required a 12-month program in a 6:1+1¹⁰ special class in a special school due to social and behavioral concerns related to autism (Parent Ex. B at pp. 1, 17). The CSE recommended initiating the student's attendance in a special class (6:1+1) in a specialized school within "district 75" (id. at p. 1).¹¹ The CSE also recommended modifying the student's speech-language therapy such that he would receive small group speech-language therapy (2:1) two times per week for 30 minutes in a separate location; continuing individual OT two times per week for 30 minutes within the general education location; providing a 1:1 crisis intervention paraprofessional at all times; and that the student receive adapted physical education and special education transportation (id. at pp. 1, 18). Recommended testing accommodations were for the alternate assessment because the student's stated cognitive and social difficulties reportedly made standardized assessment "inappropriate" (id. at p. 18). In addition to the alternate assessment, the IEP indicated the student would be assessed through administration of the "Brigance," teacher ratings, and a portfolio review (id.).

In regard to the student's academic performance and learning characteristics, the May 2008 IEP indicated that a teacher observation revealed that the student's instructional level was within the "prekindergarten" level for decoding, reading comprehension, listening

⁸ The May 1, 2008 IEP inconsistently reflected the student's age (see Parent Ex. B at pp. 1, 3-4, 6).

⁹ It appears that this participant was the special education teacher in the 6:1 special class that the student attended for approximately one hour each day (Tr. pp. 179-81; Parent Ex. B at p. 2).

¹⁰ State regulations describe a 6:1+1 special class as consisting of no more than 6 students, 1 special education teacher, and 1 supplementary school personnel (see 8 NYCRR 200.6[h][4][ii][a]).

¹¹ While not identified in the hearing record, the reference is presumably to the district's District 75 (see <http://schools.nyc.gov/Offices/District75/default.htm>).

comprehension, writing, math computation, and problem solving (Parent Ex. B at p. 3). The IEP indicated the student exhibited delays in expressive and receptive language (id.). The IEP described the student as being able to communicate his wants and needs with eight to nine word sentences; often impulsive and noncompliant to staff direction; requiring constant redirection throughout the day; and requiring a 1:1 paraprofessional throughout the day to keep him on task and to redirect his behavior (id.). The student was able to read many words and learning to add simple addition; able to trace words and numbers with highlights and learning to copy from a near point; able to identify coins and bills and all of his numbers; and learning to read and comprehend the context of a story using a reading program (id.). The May 2008 IEP also described the student's speech-language skills reflecting that he was able to combine three to four words in spontaneous speech; to use a variety of nouns, verbs and modifiers to request, comment, ask and answer questions; to name a variety of pictured objects; to name categories; and to tell how an object was used (id. at p. 4). Expressively, the student's articulation was stated to be "imprecise" due to poor tongue differentiation and mobility, but improvement was beginning to be seen in his ability to elevate his tongue tip to produce some sounds in isolation with visual and verbal prompts (id.). The IEP indicated that the student was able to follow two step directions, but that he needed redirection to maintain attention and to complete a task (id.). The IEP further described the student as able to answer a variety of "wh" questions about stories read aloud with visual prompts (id.). At the time of the May 2008 CSE meeting, the student was reported to be beginning to interact with peers (id.).

In regard to the student's social/emotional performance, the May 2008 IEP indicated the student was "very active" throughout the day, requiring constant redirecting and a 1:1 crisis management paraprofessional (Parent Ex. B at p. 5). In addition, the student had difficulty sharing and interacting with peers, which resulted in the student becoming upset and tending to scream and hit other children (id.). The student was stated to be learning to initiate conversation with classroom peers (id.). The May 2008 IEP indicated that the student's behavior seriously interfered with instruction and that he required highly intensive supervision (id.). At that time, the student reportedly received behavioral support through full time 1:1 crisis management paraprofessional services and classroom staff, discrete trial instruction, a turn-taking board, group play, a classroom and individual schedule, and a behavior plan (id.).

In regard to the student's health and physical development, the May 2008 IEP indicated that the student participated in adapted physical education due to his language and social delays (Parent Ex. B at p. 6). In addition, the IEP reflected that the student displayed delays in his fine motor skills and required words and numbers to be highlighted in order to trace them and he also required assistance with cutting, zipping, and buttoning (id.).

The May 2008 IEP indicated that the student's management needs included a highly structured learning environment using discrete trial instruction with consistent reinforcement such as verbal praise and edibles, a 1:1 paraprofessional throughout the day to assist the student in staying on task and to follow staff direction, visual prompts including written words and pictures throughout the day to focus and maintain attention, as well as group activity to teach sharing and turn taking skills (Parent Ex. B at pp. 3, 4-6). The IEP also indicated that the student required tasks broken down into steps as well as adapted physical education (id. at p. 6).

The May 2008 IEP included 13 annual goals and 39 corresponding short-term objectives (Parent Ex. B at pp. 7-15).¹² The annual goals addressed the student's need to add single-digit numerals up to the sum of 10; to identify 10 body parts independently; to appropriately interact with peers and adults; to state the use of 15 objects in his environment independently; to read and comprehend sentence from a structured reading program; to state personal information such as his parents' names, phone number, date of birth, and country; to add double-digit numerals up to the sum of 30, to trace simple words and sentences independently; to elevate tongue tip to produce a target sound in the initial position of words; to place eight sequence cards in order, to describe sequences of pictures; to write all of the uppercase letters with correct letter formation; and to independently tie his shoelaces (id.).

The May 2008 IEP included an attached BIP developed on the same day as the CSE meeting (Parent Ex. B at p. 19). The BIP described the student as requiring redirection throughout the day and not liking to have limitations placed on him or to be told "no," whereupon he tended to become upset, cry, and hit others (id.). The BIP indicated projected behavioral changes regarding compliance with staff directions when provided with visual and verbal cues (id.). Projected strategies and supports to be employed with the student included redirection and repetition, verbal praise, a visual schedule board, a structured environment, and "reinforcers" (id.).

According to the student's mother, in June 2008 she informed the district by telephone that the student would not be attending the district's program in September 2008 and that he would attend a first grade classroom in a private school (Tr. pp. 338, 371, 669-70). The hearing record reflects that the student attended the private school for one day in September 2008, but that the private school was unable to "handle him" and he reportedly returned to the district's school during the first week in September 2008 (Tr. pp. 338-39, 670).

During approximately the first week of November 2008, the parents received a document in the mail from the district, which the hearing record suggests was a "type three recommendation form" (Tr. pp. 376, 675-76, 695).¹³ The student's mother subsequently met with district staff to discuss the district's intent to place the student in an inclusion setting with typically developing peers (Tr. pp. 380-81, 675-76). According to the assistant principal, the district informed the parents that the student had made progress and would attend general education classes with typically developing peers for most of the school day, and that the student would participate in third grade level assessments and possibly earn a high school diploma (Tr. pp. 380-81). The district reportedly continued with the type three recommendation process to place the student into an inclusion class up until the parents withdrew the student from school (Tr. pp. 822-23, 827-28, 830-31).

¹² Three annual goals involving identification of body parts, writing upper case letters, and shoelace tying included in the May 2008 IEP were duplicative (see Parent Ex. B at pp. 7, 10, 14-15).

¹³ The hearing record reflects that this document was a "Referral to SBST/CSE for Substantial Change in Phase I IEP" form, also referred to as a type three recommendation form, the purpose of which is to indicate a "program change" to an IEP (Tr. p. 324).

The hearing record reflects that the parents removed their son from the district's school on November 10, 2008 because the student's mother reportedly received a telephone call from an unidentified district therapist who informed her that the district's plan was to place the student in a class of students with "bad behavior" and "problem[s]," rather than in the inclusion class as discussed at the CSE meeting (Tr. pp. 661-62, 673-74, 676, 694-95, 749-50).

By letter dated November 19, 2008, the district's principal advised the student's mother that her child had not attended school since November 10, 2008 and informed her that New York State Law required that children attend school (Dist. Ex. 12). The letter further stated that "given [the student's] disability, autism, it is very important that he have the consistency of an educational program" and requested that the student's mother call the principal at the listed telephone number "immediately" (id.).

The hearing record reveals that the parents received an "A[cknowledgment] O[f] D[ischarge] O[f] U[nder] A[ge] C[hild]" form dated December 3, 2008, which indicated that on that date, the student's parent had requested and provided signed consent witnessed by a district principal for the student to be withdrawn from the district's school "effective immediately in spite of the recommendation of the CSE or CPSE" that the student receive preschool educational services, and/or even though the student had received an IEP recommending services (Tr. p. 678; Dist. Ex. 17). The form also noted that the student's mother understood that she could contact the district at the telephone numbers provided to assist her in reenrolling the student (Dist. Ex. 17).

According to the student's mother, she enrolled her son in HLC in November 2008 for the 2008-09 school year, which he attended five days per week for one hour each day for 1:1 academic instruction (Tr. pp. 679-80).

Diagnostic testing of the student was conducted by an HLC evaluator on November 13, 2008 when the student was five years old and a results report was generated (Parent Ex. N).¹⁴ The HLC evaluation assessed the student in the areas of auditory perception, reading, mathematics, and phonological processing (id. at pp. 1-3). Administration of the Slosson Visual Motor Performance Test (S-VMPT) yielded a rating of "poor" (id. at pp. 1-2). Administration of the WOLD Sentence Copying Test yielded a rating of "fair" (id.). Administration of the Boehm Test of Basic Concepts yielded a rating of "poor" (id.). Administration of the Reading Readiness Evaluation revealed that the student mastered letter recognition for capital letters and lower case letters, as well as letter formation for capital letters at the kindergarten level, but that he had not mastered letter formation for lower case letters (id.). Administration of the Rosner's Test of Auditory Perception yielded a pre-kindergarten grade level performance with a "UTS" notation (id. at p. 1).¹⁵ Administration of the Chall Phonetic Analysis revealed that the student mastered skills involving short vowels in words, context and dictation, as well as vowels digraphs/diphthongs (id. at pp. 1-2). The student did not master skills involving consonants in

¹⁴ Although the November 13, 2008 report from HLC consists of three pages, the first two pages are duplicative (Parent Ex. N at pp. 1-2).

¹⁵ "Unable to score" (UTS) indicates that the student did not answer enough questions correctly to achieve a score on the test (Tr. p. 558).

isolation, in blends/clusters, in short vowels in isolation, and in short vowels involving silent E (id.). The diagnostic testing results report indicated "UTS" regarding the student's skill specific to vowels involving syllabication (id.). Administration of the Slosson Oral Reading Test [-Revised] (SORT -R) yielded a grade equivalent score of 3.3 and a rating of "good" (id.). Administration of the Informal Reading Inventory (IRI) yielded a rating of "poor" for various levels of oral/listening and silent reading (id.). The diagnostic testing results report indicated that the evaluator was "unable to score" a writing sample (id. at p. 3). Administration of the Huntington Math Placement Exam revealed that the student mastered number readiness at the kindergarten level, but had not mastered general math concepts – primary (id.). The director of HLC stated that the testing results were used to develop the student's curriculum (Tr. p. 548).

By letter dated February 10, 2009, the parents informed the district that they disagreed with the evaluations completed by the district and they requested independent evaluations at public expense, "including but not limited to" a neuropsychological evaluation, a psychological/psycho-educational evaluation, an OT evaluation, a speech-language evaluation, a psychiatric evaluation, and an assistive technology evaluation (Parent Ex. L at p. 1).

In a due process complaint notice dated May 29, 2009, the parents, through their attorney, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2007-08 and 2008-09 school years (Parent Ex. A). The parents specified that the May 1, 2008 CSE meeting, resulting IEP, and recommended placement for the student were procedurally and substantively flawed for reasons including that: (1) the CSE failed to classify the student; (2) the CSE improperly predetermined its recommendations for the student; (3) the CSE recommended a significant change in placement without a thorough reevaluation of the student; (4) the CSE did not base its recommendations on adequate evaluations and relied instead on informal teacher observations; (5) the IEP goals were insufficient and were drafted without the participation of the parent; (6) the CSE was not duly constituted; (7) the CSE gave the parent misinformation regarding what services were available for the student; (8) the parent was not provided with notice of her rights with regard to the special education process; (9) the CSE did not consider assistive technology for the student; (10) the placement process violated the Individuals with Disabilities Education Act (IDEA); (11) the class proposed was not functionally grouped; (12) the placement was not the least restrictive placement for the student; (13) the CSE recommended that the student be evaluated by alternative assessment, despite the fact that he was academically on grade level, and there was no evidence that he met the criteria for alternate assessment; (14) the CSE did not recommend 1:1 instruction for the student despite noting that he "needs a highly structured environment with 1:1 instruction;" and (15) the CSE, "upon information and belief," did not develop an appropriate and legally sufficient functional behavioral assessment (FBA) or a BIP (id. at p. 3).

The due process complaint notice further alleged that in October 2008, the parents had withdrawn the student from the district's school due to his "significant regression academically and behaviorally" and had requested that the district provide home instruction until an appropriate placement could be found (Parent Ex. A at p. 4). The parents further alleged that the district denied their request for home instruction and although it was aware that the student was not attending school, the district did not reevaluate the student or convene a CSE meeting (id.). The parents stated that since that time, they had been paying out of pocket for the student to

receive 5 hours of supplemental instruction per week at HLC where he experienced "significant progress" (id.).

The parents requested that the impartial hearing officer order the following: (1) that the district failed to provide the student with a FAPE for the 2007-08 and 2008-09 school years; (2) that the district provide an interim service plan (ISP) and appropriate related services until an appropriate placement is found; (3) that the district must immediately make efforts to find an appropriate placement for the student and/or fund his placement at an appropriate nonpublic school; (4) that the parents are entitled to equitable additional services and/or make-up service to compensate for the deprivation of FAPE that had occurred, including but not limited to 1:1 tutoring, speech-language services, home ABA services, and "other make-up related services as appropriate;" (5) that the parents were entitled to funding for transportation expenses to and from the services; (6) that the parents were entitled to reimbursement for all out of pocket expenses incurred as a result of the deprivation of FAPE, including reimbursement for tutoring services, evaluations and transportation; (7) that the parents were entitled to funding for independent evaluations at public expense; (8) that upon completion of the independent evaluations, the CSE must reconvene to consider the findings and recommendations and offer the student a FAPE; and (9) that the parents were entitled to any and all other relief as deemed appropriate (Parent Ex. A at p. 4).

A June 19, 2009 private speech-language evaluation was conducted when the student was approximately six years five months old as the parents were reportedly concerned about his educational placement and his speech-language development (Parent Ex. S). The evaluation consisted of formal and informal testing, language sampling, observation, and parental questionnaire, and interview (id. at pp. 1-10).

The resultant speech-language evaluation report indicated that at that time, among other things, the student used physical gestures to gain his parents attention, waved goodbye and hello, demonstrated shared interests in objects and activities, and pointed to desired objects to communicate his wants and needs (Parent Ex. S at p. 1). Socially, the evaluation report indicated that the student appeared interested in other children, but that he did not demonstrate the skills to interact with them appropriately and that he did not have any friends (id.). According to the evaluation report, the student's mother reported that the student's behavioral functioning was of primary concern as he tended to demonstrate excessive tantrums and difficulty with transitions, and he was adverse to change (id. at pp. 1-2). The evaluation report indicated that according to the student's mother, the student recently began hitting and biting, tended to become overly fascinated with topics or objects, and had difficulty with transitions (id. at p. 2). The evaluation report also noted that according to the student's mother, the student demonstrated perseverative hand, finger and body movements, such as shaking his fingers in front of his face (id.).

Administration of the Comprehensive Assessment of Spoken Language (CASL) yielded "borderline impaired" results for the basic concepts, sentence completion, and paragraph comprehension subtests; "impaired" results for syntax construction and pragmatic judgment subtests; and "low average" results for the antonyms subtest (Parent Ex. S at p. 10). The student's CASL core composite score was in the "impaired" range (id.). The evaluation report indicated that based on the results of the CASL, the student demonstrated a severe expressive

language delay characterized by poor syntax and grammar, reduced vocabulary, difficulty responding to "wh" questions, and an "overall limited use of language and communicative function" (id. at p. 3). In addition, the student demonstrated a severe receptive language delay characterized by poor knowledge of basic concepts, difficulty comprehending "wh" questions, and difficulty understanding verbally presented information (id.). The evaluator noted that the student performed better on tasks that required a minimum amount of language to be understood or used (id. at pp. 3-4). Administration of the Social Skills Rating System (SSRS) yielded results in the "impaired" range for social skills and "significantly more than average" for problem behaviors (id. at p. 10).

The June 19, 2009 private speech-language evaluation report indicated that the student's articulation was judged to be "adequate for communicative purposes" and that "a few speech sound substitutions" were inconsistent and did not significantly affect the student's intelligibility or his ability to be understood by others (Parent Ex. S at p. 3). Overall, the evaluator indicated that the student presented with scattered strengths and significantly delayed expressive and receptive language skills and a severe pragmatic language delay, which affected all areas of his activities of daily living (id. at p. 6). The evaluator further indicated that the student would benefit from academic instruction that used nonverbal strategies and incorporated the student's nonverbal strengths (id.). The evaluator noted that the student required "intensive treatment" to increase his expressive and receptive language skills, whereby speech-language therapy should focus on increasing the student's ability to produce grammatically correct sentences for his age and increase his ability to ask and answer wh-questions (id.). According to the evaluator, the student presented with severely disruptive and attention seeking behaviors, which at times "impact[ed] his ability to learn," and he appeared to use behaviors in place of communication or to initiate interaction (id.). The evaluator indicated that in addition to intensive speech-language therapy to increase expressive and receptive language, the student required significant intervention to increase his pragmatic language abilities and to interact socially and stated that the student would benefit from social scripts, role-play, and video modeling in learning ways to interact with others (id.).

The June 19, 2009 private speech-language evaluation report included general recommendations for individual speech-language therapy three times per week for 60 minutes provided by a speech-language therapist trained and experienced in working with children on the autism spectrum, with concurrent parent training within the same session or in an additional session to address parent training and education on speech-language disorders, autism spectrum disorders, behavior management, and how to generalize skills acquired in therapy to other settings (Parent Ex. S at p. 7). Additional recommendations were for small group social skills training two times per week for 60 minutes per session with other "bright, verbal children who are matched for interests and developmental level," individual "special instruction intervention" for 20 hours per week in school and family settings to generalize skills, use of behavioral contingencies, structured activities, incentives, and visual schedules (id.). Also, in consideration of the student's reported and observed fine motor and sensory difficulties, the evaluator recommended an OT evaluation to develop classroom and home supports to assist the student to learn how to regulate his behaviors (id. at p. 8). The evaluator further recommended use of a specific program designed to support students with cognitive-behavioral difficulties and consultation with a psychiatrist so that the student's family might gain more information about

pharmacological ways to manage impulsivity and increase regulation (id.). The private speech-language evaluation report listed multiple descriptive elements of what a potential school environment for the student should include (id. at pp. 8-9).

An undated private psychological evaluation report indicated that the student underwent psychological testing in June/July 2009 in order to assess his educational needs (Parent Ex. R). Among other things, including the parent's report that the student was "constantly teased and bullied" when he attended school; the psychological evaluation report reflected relevant history pertaining to the student consistent with information included in the aforementioned June 19, 2009 private speech-language evaluation report (Parent Exs. R at pp. 1-3; S at pp. 1-3).

The private psychological evaluation report indicated that during the evaluation the student was observed to exhibit "adequate" eye contact, smile socially, engage with the examiner, and display repetitive hand movements and repeated motion of his fingers in front of his eyes (Parent Ex. R at p. 2). In addition, the report indicated that the student presented as echolalic, often reciting lines from his favorite television shows (id.). According to the evaluator, the student attended to tasks with constant redirection, demonstrated difficulty accepting delayed gratification, had several "obsessional objects" including a toy car and the air conditioner "remote," became upset when told he had to wait to play with a toy car that he wanted, and jumped out of his chair while making noises, calming down only after he received a toy car (id. at pp. 2-3). The evaluation report noted that during the evaluation the student responded best to short, firm directives, and immediate and concrete reinforcement (id. at p. 3).

Administration of the Stanford-Binet Intelligence Scale, Fifth Edition yielded a full scale IQ score in the high average range of cognitive functioning when compared to the student's same age peers (Parent Ex. R at p. 3). The student's verbal IQ score was in the average range of functioning and his nonverbal IQ score was in the superior range of functioning, when compared to same age peers, with a discrepancy noted between the student's "very superior" visual spatial abilities in the 98th percentile and "substantially lower" working memory abilities in the 27th percentile (id. at pp. 3-4).

Completion of the Autism Diagnostic Interview – Revised (ADI-R), a semi-structured parent interview that takes into account historical and current data regarding a student's functioning, revealed that the student's delayed development was evident well before he was 36 months old (Parent Ex. R at pp. 4-5). The private psychological evaluation report indicated that consistent with past assessments the results of the ADI-R suggested that the student "met [the] criteria for autism" (id. at p. 5).

The evaluating psychologist indicated that overall, the student presented as a student with several well developed talents as well as relative weaknesses, something that was noted as typical of individuals with high functioning autism (Parent Ex. R at p. 5). Strength was noted in the student's nonverbal abilities, particularly in his ability to process visual-spatial information (id.). Difficulty was noted with verbal tasks and social judgment (id.). The student's working memory abilities were described as a "relative weakness" (id.). The evaluator concluded that the student's less developed verbal abilities made traditional academic settings difficult for the student without well designed accommodations and visual supports (id.). In addition, academic

success was further impeded by the student's "uncompromising behavior," which affected his ability to relate to peers (id.). The evaluator described the student as tending to become preoccupied easily and often losing his temper, and as an "attention seeker" who frequently tended to act out with the intention of getting a reaction (id.). The evaluator opined that until the student's behaviors were modified, his educational potential would not be achieved to the degree to which he was capable (id.). The evaluator further indicated that the student's high nonverbal IQ was evidence of superior intellectual abilities that needed further development to assist the student to realize his full academic potential (id.). The evaluator also noted that the student needed to develop his speech-language and pragmatic skills (id.). The evaluator concluded that the student presented with high cognitive and academic potential and required specialized instruction to assist in his development (id.).

Similar to the aforementioned speech-language evaluation report, the private psychological evaluation report listed multiple descriptive elements of what a potential school environment for the student should include (Parent Ex. R at p. 6). Educational recommendations included intensive multisensory instruction, a strong behavioral system with intense behavioral interventions that would help the student develop better self-control and regulation, parental instruction in behavioral management, information about what the student learns, social skills training to support generalization of learning in all arenas, consideration of the student's nonverbal learning style through the use of visual aids and written instructions in his school routine, a specialized class setting with students at a similar level of intellectual functioning and that uses visual cues and provides predictable structure, social skills training, continued speech-language therapy with a speech pathologist well versed in helping with children with autism develop improved language processing and pragmatic skills, continued OT, and a PT evaluation to assess proprioceptive difficulties (id. at pp. 6-7).

On June 26, 2009, the district provided the parents with an "assessment authorization" packet in response to the parents' February 10, 2009 request for independent evaluations (Parent Exs. C; L).

An impartial hearing convened on July 31, 2009 and concluded on December 21, 2009, after six days of testimony (Tr. pp. 1, 17, 221, 474, 656, 817). The district called four witnesses and submitted 19 documents into evidence (Tr. pp. 73, 325, 399, 847; Dist. Exs. 1-19). The parents called five witnesses, including the student's mother, and submitted 22 documents into evidence (Tr. pp. 541, 627, 660, 755, 766; Parent Exs. A-V). The impartial hearing officer submitted two documents into evidence (IHO Exs. i-ii).

Subsequent to the first day of the impartial hearing, in a response to the parents' due process complaint notice dated August 7, 2009, the district alleged in an answer that on February 1, 2007, the "IEP team" continued the student's previous classification as a preschool student with a disability and that there was no reason to change that classification (Parent Ex. T at p. 1). The district further alleged that the IEP team recommended a special class in a specialized school with a 6:1 ratio and that it relied on a classroom observation, related service progress reports, teacher progress reports, and a "Brigance Assessment" in making its decision (id. at pp. 2-3). The district alleged that a full-time integrated preschool class was considered but was inadequate for the student's delays; that a 12-month 6:1+3 pre-school class was too restrictive; and that the

placement offered to the student was reasonably calculated to enable the student to obtain meaningful educational benefits (*id.* at p. 3). The district further alleged that the student attended the district's school for the entire 2007-08 school year and during that time he made progress in his academics and behavior, and that he obtained meaningful educational benefits (*id.*). With respect to the 2008-09 school year, the district alleged that the parents unilaterally withdrew the student from school two times, and that when they withdrew him the second time, they did so with no notice to the district and did not enroll him in another school "despite being advised how important it was for [the student] to attend school, as he is autistic" (*id.*). The district further alleged that instead, the parents selected a program that was inappropriate for the student as it only provided tutoring services and did not address the student's behavioral needs or social interaction issues (*id.*).

The CSE reconvened on August 20, 2009 for a requested review and to develop an IEP that included an interim service plan (ISP) with a district representative who also attended as a district school psychologist, a regular education teacher, a district social worker, a district special education teacher or related service provider, and an additional parent member in attendance (Parent Ex. U at pp. 1-2).¹⁶ The CSE determined the student was eligible for special education services as a student with autism (*id.* at p. 1). The CSE recommended initiating the student's attendance in a special class (6:1+1) in a specialized school (District 75) within the district, as well as 150 to 200 compensatory hours of 1:1 instruction by a "qualified teacher" (*id.* at pp. 1-2). Related service recommendations were to continue small group (2:1) speech-language therapy two times per week for 30 minutes in a separate location, individual OT two times per week for 30 minutes within the general education location, a 1:1 crisis intervention paraprofessional at all times, adapted physical education, and special education transportation (*id.* at pp. 1-2, 14). Recommended testing accommodations were for flexible scheduling ("1.5 x rate") and flexible setting (small group) (*id.* at p. 14). The IEP indicated that the student would fully participate in all school activities except for adapted physical education where the staff to student ratio was small (*id.*).

The August 20, 2009 IEP reflected the student's academic performance, learning characteristics and social/emotional performance according to descriptions of the student in the May 1, 2008 IEP and the private psychological evaluation conducted on July 6, 2009 (Parent Ex. U at pp. 3-4). The August 20, 2009 IEP indicated that the student's behavior seriously interfered with instruction and required additional adult support, and that at the time of the IEP the student received behavioral support through full-time 1:1 crisis management paraprofessional services, discrete trial instruction, use of a turn-taking board, group play, and a visual classroom schedule (*id.* at p. 5). The August 20, 2009 IEP indicated that a November 2007 physical examination form included a diagnosis of autism (*id.* at p. 6). The August 20, 2009 IEP further indicated that the student benefited from group activities to teach sharing and turn-taking skills, that he required speech-language therapy to aid in communication, that he required adapted physical education due to communication and social limitations, that he required tasks to be broken down into steps, and that he required OT to increase his fine motor skills (*id.* at pp. 5-6). The August 20, 2009 IEP indicated that updated educational, speech-language, and OT evaluations and reports were not available at the time of the meeting (*id.* at p. 13).

¹⁶ Although the hearing record contains the August 20, 2009 IEP that indicates it includes an ISP, the ISP is not in the hearing record.

The August 20, 2009 IEP included 11 measurable annual goals (Parent Ex. U at pp. 7-11). The annual goals addressed the student's need to interact appropriately with peers and adults using gestures and verbal prompting; to demonstrate improved impulse control throughout the school day and during unstructured times; to decrease physically aggressive behaviors; to improve articulation of target sounds in the initial position in words, with tactile, visual, and verbal prompts; to demonstrate arranging and sequencing cards in order; to copy simple words and sentences independently using highlights, physical, and gestural prompts; to add single-digit numbers up to the sum of 10 using manipulative objects; to add double-digit numbers up to the sum of 30 using visual cues and manipulative objects; to read and comprehend passages demonstrated by answering questions; to state personal information such as his parents' names, phone number, date of birth, and country; and to identify 10 body parts when given verbal and gestural prompts (id.).

The August 20, 2009 IEP included an attached BIP that described the student's physically aggressive, noncompliant, and tantrum behaviors that interfered with his learning (Parent Ex. U at p. 15). The BIP indicated projected behavioral changes regarding compliance when provided with visual and verbal cues (id.). The BIP listed projected strategies such as use of redirection, verbal praise, and a visual schedule board to be implemented with the student, as well as supports including repetition and redirection, a structured environment with visual schedules, "reinforcers," and a "functional behavior plan" to be completed at school to help the student change his behavior (id.).

On September 25, 2009, the student, who was then six years old, underwent diagnostic testing conducted by an HLC evaluator (Parent Ex. Q). Administration of the Rosner Test of Auditory Perception yielded a performance at "grade level: three" (id. at p. 1). Administration of the Chall Phonetic Analysis revealed that in addition to previously mastered skills noted in the November 2008 diagnostic testing results report from HLC, the student had mastered skills involving consonants in blends/clusters and short vowels involving silent "E" (id.). In addition, the student was noted as not mastering short vowels involving dictation, a skill which had been described as mastered in November 2008 (compare Parent Ex. Q at p. 1, with Parent Ex. N at pp. 1-2). Administration of the Slosson Oral Reading Test [-Revised] (SORT -R) yielded a rating of "good" (Parent Ex. Q at p. 1). Administration of the Informal Reading Inventory (IRI) occurred at level "P," a level that was rated as "UTS" in November 2008 and as "poor" during current testing (compare Parent Ex. Q at p. 1, with Parent Ex. N at pp. 1-2). Administration of the California Achievement Tests – 5 (CAT/5) yielded a reading comprehension grade equivalent score of 1.6 and a rating of "good" (Parent Ex. Q at p. 2). Administration of the Huntington Math Placement Exam revealed that the student mastered "number readiness" at the kindergarten level and "basic addition - word problems - primary," but had not mastered "general math concepts – primary," "basic addition - whole numbers – primary," "basic subtraction - whole numbers - primary," "basic subtraction - word problems- primary," and "advanced addition - whole numbers – primary" (id.). The director of HLC testified that comparison of the student's November 2008 assessment results with the September 2009 evaluation results indicated that the student had made measurable progress in many areas including auditory perception, reading, mathematics, and phonological processing (Tr. pp. 568-69; Parent Exs. Q; N).

In an Amended Findings of Fact and Decision dated January, 25, 2010,¹⁷ the impartial hearing officer found that the district failed to provide the student with a FAPE for the 2007-08 school year, but did not make a finding as to whether the district offered the student a FAPE for the 2008-09 school year, as the district conceded that it had not (Tr. p. 31; IHO Decision at p. 14). Regarding the student's attendance at HLC, the impartial hearing officer found that the parents did not establish that HLC offered an educational program that was appropriate to meet the educational needs of the student, noting that the student was enrolled at HLC from November 2008 through June 2009 and received 1:1 instruction for one hour per day five days per week (IHO Decision at pp. 14-16). Specifically, the impartial hearing officer found that it was undeniable that the student's behavior seriously interfered with instruction and that it was his "major concern" (*id.* at p. 15). She further noted testimony that while HLC met the student's academic needs; it did not meet his social, behavioral, or therapeutic needs (*id.* at pp. 15-16). She also noted that peer interaction was not provided in the program at HLC (*id.* at p. 15).

With respect to equitable considerations, the impartial hearing officer found that the parents' withdrawal of the student from the district's school resulted in "the loss of educational opportunity for the 2008-2009 school year and that their actions were unreasonable and uncooperative" (IHO Decision at pp. 18-19). She further determined that the parents did not give written notice that they were withdrawing their son from the district's school and placing him at HLC, which was "particularly unreasonable" in this case because the district had initiated a process to change the student's program (*id.* at pp. 16-17). The impartial hearing officer also stated that she "did not find it credible" that the parents withdrew the student from the district's school based on a conversation with an unidentified therapist (*id.* at p. 18). Based on the foregoing, the impartial hearing officer denied reimbursement of the costs associated with the student's attendance at HLC (*id.* at p. 16).

Regarding the compensatory services sought by the parents, the impartial hearing officer denied the parents' request for speech-language and OT services, after finding that the student had received appropriate speech-language and OT during both the 2007-08 and 2008-09 school years as documented and recommended in his progress reports until the parents withdrew the student from school, and that any subsequent loss of related services was attributable to the parents' withdrawal of the student from school (IHO Decision at pp. 19-20). However, she further determined that a lack of parent training "contributed to the deprivation of a FAPE" and ordered that when the CSE reconvened, parent training was mandated as a related service and the CSE should determine the extent to which it would be provided (*id.* at p. 20). Next, the impartial hearing officer denied the parents' request for 1:1 remediation by a private provider, stating that the student's educational program had consisted solely of 1:1 instruction since November 2008 and that it was "undisputed that the [s]tudent would benefit from an educational placement designed for students with high functioning autism capable of grade level and advanced academic performance with a strong behavioral component" (*id.* at p. 21). She further stated that

¹⁷ The impartial hearing officer issued multiple orders and decisions in this matter including: (1) an Interim Order dated July 31, 2009; (2) a Second Interim Order dated October 6, 2009; (3) a Second Amended Interim Order dated October 14, 2009; (4) a Second Amended Interim Order – Corrected dated October 14, 2009; (5) a Third Interim Order dated December 1, 2009; (6) a Findings of Fact and Decision dated January 20, 2010; and (7) an Amended Findings of Fact and Decision dated January 25, 2010.

additional 1:1 instruction could do the student a "disservice" as an "appropriate placement [for the student] is in a class with other children at similar levels of intellectual functioning in a setting where behavioral interventions are provided by staff versed in methods for instructing and managing children with autism" (id.).

Regarding the parents' request for reimbursement for the independent evaluations, the impartial hearing officer ordered the district to reimburse the parents for the private psychological evaluation and the private speech-language evaluation that they had obtained for the student (IHO Decision at p. 22). She also ordered the parents' requested neuropsychological evaluation, psychiatric evaluation, OT evaluation, and assistive technology evaluation be performed at a reasonable rate at public expense (id.). The impartial hearing officer further ordered that the CSE reconvene and develop an IEP consistent with her order, including but not limited to an appropriate award of compensatory services, parent training as a related service at a minimum of once per week for 30 minutes for one year, and consideration of the "ASD Nest program"¹⁸ as a placement for the student (id.).

The parents appeal from portions of the impartial hearing officer's decisions¹⁹ that denied their request for reimbursement for the costs of 1:1 supplemental instruction for the student at HLC, denied their request for "additional compensatory educational/additional services" in the form of individual instruction, remanded the matter to the CSE to determine a compensatory award, and denied the parents' request for additional make-up related services.

With respect to the impartial hearing officer's findings regarding compensatory services, the parents allege, among other things: (1) that the impartial hearing officer failed to give due weight to the facts that the student had been denied access to the general curriculum at the district's school and that he made measurable academic progress while attending HLC; (2) that the district should have been estopped from arguing that 1:1 tutoring was inappropriate as compensatory education as the CSE had already determined that 1:1 tutoring was an appropriate compensatory remedy as part of the IEP/ISP process ordered by the impartial hearing officer; (3) that the 20 hours per week of 1:1 tutoring as interim and final relief ordered by the impartial hearing officer, as well as any order finding that 1:1 compensatory services are inappropriate is inconsistent with the rest of the impartial hearing officer's decision; and (4) that the impartial hearing officer applied the incorrect standard in assessing the parents' request for reimbursement of HLC services as the parents sought reimbursement as partial compensatory services rather than as a unilateral private placement.

¹⁸ The "ASD Nest program" is described in the hearing record as "an integrated coteaching program for students on the autism spectrum" (Tr. pp. 851-52).

¹⁹ The parents state in their petition that the appeal "follows" from the Findings of Fact and Decision dated January 20, 2010 and the Amended Findings of Fact and Decision dated January 25, 2010 (Pet. ¶ 1). I note that the only difference between the January 20, 2010 Findings of Fact and Decision and the January 25, 2010 Amended Findings of Fact and Decision, appears to be the addition in the Amended Findings of Fact and Decision of an order that an interim pendency order in this matter dated November 30, 2009, was to remain in effect until the CSE met and developed an appropriate educational program for the student consistent with the order of the impartial hearing officer.

With respect to the impartial hearing officer's findings regarding the equities, the parents allege, among other things: (1) that the impartial hearing officer's award of compensatory services in some form to be determined by the CSE when she denied the parents' request to be reimbursed for compensatory services based upon her finding that equitable factors weighed against reimbursement, is inconsistent with her latter finding that compensatory education is warranted; (2) that the impartial hearing officer's finding that the parents' conduct during the 2008-09 school year was inequitable is erroneous since the district failed to offer the student a FAPE as of the start of the school year, the removal of the student by the parents did not occur until November 10, 2008, and there is no evidence that the parents thwarted the district's effort to provide a timely FAPE, refused to attend evaluations of IEP reviews, or refused any appropriate services offered; (3) that there was no evidence presented by the district that a "type 3" process was initiated; (4) that the district was aware that after the parents withdrew the student they did not intend to send him back; and (5) that the impartial hearing officer incorrectly found that the parents' failure to notify the district that they were enrolling the student at HLC constituted an equitable factor that would bar relief.

With respect to the impartial hearing officer's findings regarding related services, the parents allege, among other things: (1) that the that the impartial hearing officer wrongly credited the limited testimony of the district's witnesses, none of whom were related services providers, that the student was provided with related services as recommended; (2) that the district offered no proof that the recommendations for related services were appropriate; and (3) that the impartial hearing officer erred in failing to consider testimony and a report by the parents' witness, a licensed speech pathologist, in determining that the student received appropriate speech-language services. The parents seek: (1) reversal of the impartial hearing officer's denial of reimbursement for services at HLC; (2) reversal of the impartial hearing officer's denial of additional compensatory instruction and an award of 300 hours of 1:1 remediation at a rate of \$85 per hour; (3) reversal of the impartial hearing officer's findings regarding related services and an award of make-up speech-language services in accordance with the private speech-language evaluation obtained by the parents, as well as make-up OT services as appropriate; and (4) reversal of the impartial hearing officer's remand to the CSE to determine compensatory services.

In its answer, the district denies many of the parents' allegations. The district contends that HLC was not an appropriate program for the student, regardless of which legal standard is applied. The district further contends that the impartial hearing officer correctly determined that the parents' request for reimbursement at HLC was barred by the equities. The district asserts that the impartial hearing officer correctly found that compensatory services would not provide educational benefits to the student and that she was correct in remanding the matter to the CSE. Lastly, the district contends that the impartial hearing officer was correct in denying the parents' requests for speech-language and OT services. The district requests that the parents' petition be denied and that the impartial hearing officer's decision be affirmed in all respects.

I will first consider the parents' request for reimbursement of the costs of obtaining supplemental instruction for the student at HLC. Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and

prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally 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]). Also, a FAPE must be available to an eligible student "who needs

special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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 (see Application of the Bd. of Educ., Appeal No. 08-016).

Here, the district did not appeal the finding by the impartial hearing officer that the district failed to provide the student with a FAPE for the 2007-08 school year, and the district conceded that it failed to offer the student a FAPE for the 2008-09 school year. An impartial hearing officer's decision is final and binding upon the parties unless appealed to the State Review Officer (34 C.F.R. § 300.510[a]; 8 NYCRR 200.5[j][5][v]). Consequently, the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2007-08 and 2008-09 school years is final and binding (Application of a Student with a Disability, Appeal No. 10-010; Application of the Dep't of Educ., Appeal No. 09-046; Application of the Dep't of Educ., Appeal No. 09-033; Application of the Dep't of Educ., Appeal No. 09-027; Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-021; Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

Having established that whether the student was offered FAPE for the 2007-08 and 2008-09 school years is not contested on appeal, I will address whether the hearing record supports that the services received by the student at HLC, for which the parents seek reimbursement, were

appropriate for the student.²⁰ A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every

²⁰ The parents argue that the portion of their appeal requesting reimbursement for costs of services at HLC should be considered as a claim for partial compensatory services rather than a claim for tuition reimbursement of a unilateral placement. As the parents withdrew the student from the district school and placed him in the program at HLC, the claim will be considered one for tuition reimbursement (Tr. p. 694; Dist. Ex. 17; see Application of the Dep't of Educ., Appeal No. 09-033).

special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

As discussed below, the hearing record does not support a finding that the program that the student received at HLC was an appropriate educational placement for the student. Rather, the hearing record demonstrates that HLC did not provide educational instruction that was specially designed to address the unique needs of the student.

As discussed above, the June 19, 2009 private speech-language evaluation reflected that the student demonstrated severe delays in the areas of expressive language, receptive language, and pragmatic language (Parent Ex. S at pp. 3, 6). Additionally, the private psychological evaluation that was conducted in June/July 2009 revealed that the student demonstrated above average academic skills, as well as average verbal cognitive abilities and superior nonverbal cognitive abilities when compared to same age peers (Parent Ex. R at pp. 1, 3). Also as discussed above, the district's occupational therapist completed another OT progress report on January 24, 2008 which indicated that the student demonstrated progress in fine motor skills and self care skills, but that he continued to display delays in these areas (Parent Ex. J at pp. 1-2).

As more specifically indicated below, the hearing record reveals that the student had demonstrated behavioral difficulties including hitting, biting, scratching, and kicking peers and adults (Dist. Ex. 6; Parent Exs. B at p. 5; E at pp. 4, 11). The student also displayed a low frustration tolerance, noncompliance, distractibility, and impulsivity (Dist. Ex. 6; Parent Ex. E at p. 3). The student's preschool special education teacher reported that although the student demonstrated progress in his social/emotional functioning, he continued to display behavioral difficulties that negatively affected his development and she recommended the student continue to receive services in an environment that was both cognitively challenging and provided him with opportunities for social emotional development (Parent Ex. H at p. 2). The private psychologist who evaluated the student in summer 2009, reported that the student frequently exhibited inappropriate behavior in order to get a reaction and that the student's behavioral difficulties impeded his educational achievement and negatively affected his ability to relate to his peers (Parent Ex. R at p. 5). Additionally, the student's May 1, 2008 IEP indicated that the student was often noncompliant and would scream and hit other children (Parent Ex. B at p. 5). The May 1, 2008 IEP also reflected that the student's behavior interfered with instruction and required highly intensive supervision, and it recommended a 6:1+1 special class on a 12-month basis with a full-time 1:1 crisis management paraprofessional services, related services of speech-language therapy and OT, discrete trial instruction, group play, and a BIP (id. at pp. 5, 18).

The director of HLC testified that HLC is a provider of "supplemental instruction" in reading, writing, and math for preschool through twelfth grade students (Tr. pp. 542, 544). She testified that HLC provides services to both general education and special education students

including students with speech-language impairments, learning disabilities, attention deficit disorders, and autism spectrum disorders (Tr. pp. 544-45). She also testified that HLC provides 1:1 instruction for students who require a 1:1 ratio and for students below the fifth grade level (Tr. pp. 545-56).²¹

The 2009 private psychological evaluation report indicated that staff at HLC reported that as a result of the ongoing 1:1 multisensory academic instruction provided to the student, he had demonstrated significant progress in all academic areas (Parent Ex. R at p. 2). However, staff at HLC further reported that the student's behavioral difficulties were often an interfering factor (id.). The private psychological evaluation report indicated that while at HLC, the student struggled with auditory instructions but he responded well to written questions (id.). The student was also described to be more successful whenever manipulative objects were part of an activity and less successful when verbal instructions without visuals were used (id.). The evaluation report indicated that the student enjoyed math activities at HLC and that staff at HLC sometimes used math problems as a successful reinforcement for him (id.). The private psychologist opined in the report that "it is critical that [the student's] behavior be shaped" in a manner that enabled him to demonstrate learning in "more normalized settings" (id. at p. 5).

The director of HLC testified that the student received supplemental instruction from HLC five times per week, individually for one hour, from November 2008 through June 2009 and that she was the student's primary instructor along with three or four other teachers (Tr. pp. 547, 549, 575-77). The director testified that she had not received training regarding autism spectrum disorders (Tr. pp. 580-81). The director further testified that an HLC evaluator conducted an assessment of the student in November 2008 to determine his levels in reading, math, writing, and fine motor skills and that the testing results were analyzed and used to develop the student's HLC curriculum (Tr. pp. 547-48; Parent Ex. N). According to the director, the student received instruction in fine motor skills, phonological processing, vocabulary, sentence composition, letter formation, and mathematics during each session of supplemental instruction at HLC (Tr. pp. 582, 584-85). The director stated that the student underwent another evaluation in September 2009 to assess his progress, and that a comparison of the November 2008 assessment results with the September 2009 evaluation results indicated that the student made "measurable improvement" in many areas including auditory perception, reading, mathematics, and phonological processing (Tr. pp. 548-49, 568-70; Parent Exs. N; Q). However, the director testified that during his instructional sessions at HLC, the student exhibited impulsive behavior, had difficulty following directions, and distracted other students (Tr. pp. 553-54). She testified that to address the student's behavioral needs, the student's HLC teachers remained calm, used a "measured tone," and implemented consistent routines and expectations, along with the provision of reinforcement for positive choices (Tr. p. 554). The director stated that the student's HLC instructors had informal meetings to discuss methods to address the student's behavior (Tr. pp. 586-88). The director also stated that as a result of the strategies utilized by the HLC teachers, the student became more cooperative (Tr. pp. 554-56). In response to a question at the impartial hearing as to whether the services received by the student from HLC were appropriate to address the student's educational needs, the director testified that "[i]t

²¹ The director testified that HLC typically provides 3:1 instruction for students at the fifth grade level and above (Tr. pp 545-46).

was not sufficient. I do not consider [HLC] a replacement for school for any student. We're supplemental" (Tr. p. 610).

Although HLC provided academic instruction to the student, the hearing record reveals that the student's primary deficit areas of behavior and language skills were not sufficiently addressed. Although the director of HLC testified that the HLC staff attempted to manage the student's behavior and that the student became more "cooperative" during his time at HLC, the student only received services in a 1:1 setting and HLC did not address any socialization needs of the student (Tr. pp. 545-46, 554-55, 600, 604, 608). The hearing record also does not indicate that HLC's providers were "well versed in specialized methods for instructing and managing children with autism," or that HLC provided a "setting with intense behavioral interventions," parent training in behavior management, social skills training focused on "reciprocal conversations and forming relationships with same-aged peers, speech-language therapy, or OT;" all of which were recommendations made by the parents' private psychologist in order to "facilitate the continued development of [the student's] social, emotional, and behavioral needs" (see Parent Ex. R at pp. 6-7). Based on the above, the hearing record demonstrates that that HLC did not address the student's significant needs in the areas of behavior; receptive, expressive and pragmatic language; and fine motor skills as identified in the private psychological, and the speech-language and OT evaluative and progress reports. Moreover, the HLC director testified that the HLC program was not appropriate to meet the student's needs in this case. Accordingly, the hearing record does not support a finding that the parents have met their burden to show that HLC was appropriate to meet the student's special education needs.

Having determined, as the impartial hearing officer did, that the parents failed to meet the second criterion for an award of reimbursement for the program provided by HLC, the necessary inquiry on this issue is at an end and I need not reach the issue of whether equitable considerations support the parents' claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

Although I need not reach the issue of whether equitable considerations support the parents' claim, I will address their claim that they were not provided with a notice of procedural safeguards that contained adequate information. Pertinent to the facts herein, relevant provisions of the IDEA require that a copy of the procedural safeguards notice be given to a parent one time per year, upon the first occurrence of the filing of a due process complaint notice, or upon request by a parent (see 20 U.S.C. § 1415[d][1][A]; see also 34 C.F.R. § 300.504[a]; 8 NYCRR 200.5[f][3][i]-[v]). The hearing record reflects that a "Notice of Parental Rights" provided to the parents in this matter was a version revised on July 25, 1991, instead of the then most current version, and did not include, among other things, information regarding limitation on reimbursement (Dist. Ex. 11).^{22,23} The parents claim that the contents of the 1991 notice did not provide adequate information related to limitation on reimbursement is sustained. I will therefore order the district to review its policy and procedures pertaining to provision of the

²² The most recent mandatory Procedural Safeguards Notice, revised in January 2009, may be obtained at the following website: <http://www.vesid.nysed.gov/specialed/publications/policy/psgn109.htm>.

²³ For provisions related to limitation on reimbursement see 20 U.S.C. § 1412 (a)(10)(C)(iii)(I) and 34 C.F.R. § 300.148(d).

mandatory procedural safeguards notice to the parents of students with disabilities and identify and correct any deficiencies consistent with this decision.

I turn next to the parents' request that the impartial hearing officer's decision to deny additional compensatory instruction be reversed and 300 hours of 1:1 remediation at a rate of \$85 per hour be awarded. Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 C.F.R. § 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 C.F.R. § 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation 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., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; 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 students under the age of twenty-one]). Likewise, State Review Officers have awarded compensatory "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 (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 a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading

instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; 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 this matter, the student remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Here, however, the hearing record does not show the particular services that would be appropriate to remediate the deprivation of educational services that led to a denial of a FAPE in the years at issue (see Tr. pp. 867-68; Parent Ex. R at p. 3). The impartial hearing officer, in her decision, stated that it was "undisputed that the [s]tudent would benefit from an educational placement designed for students with high functioning autism capable of grade level and advanced academic performance with a strong behavioral component" (IHO Decision at p. 21). She found that additional 1:1 instruction could do the student a "disservice" as an "appropriate placement [for the student] is in a class with other children at similar levels of intellectual functioning in a setting where behavioral interventions are provided by staff versed in methods for instructing and managing children with autism" (*id.*). The hearing record demonstrates that there is no reason to disturb the findings of the impartial hearing officer and no reason not to uphold the impartial hearing officer's denial of additional 1:1 compensatory instruction for the student in this case.

Next, I review the parents' request for reversal of the impartial hearing officer's findings regarding related services, and for an award of make-up speech-language services in accordance with the private speech evaluation obtained by the parents, as well as make-up OT services, as appropriate. The impartial hearing officer found that the student had received appropriate speech-language and OT services for both school years at issue as recommended by the student's service providers until the parents withdrew the student from school, and that any subsequent loss of related services was attributable to the parents' withdrawal of the student from school (IHO Decision at pp. 19-20). The hearing record does not demonstrate that the recommended related services were not appropriate or that they were not properly implemented by the district. Accordingly, there is no reason to disturb the findings of the impartial hearing officer with regard to the related services award sought by the parents.

I will now address the parents' request for reversal of the impartial hearing officer's remand to the CSE to determine compensatory services. The impartial hearing officer ordered that the CSE reconvene and, among other things, develop an IEP to include an appropriate award of compensatory services for the student (IHO Decision at p. 22). The hearing record in this matter does not clearly indicate what services, and the frequency or duration thereof, are needed to remedy the deprivation of services caused by the denial of a FAPE to the student during the 2007-08 and 2008-09 school years (see Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1181 [S.D.N.Y. 1992]; Student X, 2008 WL 4890440, *26 [E.D.N.Y. Oct. 30, 2008]; Application of a Child with a Disability, Appeal No. 04-054; Application of a Child with a Disability, Appeal No. 03-067; Application of a Child with a Disability, Appeal No. 98-49). Accordingly, the impartial hearing officer's remand of the matter back to the CSE to determine an appropriate award is upheld. Once it is determined what provision of additional services is

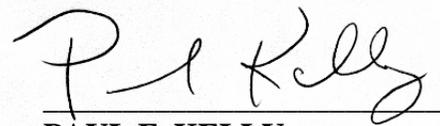
appropriate, those services should be provided by the district in accordance with the order of the impartial hearing officer.

I have considered the parties' remaining contentions and find that they are unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that, within 30 days of the date of this decision, the district shall review its policy and procedures pertaining to provision of the mandatory procedural safeguards notice to the parents of students with disabilities under the IDEA and identify and correct any deficiencies consistent with this decision.

Dated: **Albany, New York**
 May 3, 2010



PAUL F. KELLY
STATE REVIEW OFFICER