



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-055

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:

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

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, 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 costs of their son's home-based applied behavior analysis (ABA) therapy and tuition at the McCarton School (McCarton) for the 2009-10 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that the student requires 1:1 teaching. The appeal must be dismissed. The cross-appeal must be dismissed.

The student received a diagnosis of autism around age five (Tr. p. 609).¹ According to the student's mother, the student attended three district-approved schools until age seven, when the director of the third school reportedly told the parents that the student lacked the cognitive development necessary to remain in the 6:1+1 program and indicated that he required more individualized instruction (Tr. pp. 610-11). Subsequently, the parents unilaterally placed the student at McCarton, where he has been attending school since 2004 (Tr. pp. 230, 265). The hearing record indicates that McCarton is a private school that exclusively serves students with autism and provides 1:1 instruction using ABA therapy (Tr. pp. 217, 221-22, 235). McCarton is not approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

¹ The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (Tr. p. 351; Parent Exs. A at p. 1; C at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

During the 2008-09 school year, the student attended a McCarton classroom with five other students (Dist. Ex. 9 at p. 1). He received 40 hours of 1:1, individualized instruction, along with daily related services of one hour of speech-language therapy and 45 minutes of occupational therapy (OT) (*id.*). In addition, the student received three hours per week of home-based ABA services (Parent Ex. B at p. 41).

According to a McCarton educational progress report, in January 2009, the student demonstrated marked delays in communication, cognition, and socialization (Dist. Ex. 9 at p. 4). All areas of the student's learning, socialization, and community integration were affected by his poor attention to tasks, language delays, and behavioral challenges (*id.*). The student engaged in multiple ritualistic behaviors, as well as non-contextual vocal and motor stereotypic behaviors (Dist. Exs. 9 at p. 1; 11 at p. 1). Academically at McCarton, the student was working at a first to third grade instructional level on tasks such as adding and subtracting three digit numbers using a calculator, learning coin values, learning to read and spell new sight words, decoding blends, comprehending what he read by identifying corresponding pictures, answering "how" and "why" questions about a topic after reading two short sentences, writing sentences using proper capitalization and a period at the end, and writing novel sentences (Tr. pp. 355-56; Dist. Exs. 4 at pp. 1-2; 9 at p. 2). As noted in a January 2009 McCarton speech-language progress report, the student demonstrated difficulty with receptive and expressive language skills, receptive and expressive vocabulary, and pragmatic language skills (Dist. Ex. 11 at p. 4). The student's occupational therapist from McCarton reported that the student demonstrated sensory processing weaknesses including decreased auditory processing and difficulty following directions, gross motor skills that were "a little below" age level, and difficulties related to fine motor precision and integration (Tr. p. 296). A January 2009 McCarton OT progress report indicated that the student had made improvements in the areas of self-care and fine motor skills, was working on increasing his strength and endurance for gross motor tasks, and had demonstrated progress with respect to writing and typing (Dist. Ex. 10 at p. 5).

In March 2009, a special education teacher from the district observed the student in his classroom at McCarton and also interviewed the student's McCarton teacher (Parent Ex. L).² In April 2009, a second special education teacher from the district observed the student in his McCarton classroom and in a written report detailed the student's responses to a variety of academic activities (Parent Ex. K).

On May 1, 2009, the CSE convened to develop the student's individualized education program (IEP) for the 2009-10 school year (Parent Ex. C at p. 1). Meeting participants included the school psychologist, who also served as the district representative; a special education teacher from the district, who had observed the student at McCarton; the student's mother; and an additional parent member (*id.* at p. 2; *see* Parent Ex. K). In addition, McCarton staff who worked with the student, including an ABA supervisor who was a board certified behavior

² The hearing record contains multiple duplicative exhibits. For purposes of this decision, only Parent exhibits were cited in instances where both a District and a Parent exhibit were identical. It is the responsibility of the impartial hearing officer to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; *see Application of a Child with a Disability*, Appeal No. 07-119; *Application of the Bd. of Educ.*, Appeal No. 06-074).

analyst (BCBA), an occupational therapist, and a speech-language pathologist participated in the meeting by telephone (Parent Ex. C at p. 2). The May 2009 CSE meeting lasted approximately four hours (Tr. pp. 350, 650). According to the school psychologist, everyone at the CSE meeting had a package consisting of reports given to the district by McCarton, which included the January 2009 educational progress report, the January 2009 speech-language progress report, the January 2009 OT progress report, a McCarton individual education plan and McCarton speech-language goals for 2008-09 (Tr. pp. 344-47, 357; see Dist. Exs. 9-13). In addition, the May 2009 CSE reviewed the district's March 2009 and April 2009 observations of the student at McCarton as well as a psychological report from December 2005 (Tr. pp. 345, 347-48; see Dist. Ex. 14; Parent Exs. K; L).

The student's present levels of performance, as detailed on the resultant IEP, reflected information from the McCarton reports and McCarton staff (compare Parent Ex. C at pp. 3, 5, 6, 7, with Dist. Exs. 4; 9-11). According to the IEP, the student's instructional level for academic skills ranged between first and third grade (Parent Ex. C at p. 3). As detailed in the IEP, the student's receptive language deficits included difficulty understanding and following directions, limited understanding of vocabulary and linguistic concepts, weak understanding of syntax, and poor "inferencing" skills (id.). The IEP indicated that the student was able to learn routines well with repetition and that he was able to do independent work and engage in group time (id. at p. 5). The IEP detailed the student's tendency to engage in verbal perseveration and ritualistic behaviors such as repeating sentences and always wanting to walk the same route (id.). The IEP also noted the mother's opinion that the student became frustrated at times and needed to be able to express his frustration in an appropriate manner, including when confronted with situations that required a shift in his routine (id.). The student initiated conversations with staff, although the conversations were often stereotypic (id. at p. 6). As noted in the IEP, the student was motivated by social praise and attention from staff (id.). The student could complete most basic self-care skills independently, with some prompting for thoroughness (id.).

To address the student's cognitive delays, weaknesses in socialization, and attending difficulties, the May 2009 CSE recommended that the student be placed in a 6:1+1 special class in a specialized school with a full-time, 1:1 behavior management paraprofessional (Parent Ex. C at pp. 1, 25). In addition, the CSE recommended that the student receive speech-language therapy two times per week for 45 minutes in a dyad and three times per week for 45 minutes individually to address his deficits in expressive and receptive language, as well as delays in his pragmatic language skills (id. at pp. 3, 25). To address the student's motor delays and sensory processing deficits, the CSE recommended that the student receive individual OT five times per week for 45 minutes and also that he participate in adaptive physical education (id. at pp. 7, 25). The CSE developed a "behavior intervention plan" which targeted the student's verbal perseveration, out-of-context speech, ritualistic behaviors, and difficulty attending, all of which interfered with the student's learning (id. at p. 26). The CSE recommended the following modifications and supports: the use of a multisensory approach including the use of manipulatives; visual representations and supports such as the use of a schedule; repetition, review, and drill; structure and clear expectations; teacher prompts to refocus; positive reinforcements; extra time for processing and response; an emphasis on functional material; verbal supports; and advance warning to changes in routine or schedule (id. at pp. 4, 5). The IEP developed by the May 1, 2009 CSE included annual goals with corresponding short-term

objectives related to reading, writing, math, receptive language, expressive language, social communication skills, pre-vocational skills, fine motor and grapho-motor skills, sensory processing abilities, personal safety, physical education, gross motor skills, communicating feelings, social and play skills, and improving the student's functioning within the classroom environment (id. at pp. 8-22). The CSE recommended the student for a 12-month program and the IEP indicated that due to global delays the student would participate in alternative assessment (id. at pp. 1, 25). According to CSE meeting minutes, the student's mother was not in agreement with the recommendation that the student be placed in a 6:1+1 special class (Dist. Ex. 4 at p. 4). She opined that the student required a 1:1 student-to-teacher ratio and requested that her son stay at McCarton, where he received individualized teaching and instruction using ABA methodology (id.).

In a final notice of recommendation dated June 11, 2009, the district informed the parents of the specific location of the proposed 6:1+1 special class (Parent Ex. H). On June 24, 2009, the student's mother visited the recommended placement along with a special education teacher who had previously worked with the student at McCarton (Tr. pp. 623-24, 666-67). In a report that detailed her observations, the special education teacher noted the lack of individual behavior plans in the district's recommended program, as well as the lack of staff training with regard to ABA and behavioral techniques (Parent Ex. F at p. 2). In addition, she cited the inability of classroom staff to provide the students with continuous instruction to keep them on task (id. at pp. 2-3). The special education teacher did not recommend that the student attend the district's proposed program and instead recommended that the student continue to be placed in a program with a 1:1 student-to-teacher ratio to keep him engaged and on task (id. at p. 3).

Following her visit, the student's mother informed the CSE, by letter dated June 24, 2009, that she found the district's proposed program to be inappropriate for the student because it provided insufficient 1:1 instruction (Parent Ex. E). The student's mother advised that "[s]ubject to any appropriate program and placement that the [district] may offer," the student would be attending McCarton with an additional eight hours per week of home and community ABA and that the parents would seek reimbursement from the district (id.).

On August 6, 2009, the student's mother visited the district's recommended placement for a second time, this time accompanied by a private BCBA who had observed the student in the past (Tr. pp. 629-30). The private BCBA generated a written report in which she detailed her observations of the district's recommended program, as well as her observations of the student at McCarton several days earlier (Parent Ex. X). In her report, the private BCBA stated that the district's program "was considered and rejected due to several factors," including the lack of a sufficiently structured instructional program, the lack of on-site skilled behavior analysts to address the student's interfering behaviors, and the lack of an intensive 1:1 program (id. at p. 11). The private BCBA recommended the student's continued placement at McCarton, along with a home-based therapy program for generalization and skill development (id. at p. 12).

On August 12, 2009, the student's father signed an enrollment contract with McCarton for the 2009-10 academic year (Parent Ex. U). The student attended McCarton for the 2009-10 school year, where he was placed in a classroom with five other peers (Parent Ex. P at pp. 1, 6). He received forty hours of 1:1 individualized education weekly and his daily related services

included one hour of speech-language therapy and forty-five minutes of OT (*id.*). In addition, the student received three hours per week of home-based ABA therapy and one session per week of supplemental OT outside of school (Tr. pp. 335, 556-57).

By due process complaint notice dated December 9, 2009, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school year and requested an impartial hearing to adjudicate claims for pendency and reimbursement (Parent Ex. A at p. 1). While the parents asserted numerous procedural and substantive allegations in their due process complaint notice, the gravamen of the parents' complaint was that the CSE's recommendation of a 6:1+1 program was inappropriate because the student required "intensive 1:1 instruction" (*see id.* at pp. 2-4).

On January 4, 2010, the parties proceeded to an impartial hearing that occurred over the course of nine, nonconsecutive days and concluded on April 30, 2010 (Tr. pp. 1, 7, 33, 77, 203, 338, 410, 546, 678).³ Both parties presented testimonial and documentary evidence at the impartial hearing (Tr. pp. 45, 81, 212, 296, 342, 413, 511, 550, 608, 682; Dist. Exs. 1-15; Parent Exs. A-Z; AA-CC). By decision dated May 12, 2010, the impartial hearing officer determined that the district offered the student a FAPE for the 2009-10 school year (IHO Decision at p. 22). The impartial hearing officer found that the May 1, 2009 IEP was procedurally and substantively appropriate (*id.* at p. 20). She found that the parents had a meaningful opportunity to participate in the development of the IEP; that the IEP included a thorough discussion of the student's present levels of performance, academic management needs, social/emotional performance, and health and physical development; and that the CSE developed appropriate goals that addressed the student's deficits (*id.* at pp. 20-21).

In evaluating the numerous procedural and substantive arguments raised in the parents' due process complaint notice, the impartial hearing officer first noted that the parents had alleged that the functional behavioral assessment (FBA) developed by the district was inadequate because it was not performed in the environment in which it would be implemented (IHO Decision at p. 21). Considering that the student had not yet participated in the district's recommended program, the impartial hearing officer determined that the district had limited means to evaluate the student's behavior in the context of the recommended program (*id.*). She found it reasonable for the CSE, in conducting the FBA, to have relied upon information provided by the student's providers, the two classroom observations conducted by the district, and other available information from McCarton (*id.*). Regarding the parents' allegations that the district's behavior intervention plan did not include sufficient detail, the impartial hearing officer noted that it identified verbal perseveration, ritualistic behaviors, and attention difficulties as behaviors that interfered with the student's learning and provided for the use of a point system, verbal and visual prompts, verbal and visual supports (schedule), social praise, modeling, and support of staff (including a behavior management paraprofessional) as strategies to reduce the

³ On January 11, 2010, the impartial hearing officer issued an interim order in which she indicated that the parties agreed that during the pendency of the proceedings, the student's placement would be at McCarton, as provided in a prior, unappealed decision of an impartial hearing officer dated November 4, 2009 (Interim IHO Decision at p. 2). The prior impartial hearing officer had awarded the parents reimbursement for the student's tuition at McCarton for his 12-month school year and had declined the parents' request for reimbursement for 7.5 hours of home-based ABA therapy (Parent Ex. B at pp. 37, 53-54).

student's targeted behaviors (*id.*). Thus, the impartial hearing officer rejected the parents' contentions that the district failed to conduct an FBA and develop an appropriate behavior intervention plan (*id.*).

Turning to the district's proposed program, the impartial hearing officer determined that the student could make educational progress in a 6:1+1 special class with related services and a full-time behavior management paraprofessional (IHO Decision at p. 22). According to the impartial hearing officer, the hearing record indicated that "while [the student] requires one-to-one teaching to sustain the attention needed to learn skills, he benefits from group instruction, and enjoys social interaction" (*id.*). She further noted that the hearing record demonstrated that the student could perform some academic tasks independently (*id.*). The impartial hearing officer also credited the testimony of the district's teacher that she would be able to provide the student with individualized instruction, as needed, to implement his IEP goals (*id.*). In addition, the impartial hearing officer determined that the district's recommended program included parent counseling and training as required by State regulations (*id.*). The impartial hearing officer declined to consider the parents' claims relating to the availability of OT at the district's proposed placement, finding that such claims were not raised in the parents' due process complaint notice and were first presented at the impartial hearing over the district's objections (*id.*). In conclusion, the impartial hearing officer denied the parents' request for reimbursement of the student's McCarton and home program for the 2009-10 school year (*id.* at p. 23).

The parents appeal.⁴ The parents allege that the district failed to meet its burden to show that it offered a FAPE to the student and that it could implement the student's program. In their petition, the parents focus on two issues: (1) that a district placement officer, rather than the IEP team at the CSE meeting, selected a school "situs" for the student, and (2) that the district's recommended "placement situs" could not provide OT to the student.⁵ The parents contend that the impartial hearing officer erred in dismissing their claim relating to the lack of OT at the district's recommended school on the ground that such claim was not adequately pled in the parents' due process complaint notice. According to the parents, the district also failed to adequately assess the student, failed to conduct an appropriate FBA, failed to develop a proper behavioral intervention plan (BIP), and did not provide for a plan for transitioning the student into public schools. As relief, the parents request that a State Review Officer annul the impartial hearing officer's decision and award them tuition reimbursement for McCarton.⁶

⁴ In their petition, the parents "urge" me to recuse myself. State regulations mandate that a State Review Officer have "no personal, economic or professional interest in the hearing which he or she is assigned to review" (8 NYCRR 279.1[c][4]). To the extent that the parents are requesting that I recuse myself, I decline their request because there is no basis for my recusal, I have no interest in the outcome of the case, and I am able to impartially decide the case.

⁵ In their petition, the parents use the term "situs" to refer to the "bricks and mortar" of the specific school.

⁶ Pursuant to State regulations, a petition for review must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken" (8 NYCRR 279.4[a]). To the extent that the parents raised additional issues in their due process complaint notice and during the impartial hearing that were not set forth in their petition, such issues have been waived by the parents and will not be reviewed (*see Application of the Dep't of Educ.*, Appeal No. 09-136; *Application of a Student with a Disability*, Appeal No. 09-068).

In its answer, the district asserts that the impartial hearing officer properly dismissed the parents' claims and denied their request for reimbursement for the student's McCarton and home program. The district contends that the impartial hearing officer correctly determined that the district offered the student a FAPE for the 2009-10 school year. The district maintains that it offered the student a program that was reasonably calculated to provide educational benefits and which could have been implemented at the district's recommended school. In addition, the district asserts that the parents failed to meet their burden to show that McCarton and the student's home-based ABA program were specifically designed to meet the student's unique needs. The district also submits that McCarton is an overly restrictive environment for the student, that the student has attended McCarton for six-years and has failed to make sufficient progress to require anything less than a 1:1 program, and that the student's home-based ABA program is provided to "generalize" skills taught at McCarton and such costs are not reimbursable under the IDEA.

In its cross-appeal, the district seeks to annul the impartial hearing officer's determination that the student "requires one-to-one teaching." The district argues that the hearing record demonstrates that the student can learn from group instruction. According to the district, annulling such determination would be consistent with the impartial hearing officer's ultimate determination that the district's recommended 6:1+1 program with a 1:1 behavior management paraprofessional was appropriate.

In their answer to the district's cross-appeal, the parents assert that the student can only learn in a group if he is provided simultaneous 1:1 "teaching" support. The parents further argue that McCarton provides the student with the 1:1 support that he requires.

Before turning to the merits of this matter, I will address a procedural issue. The parents submitted exhibits with their petition for consideration as additional evidence. The district objects to the submission of the additional exhibits. Some of the exhibits submitted by the parents were previously introduced into evidence during the impartial hearing and thus, because they are part of the hearing record, will be considered in this appeal (Pet. Exs. A; B; D). The remaining exhibits submitted by the parents with their petition were not offered as evidence during the impartial hearing. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 09-098). Here, I decline to consider the remaining exhibits submitted by the parents because such exhibits are not necessary in order to render a decision in this appeal (Pet. Exs. C; E).

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148). The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]).

Upon review and due consideration of the entire hearing record in this matter, I find that the impartial hearing officer correctly determined that the district's recommended program and services were designed to confer the student with educational benefits during the 2009-10 school year.

As stated above, the parents argue that the district failed to adequately assess the student. An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No.

07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 C.F.R. § 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

In this case, both the May 1, 2009 IEP and CSE meeting minutes reflect the active participation of the student's mother and McCarton staff at the approximately four-hour CSE meeting (Tr. pp. 349-50, 650; Dist. Ex. 4; Parent Ex. C at pp. 2, 5; see Cerra, 427 F.3d at 193; Perricelli, 2007 WL 465211, at *14-15). The hearing record reflects that the May 2009 CSE reviewed McCarton reports (including the January 2009 educational evaluation, speech-language progress report, and OT progress report), two district observations of the student, the December 2005 psychological evaluation, the student's 2008-09 McCarton individual education plan, and McCarton speech-language goals (Tr. pp. 344-48, 357-58; see Dist. Exs. 9-14; Parent Exs. K; L). The district's special education teacher, who was a member of the May 2009 CSE, observed the student in his McCarton classroom in April 2009 (Parent Exs. C at p. 2; K). In addition, the school psychologist testified that she had observed the student's class at McCarton prior to the May 2009 CSE meeting; however, not for the specific purpose of observing the student (Tr. p. 382). The student's mother acknowledged that she was given the opportunity to provide input at the May 2009 CSE meeting and that it was a thorough meeting (Tr. p. 650). The school psychologist opined that all parties, including the student's mother and McCarton personnel were asked for and allowed to make full input at the CSE meeting (Tr. p. 351).

The school psychologist testified that the instructional levels listed on the May 1, 2009 IEP were provided by the student's McCarton teachers and that the student's mother did not object to the characterization of the student's levels of functioning (Tr. pp. 356-57). The psychologist further testified that "in every area that we discussed, whether it be reading or math," the CSE asked the student's mother "to let us know about her concerns and [the student's] level of functioning" (Tr. p. 358). According to the school psychologist, at the CSE meeting, the district's special education teacher and McCarton teacher developed strategies and modifications to address the student's academic management needs (Tr. p. 359). The school psychologist indicated that the IEP reflected supports that were currently being used with the student at McCarton and found to be effective, along with others that "there was a feel . . . would be effective if they were added in" (Tr. pp. 360, 361-62). The school psychologist indicated that the CSE collectively believed that the academic and social emotional supports recommended by the CSE were appropriate for the student (Tr. p. 362). Based on the foregoing, the hearing record does not demonstrate that the CSE did not properly identify all of the student's special education and related services needs or that the May 2009 IEP was deficient insofar as it was developed without adequate data regarding the student's individual needs. Under the circumstances of this case, I find that the lack of any formal testing of the student since the December 2005 psychological evaluation did not impede the student's right to a FAPE, significantly impede the parents' meaningful participation in the CSE process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

I also find that the hearing record supports the impartial hearing officer's conclusions regarding the district's FBA and behavior intervention plan. In the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider, when appropriate, strategies, including positive behavioral interventions, and supports to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). In addition to the federal requirement, State regulations require that an evaluation include an FBA for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral, and emotional factors that contribute to the suspected disabilities (8 NYCRR 200.4[b][1][v]; see Connor v. New York City Dep't. of Educ., 2009 WL 3335760, at *4 [S.D.N.Y. 2009]). An FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]).

Here, the student has not attended the district's recommended program and placement. The school psychologist reported that the May 2009 CSE relied on the IEP developed by McCarton, as well as information provided by the student's McCarton teacher, to develop a behavior intervention plan for the student (Tr. p. 363). The school psychologist explained that the student's McCarton teacher was asked to delineate each behavior that needed to be addressed, as well as the frequency, intensity, and duration of the behavior in order to create an FBA worksheet (id.). Once the CSE had that information, the CSE discussed how each behavior was being addressed and that was translated to "page ten" of the IEP (Tr. p. 364).⁷ According to the school psychologist, the behavior intervention plan was fully discussed at the May 2009 CSE meeting and all parties were in agreement as to the appropriateness of the identified behaviors and strategies (Tr. p. 365). Moreover, the hearing record reflects that the student responds to the strategies recommended (a point system, verbal and visual prompts, verbal and visual supports (schedule), social praise, and modeling), and that these strategies are successfully used at McCarton and by the student's home-based ABA therapist (Tr. pp. 422-23, 589; see Tr. pp. 709-14; Parent Ex. X at p. 9). The hearing record also indicates that had the student attended the district's proposed class, paraprofessionals in the class would have observed the student's behaviors within the classroom (Tr. p. 85). The special education teacher of the district's proposed class testified that the paraprofessionals took data in which they described students' behaviors, as well as the antecedents to and consequences of the behaviors (Tr. p. 132; see Tr. pp. 165-66). Based on the foregoing, I find no reason to disturb the impartial hearing officer's determinations regarding the FBA and behavior intervention plan.

Next, I turn to the parents' assertion that the district failed to offer a FAPE to the student because it did not provide a transition plan for the proposed change from his current private placement at McCarton to the district's proposed public placement. The special education teacher of the proposed class explained that prior to a new student's arrival, she consults with the student's

⁷ "Page ten" appears to refer to the behavior intervention plan included in the May 1, 2009 IEP (Tr. pp. 363-64; Parent Ex. C at p. 26).

parents, meets with the student, and provides an opportunity for the student to meet with other students in the class (Tr. p. 186). The special education teacher testified that she allows time for an entering student "to adjust and feel safe" and afterwards she observes the student and conducts ongoing assessments (Tr. p. 185). She further testified that she communicates with parents through the use of a "homework book," telephones parents when needed, and that there are open school conferences available to parents (Tr. p. 176). While neither federal nor State law require that a transition plan be identified on a student's IEP pertaining to the movement of a student from one school to another, there should be appropriate services identified and offered if a particular student's needs require such services. Here, although transition services were not identified on the student's IEP, the hearing record shows that the proposed school would have been responsive in addressing any transition needs related to the student's enrollment at the public school. Under the circumstances of this case, I find that the lack of specified services on the IEP to assist the student in transitioning from McCarton to the public school program did not impede the student's right to a FAPE, significantly impede the parents' meaningful participation in the CSE process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see A.H., 2010 WL 3242234, at *2; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

I now turn to the parents' argument that the CSE failed to identify a specific school while formulating the student's IEP at the May 2009 CSE meeting. The Second Circuit has established that "'educational placement' refers to the general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the 'bricks and mortars' of the specific school" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; see Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII], 34 C.F.R. § 320[a][7], 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site. (T.Y., 584 F.3d at 419-20). The United States Department of Education (USDOE) has noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]). (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).^{8, 9} This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]; see Application of a

⁸ The federal and State continuums of alternative placement options are identified in 34 C.F.R. § 300.115 and 8 NYCRR 200.6.

⁹ The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environments that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?" (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414[d][1][A][i][VII]; 34 C.F.R. § 300.320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]).

Student with a Disability, 09-082; Application of a Student with a Disability, 09-074; Application of a Student with a Disability, 09-063; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5). Thus, as held by the Second Circuit, the lack of a specific school location on a student's IEP does not constitute a per se violation of the IDEA (K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; T.Y., 584 F.3d at 420; see White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents, 629 F.2d at 756; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]).

Here, the district formulated an IEP for the student that specifically identified a placement on the continuum of placement options, a 6:1+1 special class in a specialized school (see 8 NYCRR 200.6[h][4]). At the time of the May 2009 CSE meeting, the student's mother disagreed with the CSE's proposed placement and asserted that the student could only make educational progress at McCarton (Tr. pp. 375-76, 402; Dist. Ex. 4 at p. 4). The hearing record reflects that the May 2009 CSE considered a 12:1+1 special class in a community school and a 6:1+1 special class in a specialized school without a behavioral management paraprofessional, but rejected both placement options due to its determination that the student needed more support (Parent Ex. C at p. 24). On June 11, 2009, the district offered the student a specific school (Parent Ex. H). The student's mother subsequently visited the proposed school on two occasions, accompanied by professionals to assist her in reviewing the program (Tr. pp. 623, 629; see Parent Exs. F; X).¹⁰ In a letter to the CSE dated June 24, 2009, the student's mother rejected the IEP, stating that the student "would not receive enough of the 1:1 instruction that was critical for his success" (Parent Ex. E at p. 2). Although the parents argue that they disagreed with a 6:1+1 placement and were not involved in the selection of a particular school, the hearing record demonstrates that the student's mother was present during the four-hour CSE meeting, had the opportunity to visit a classroom on two occasions, and had an opportunity to express her opinion and concerns about the district's recommendations. Under the facts of this case, I find that the fact that a specific school location was not offered by the district at the May 2009 CSE meeting did not deprive the student of a FAPE (see K.L.A., 2010 WL 1193082, at *2; T.Y., 584 F.3d 412).¹¹ Furthermore, I find that the failure to identify a specific school location on the student's IEP at the time of the CSE meeting did not impede the student's right to a FAPE, significantly impede the parents' meaningful participation in the CSE process, or cause a deprivation of

¹⁰ The student's mother testified that she did not share with the district the report from the BCBA who observed the recommended program in August 2009 (Tr. pp. 652-53).

¹¹ The parents request that I reverse the Second Circuit's holding in T.Y. or decline to follow the Court's ruling in this case (Pet. at n.7). I note that the parents have not set forth an exception to the Second Circuit's holding in T.Y. or explained how the facts in the instant case are distinguishable from those in T.Y. Therefore, I will apply the Court's ruling in T.Y. to this case. Moreover, I note that the statutory interpretation set forth in T.Y. has not been examined by the United States Supreme Court or modified by Congressional action and I have no authority to reverse the decision of a controlling court (see generally Application of a Child with a Disability, Appeal No. 06-032; Application of a Child with a Disability, Appeal No. 01-052; Application of a Child with a Disability, Appeal No. 01-049; Application of a Child with a Disability, Appeal No. 01-044).

educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see A.H., 2010 WL 3242234, at *2; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

I also find that the impartial hearing officer properly dismissed the parents' claim that the district's recommended school would not be able to offer OT. State regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 C.F.R. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; A.B. v. San Francisco Unified Sch. Dist., 2008 WL4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 09-140). As the impartial hearing officer concluded, the hearing record demonstrates that the parents failed to assert such a claim in their due process complaint notice and there is no indication in the hearing record that the district agreed to expand the scope of the impartial hearing to include issues relating to the availability of OT (IHO Decision at p. 22 n.3; see Parent Ex. A).

Moreover, the hearing record does not support the parents' argument that they could not assert the unavailability of OT in their December 2009 due process complaint notice due to a lack of notice that the district would be issuing a related services authorization (RSA) for OT. The hearing record indicates that the student's mother faxed a letter to the district on June 25, 2009 rejecting the district's program (Parent Ex. E at pp. 1, 2; see Tr. pp. 654-55). The student's mother visited the recommended placement a second time on August 6, 2009, and according to her own testimony, was advised at that time that the district would be issuing an RSA for OT in the fall due to a shortage of occupational therapists (Tr. pp. 630-31).¹² In September 2009, the student's mother resent the same June 25, 2009 letter to the district rejecting its recommended program, adding no concerns about the lack of OT (see Tr. pp. 674-75; Parent Ex. D). As stated above, the parents filed their due process complaint notice in December 2009, which did not include any assertions about the lack of OT at the proposed placement (see Parent Ex. A). Thus, the hearing record indicates that the parents had an opportunity to raise allegations concerning the availability of OT before the impartial hearing as the district advised the parents in August 2009 that it may be issuing an RSA for OT.

Notwithstanding the above discussion, the hearing record demonstrates that OT was available at the district's recommended placement in the beginning of the school year. The district must have an IEP in effect for each student with a disability at the beginning of each school year (20 USC § 1414(d)(2)(a); see Tarlowe, 2008 WL 2736027, at *6, quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]; Application of a Student with a Disability, Appeal No. 08-088). The student has a twelve-month

¹² The hearing record reveals that for a time period during the 2009-10 school year, the student was receiving less OT at McCarton than what was recommended for him due to a shortage of providers (Tr. pp. 315, 669).

IEP, thus, the district must have offered him a placement before July 2009.¹³ Here, the hearing record indicates that the district offered the student a placement by July 2009 and OT was available at the recommended placement in July 2009 (see Tr. pp. 57-58, 61-63, 182; Parent Ex. H). Testimony by district staff further reveals that due to a shortage of available providers in September 2009, the district issued RSAs to students who were not receiving OT and that the special education teacher of the proposed class incorporated "occupational activities" such as use of a sensory basket, therapy ball, bean bag, and play dough to those students with sensory needs (Tr. pp. 71, 182-85). Moreover, a June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. According to the document:

[S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

(<http://www.emsc.nysed.gov/resources/contractsforinstruction/qa.html>, Question 5; see <http://www.emsc.nysed.gov/resources/contractsforinstruction/>). In sum, even had it been properly raised, the hearing record does not support a finding that OT was unavailable at the start of the school year, July 1, 2009, or that the district would have denied the student a FAPE under the circumstances of this case where the district may have had to issue an RSA to the student for the provision of OT due to a shortage of providers.

Furthermore, the hearing record demonstrates that the recommended school would have been able to implement the student's recommended program. The special education teacher of the recommended class testified that she had been employed by the district for thirty years and had worked with students with autism for approximately ten years (Tr. pp. 82-83). As detailed in the hearing record, the special education teacher had training in ABA and TEACCH (Tr. pp. 83-84, 129-31, 165).¹⁴ According to the special education teacher, as of July 1, 2009, there were

¹³ In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]).

¹⁴ According to the special education teacher, the acronym TEACCH stands for: Treatment and Education of Autistic and related Communication handicapped CHildren (see Tr. p. 84).

five students in her class ranging in age from 11 to 14 years old (Tr. p. 86).¹⁵ The daily schedule of the class included an instructional breakfast period, followed by morning meeting, a read aloud period, TEACCH instruction or a cooking activity, a cluster activity, an instructional lunch period, yoga class, a second cluster activity, a leisure activity period and dismissal (Tr. pp. 92-98). The teacher reported that students in her class were functionally grouped on a daily basis except for during TEACCH, when instruction was individualized (Tr. pp. 89-90). The special education teacher described the recommended classroom as "two smaller rooms within one large room" (Tr. p. 91). She indicated that one room was used for group activities and socialization and the other for instruction and students' individual work programs (TEACCH) (Tr. pp. 91, 154). The teacher testified that she consulted with the students' related service providers in order to incorporate aspects of students' related services goals into her class (Tr. p. 120).

The special education teacher testified that she conducted both formal and informal assessments of her students (Tr. p. 103). She indicated that she kept daily data, which was calculated on a weekly basis to determine what the student needed for the following week (*id.*). The special education teacher reported that the district was in the process of switching from using the "Brigance" to assess students to using the Assessment of Basic Language Learning Skills (ABLLS) (Tr. p. 125). According to the special education teacher, each day a student was assigned to work with either a teacher or a paraprofessional, during which time students were taught new skills (Tr. p. 151). The special education teacher explained that once a student had mastered new skills, in order to get reinforcement and repetition in those skill areas, the items were added to the student's TEACCH program (*id.*). The special education teacher indicated that the length of time a student was engaged in his or her TEACCH program was dependent on how long a student could stay on task (Tr. p. 152). The special education teacher noted that activities were devised for a student's TEACCH program based on the student's needs (*id.*). According to the special education teacher, the TEACCH program was usually forty-five to fifty minutes in length (Tr. pp. 152-53).

With respect to behavior management, the special education teacher explained that there was a school-wide point system called "KARMA," which stood for "kind, accountable, responsible, mature and appropriate" (Tr. p. 97). As used by the special education teacher, the students in her class could earn points (converted to a money system) that they could exchange for rewards (Tr. p. 162). The special education teacher testified that one of the roles of the paraprofessionals in her class was to observe behaviors within the classroom (Tr. p. 85). She noted that the paraprofessionals took data in which they described student behaviors, as well as the antecedents to and consequences of the behaviors (Tr. p. 132; *see* Tr. pp. 165-66). In describing TEACCH, the special education teacher noted that it included a motivational component (Tr. p. 151).

Turning to the district's cross-appeal, I find that a review of the hearing record supports the impartial hearing officer's determinations that the student requires some one-to-one teaching (IHO Decision at p. 22). The impartial hearing officer found that the student could make educational progress in a special class with a 6:1+1 staff ratio, along with related services and a full-time behavior management paraprofessional (*id.*). In doing so, she noted that while the hearing record indicated that the student "require[d] 1:1 teaching to sustain the attention to learn

¹⁵ At the time of the impartial hearing, there were three students enrolled in the recommended class (Tr. p. 136).

skills," the student also benefited from group instruction, enjoyed social interaction, and was able to perform certain academic tasks independently (*id.*) (emphasis added).

As described in the hearing record, McCarton provides an interdisciplinary instructional model in a 1:1 classroom setting (Dist. Ex. 9 at p. 1). The student's 1:1 instructional setting at McCarton consisted of six students being individually instructed simultaneously by six different instructors, all within the same classroom (Tr. pp. 260-62). The instructors work under the supervision of a BCBA (Tr. pp. 257-58).¹⁶ During the 2008-09 school year, the student received 40-hours per week of "individualized education" (Dist. Ex. 9 at p. 1).

Although McCarton staff testified that the student required 1:1 instruction to learn new skills due to his attending and processing difficulties (Tr. p. 236), they also testified that the student participated in numerous group activities throughout the day. The educational director testified that the student's 1:1 instruction had been faded for the student's routine activities, such as lunch, activity and exercise groups, as well as his morning routine (Tr. pp. 272-73, 235-36). In addition, the educational director indicated that the student participated in reading and math groups that covered mastered materials, with a 1:1 shadow assisting him (Tr. pp. 264, 287). The head teacher in the student's classroom indicated that in addition to 1:1 instruction, a typical day in her classroom included exercise time, morning meeting, community outings, lunch, and other group activities (Tr. pp. 425, 427-28). The head teacher testified that there was a morning group and an afternoon group and that the teachers were trying to phase out the 1:1 instruction to try to get the students more accustomed to a group setting (Tr. pp. 487-88).

Consistent with the impartial hearing officer's finding that the student was able to perform certain academic tasks independently, the head teacher reported that the student could engage in many different leisure activities independently following a written schedule (Tr. p. 456). In addition, the educational director reported that student was able to work on some learned skills independently and that the student engaged in some independent work in the morning when he arrived at school (Tr. p. 250). Comments made by the student's home-based instructor indicating that the student "enjoyed people" and that it was very motivating for the student to maintain engagement with people were consistent with the impartial hearing officer's findings that the student enjoyed social interaction (Tr. p. 558). The student's head teacher reported that the student visited another class (with a 1:1 instructor) consisting of more verbal peers for snack and a sports group because he was "more verbal" than the students in his own class and had "nice" social skills (Tr. p. 430). Based on the foregoing, I find that the testimony from McCarton staff supports a finding that the student could be educated in a small group setting with 1:1 support.

Furthermore, I find that the district's recommended program would have provided the student with 1:1 instruction for the introduction of new skills, as was deemed necessary by

¹⁶ As noted by the district's school psychologist, it appears that the 1:1 "teachers" or "instructors" at McCarton often functioned as paraprofessionals (Tr. p. 403). The head teacher of the student's classroom was a BCBA who supervised the other teachers in the class (Tr. pp. 414, 415-16). She testified that the other teachers were able to provide appropriate instruction with supervision but acknowledged that she did not think that they had the requisite training, experience, or skill level to teach without her supervision (Tr. pp. 470-71).

McCarton staff. The special education teacher of the district's proposed class reported that she met with her students individually throughout the day based on their needs, so that she could teach the students new skills and assess them (Tr. pp. 100-01). The teacher indicated that she could do 1:1 instruction during breakfast and lunch when she had other teachers in the room, during TEACCH time, during leisure time, and during her preparation period if necessary (Tr. p. 167). The special education teacher stated that there was no "formula" for the maximum amount of time a student could receive 1:1 instruction, rather it was as needed (Tr. p. 168). The special education teacher indicated that students also could learn new skills 1:1 from a paraprofessional if she reviewed the skill with the paraprofessional in advance of instruction (Tr. p. 153). Based on the foregoing, I find no reason to disturb the impartial hearing officer's determination that the student "requires one-to-one teaching to sustain the attention needed to learn skills" (IHO Decision at p. 22). Accordingly, I will dismiss the cross-appeal.

In summary, any procedural errors asserted were either not supported by the hearing record or did not rise to the level of a denial of a FAPE. There is no showing that any procedural error impeded the parents from meaningfully participating in the formulation of their son's IEP (see Cerra, 427 F.3d at 193). I also conclude that the CSE's recommendation of a 6:1+1 special class with related services of speech-language, OT, and a behavior management paraprofessional was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2009-10 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). In addition, I find that the hearing record demonstrates that the district's proposed program is consistent with LRE requirements (see 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]). Having determined that the district offered the student a FAPE, I need not reach the issue of whether McCarton was appropriate for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

**Dated: Albany, New York
August 19, 2010**



**PAUL F. KELLY
STATE REVIEW OFFICER**