



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-085

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 Board of Education of the [REDACTED] Free School District

Appearances:

Thivierge and Rothberg, P.C., attorneys for petitioners, Randi M. Rothberg, Esq., of counsel

Jaspan, Schlesinger LLP, attorneys for respondent, Carol A. Melnick, 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 private educational services that they obtained for their son for the 2008-09 and 2009-10 school years. The appeal must be dismissed.

At the time the impartial hearing convened in January 2010, the student was receiving private applied behavioral analysis (ABA) and applied verbal behavior (AVB) therapy at the Carbone Clinic (Carbone) and through privately-obtained service providers in the home and community. The district agreed to provide the student with the related services identified on the student's 2009-10 individualized education program (IEP), including occupational therapy (OT), occupational therapy consultation, physical therapy (PT), physical therapy consultation, speech-language therapy, speech-language therapy consultation, behavior consultation, and parent counseling and training (Parent Ex. A at p. 7). Carbone has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

With regard to the student's educational history, the parents became concerned with atypical behaviors displayed by the student at an early age (Tr. pp. 1167-68). The student was evaluated through the Early Intervention Program (EIP) by a developmental pediatrician who

gave the student a diagnosis of autism (Tr. p. 1168; Dist. Ex. 8 at p. 1). Through the EIP the student received 15 hours per week of ABA therapy at home, along with speech-language therapy, OT, and PT services (Dist. Ex. 8 at p. 1). Following the EIP, the student transitioned to the committee on preschool special education (CPSE) where he was recommended for placement in a 6:1+2 special class in a state-approved preschool special education program for the 2007-08 school year (Dist. Ex. 11 at p. 43). The student also received ten hours per week of home-based ABA therapy from a special education itinerant teacher (SEIT) and related services of speech-language therapy, OT, and PT in his special class (Dist. Exs. 8 at p. 1; 11 at pp. 43-44).

On March 18, 2008, the committee on special education (CSE) met to review the student's program and to discuss his transition from the CPSE to the CSE (Dist. Ex. 12 at p. 1). The IEP developed by the March 2008 CSE included the results of private evaluations obtained by the parents as well a description of the student's progress and needs as reported by his preschool providers (id. at pp. 3-5; see District Exs. 7-9; 11). The March 2008 CSE recommended that for the 2008-09 school year (kindergarten) the student be classified as a student with autism and that he be placed in a 9:1+3 special class with a shared (2:1) aide (Dist. Ex. 12 at p. 1). The CSE also recommended that the student receive individual speech-language therapy three times per week, individual OT two times per week, and individual PT two times per week (id. at pp. 1-2). The March 2008 IEP included provisions for monthly related services consultations, as well as parent counseling and training (id. at pp. 1, 2). The IEP also included annual goals and benchmarks related to study skills, mathematics, speech and language, social/emotional/behavioral development, motor development, cognition, and activities of daily living (ADL) (id. at pp. 6-11). The March 2008 IEP indicated that the CSE was to reconvene during the third week in October 2008 (id. at p. 5).

According to the hearing record, for summer 2008 the district contracted with a private agency to provide a 1:1 home-based program for the student (Tr. pp. 339-40, 1175-76; see Dist. Exs. 3-6; Parent Ex. II at p. 1). During July and August 2008, the student, his parents, and his home therapists participated in an evaluation by an outreach consultant at Carbone (Parent Ex. II at pp. 1-2). The parents reportedly sought the evaluation to get assistance in determining the steps necessary to set up a home-based ABA/AVB program and to increase the student's functional and spontaneous language and motivation (id. at pp. 1-2).

For the 2008-09 school year, the student attended the 9:1+3 special class recommended by the CSE (Tr. pp. 27, 45; see Dist. Ex. 15 at p. 6; Parent Ex. II at p. 1). In addition, the student's parents arranged for the student to receive two to four hours per week of private home-based ABA services which incorporated components of AVB (Dist. Ex. 28 at p. 1; Parent Exs. II at p. 2; NN).¹

On October 27, 2008, a subcommittee of the CSE (sub-CSE) convened to review the student's progress and needs following his transition from preschool (Dist. Ex. 15 at p. 5).

¹ The hearing record reflects that beginning in July 2008 the parents hired a person who had previously worked as the student's babysitter to provide home-based ABA/AVB services to the student (Tr. pp. 534, 605-08, 1384). At the time the babysitter began providing services she had participated in a one day consultation/training at Carbone (Tr. p. 605-09).

According to the sub-CSE meeting minutes included in the resultant October 2008 IEP, the student's teacher reported that the student was "capable but did not always demonstrate what he knew" (*id.* at p. 6). The teacher indicated that she was seeking a balance of preferred and non-preferred activities for the student and that she wanted to decrease the amount of reinforcers given to the student throughout the day (*id.*). The student's home-based ABA provider reported a decrease in the student's "manding," and the parents believed that the student had recently shown decreased energy and was quieter (*id.*).² The parents indicated that they had difficulty getting the student to "mand" for toys and activities and that the student tended to isolate himself when he got home from school (*id.*). Also according to the sub-CSE meeting minutes, the student's mother had inquired as to whether the student's March 2008 IEP goals were reachable, noting that they were the same goals that the student had worked on in the past (*id.*). In response the student's special education teacher discussed each goal on the student's IEP (*id.*). The sub-CSE minutes reflected that the student's parents requested a subsequent CSE meeting be held in December 2008 in order to further review the student's progress toward meeting his IEP goals (*id.*). The sub-CSE continued the March 2008 CSE's recommendations without modification (*id.*).

The student's report card for the first marking period of the 2008-09 school year included teacher comments that indicated that the student transitioned "nicely" into the school routine, that he participated in group instruction with frequent redirection, and that he was working to improve his attention/focusing skills (Parent Ex. DD).³ The report card indicated that the student was demonstrating progress with respect to the following skills: identifying objects, colors, shapes, and letters; rote counting; playing appropriately with toys and engaging in symbolic play; transitioning; and ADLs (*id.*). In addition, the student's IEP progress report noted that the student was demonstrating some progress or was progressing satisfactorily toward some of his IEP goals and objectives (Dist. Ex. 30).

The student's home-based ABA provider reported that, beginning on December 16, 2008, the student's weekly ABA hours were increased from two to four hours per week to four to six hours per week (Parent Ex. NN at p. 1).

As previously requested by the parents, a sub-CSE reconvened on December 18, 2008 (Dist. Ex. 16). Meeting participants included the sub-CSE chairperson, the school psychologist, the student's special education teacher and related services providers, the student's private home-based ABA provider, and the student's parents (*id.* at p. 5). During the December 2008 sub-CSE meeting, the student's physical therapist noted that the student had made functional gains in all areas (*id.*). The student's occupational therapist reported that a therapeutic brushing program had been implemented and that the student was "more available" to participate and engage in tasks (*id.*). The student's speech-language therapist reported an increase in the student's attention to task (*id.*). The student was described in the December 2008 meeting minutes as being more tolerant and attentive in the classroom and able to demonstrate increased independence for certain tasks (*id.* at p. 6). According to the sub-CSE meeting minutes, the student used some

² The term "manding" is described in the hearing record as "requesting" (Tr. pp 25, 931).

³ According to the student's teacher, marking periods concluded three times per year in December, March, and June (Tr. p. 222).

language spontaneously in the classroom, but he required prompting most of the time (*id.*). The student was reportedly doing well with sorting at home (*id.*). The December 2008 IEP reflects that the parents requested that the district require the student to use language and "mand" throughout the school day, which the student's special education teacher acknowledged as a priority (*id.*). The special education teacher reportedly discussed the student's 2008-09 IEP benchmarks, including the level of progress noted, and indicated that all of the goals and benchmarks continued to be appropriate (*id.*).

In February 2009 the parents obtained a private neurodevelopmental and psychological evaluation of the student, which was conducted by a developmental pediatrician and a school psychologist (Parent Ex. BB). The developmental pediatrician had previously evaluated the student in February and March 2008 (*see* Dist. Ex. 8). Administration of the Stanford-Binet Intelligence Scales, Fifth Edition (SB-5) yielded the following standard scores (and percentile ranks): full scale IQ score 45 (<1st), verbal IQ score 46 (<1st) and nonverbal IQ score 50 (<1st) (Parent Ex. BB at pp. 3, 8). The student's overall adaptive behavior skills, as measured by the Vineland Adaptive Behavior Scales-Second Edition (Vineland-II), were in the low range (*id.* at p. 4). The developmental pediatrician, along with the evaluating psychologist, stated that "by parent report and evaluation", the student had made little progress since his last assessment (*id.* at p. 1). The evaluators reported that the student had begun to make some spontaneous verbal requests since beginning his home ABA/AVB program, but that the student had not generalized those skills to the school setting (*id.*). According to the evaluators, the student was not meeting his current IEP goals, some of which had remained the same for the past three years (*id.*). The evaluators concluded that the student's school program was not sufficiently intensive for him to make measurable improvements and generalize his skills across environments (*id.* at p. 5). They further concluded that the student's then current group setting was not appropriate for the student because he was not meeting his IEP benchmarks and goals (*id.*). Among other things, the evaluators recommended that the student receive 1:1 ABA/AVB therapy for 40 hours per week in a clinic, the community and at home, and that the program be supervised by an individual who was very experienced with AVB therapy (*id.* at p. 6).

The student's report card for the second marking period of the 2008-09 school year indicated that the student had made gains in independence (Parent Ex. DD).⁴ According to teacher comments, the student's participation was heavily reliant on motivation, cause-effect toys, and a high rate of reinforcement (*id.*). The report card indicated that the student was making progress in matching objects, colors, and letters; identifying letter sounds; tracing shapes, letters and numbers; identifying numbers; making his wants and needs known; following directions; engaging in parallel play; and participating in classroom activities (*id.*). The student's teacher reported that the student had mastered the ability to identify shapes and to eat and drink independently (*id.*). The student's IEP progress report indicated that the student was demonstrating some progress or progressing satisfactorily toward many of his IEP goals and

⁴ The student's special education teacher reported that in March 2009 she began to reinforce the student using edibles (Tr. p. 141).

benchmarks (Dist. Ex. 30).⁵ Additionally, the student had attained several motor benchmarks contained in his 2008-09 IEP (id.).

In a letter to the student's special education teacher dated April 1, 2009, the parents reiterated their concern regarding the student's lack of progress toward meeting his 2008-09 IEP goals (Dist. Ex. 26). They indicated, among other things, that they looked forward to meeting with the district to plan for the 2009-10 school year (id.).

In April 2009, a private board certified assistant behavioral analyst (BCaBA) from Carbone observed the student in his classroom at the district (Dist. Ex. 28).⁶ According to the parents, the purpose of the observation was to assess the work that the student was doing in the school program, with an emphasis on management of the student's motivation and learner cooperation (Dist. Ex. 26). The parents' stated hope was that the observation would yield new ideas to help the student achieve his IEP goals, and to guide the student's home-based program (id.). The private BCaBA observed the student during the morning meeting as it was conducted by the student's special education teacher (Dist. Ex. 28 at p. 2). According to the private BCaBA, the special education teacher incorporated a variety of learner goals within a lesson on the four seasons, including matching, labeling, reading, letter sounds, and imitation skills (id.). The private BCaBA described the lesson as an instructional activity that promoted learning opportunities for the student with his peers, but stated that the instructional activities did not promote active engagement of the student or contrive enough response opportunities to compete with the student's off-task behaviors (id.). The private BCaBA reported that on several occasions the student engaged in behaviors during the morning meeting that interfered with his learning, such as rapidly moving his hands up and down and singing/humming (id.). She also observed long latencies in the student's responding (id.). According to the private BCaBA, the interfering behaviors occurred most often when the student was not provided with high rates of reinforcement for on-task behaviors or for responding correctly to instructional demands (id.).

The private BCaBA noted that the student did not reliably respond to teacher instructions unless explicitly called on, but indicated that when the student was directed to respond vocally he occasionally responded quickly (Dist. Ex. 28 at p. 2). According to the private BCaBA, when the teacher asked the group to respond together the student looked out the window, sang songs, and ignored the teacher's demand (id. at p. 1). The private BCaBA described one occurrence in which the student responded to a group demand accurately without any prompting, and she noted

⁵ It appears that a meeting was held on March 17, 2009 to discuss the student's progress (see Dist. Ex. 24). In a letter to the student's teacher written the following day, the student's parents, among other things, detailed their disagreement with the district's assessment of the student's progress (id. at p. 1). Specifically, the parents requested that the student's progress report be changed to reflect that the student was not progressing satisfactorily toward the goal of following two-step directions (id.). In a response dated March 31, 2009, the student's teacher and speech-language pathologist stated that they believed that the student was making progress toward following two step-directions in the classroom and in therapy, and noted that the student's 2008-09 IEP goal addressed the student's ability to follow one-step directions through individual tasks, an area in which the student had made progress (Dist. Ex. 25).

⁶ The private BCaBA was the same outreach consultant who had evaluated the student at Carbone in July 2008 (Parent Ex. II at p. 1).

that the teacher praised the group but did not provide tangible reinforcers to the student for fluent responding (id. at p. 2).

In her observation report, the private BCaBA recounted that when the class transitioned from morning meeting to a computer activity the student required vocal and physical prompts to stay in his chair until asked to line up (Dist. Ex. 28 at p. 2). She noted that when it was the student's turn to transition he required minimal physical prompts to line up and that he walked to the computer lab in line with his class; however, she also noted that the student sang and hummed songs in the hallway (id.). In the computer room, the student participated in a group with three other students during which the students were asked to fill in the missing words to songs, imitate actions, and follow simple one-step directions related to the activity (id. at p. 3). According to the private BCaBA, the student responded quickly and accurately when asked to respond (id.). When the lesson focused back on the four seasons, the private BCaBA reported that the student had difficulty answering complex "wh" questions (id.). The student did not respond to the teacher's question "what season is it," and instead looked at other students' computer screens or the ceiling fans (id.). In response to the student's behavior, the classroom aide blocked the student's eyes and tried to physically redirect him toward the teacher (id.).

Following her observation of the student, the private BCaBA met with the student's special education teacher and the school psychologist (Dist. Ex. 28 at p. 3). The student's teacher reported that the student had opportunities for discrete trial instruction on some days for 15-20 minutes per day, and for natural environment teaching with an emphasis on requesting preferred items 15-20 minutes per day, depending on whether the student was scheduled for other activities such as related services (id.). According to the private BCaBA, although the teacher reported that data was collected on IEP goals, no data was presented during the meeting nor was any collected during the observation (id.).

In her observation report, the private BCaBA opined that the student's school placement did not meet the student's educational needs (Dist. Ex. 28 at p. 3). Relying on data from the student's most recent progress report, the private BCaBA concluded that the student had not achieved mastery for 97% of his educational goals (id.).⁷ According to the private BCaBA, the student required a greater level of intensity of services in order receive reasonable educational benefit including a minimum of three hours per day of discrete trial and natural environment instruction in a one-to-one format (id.). She opined that, in addition, the student required a well-trained individual to guide all school-based activities to insure that the student benefited from individual and group instruction (id.).

In a letter to the district dated April 27, 2009, the parents requested that the student's annual review be scheduled as soon as possible if it had not already been scheduled (Dist. Ex. 17). The parents noted their interest in discussing the student's programming for the remainder of the 2008-09 school year, as well as the student's program and services for the 2009-10 school year (id.). The parents advised the district that the student had recently been accepted to receive

⁷ The private BCaBA did not identify the progress report upon which she based her opinion regarding the student's educational goals, and it appears that her observation report addressed the ratings on the student's first or second marking period report card rather than his 2008-09 IEP goals (Tr. p. 1312; Dist. Ex. 20 at p. 7; see Parent Ex. DD).

ABA services at Carbone and that they wanted to discuss both those and other services with the CSE (id.). The parents informed the district that they looked forward to working with the CSE to develop an appropriate plan for the student, but reserved their right to seek reimbursement for any costs or expenses for the supplemental ABA services (id.).

The district's special education director acknowledged receipt of the parents' letter on April 29, 2009 and notified the parents of the date of the student's annual review (Dist. Ex. 18). The director indicated that the parents' decision to secure additional ABA services through Carbone had been made unilaterally, that supplemental ABA services had not been recommended by the CSE on the student's IEP and, therefore, the additional ABA services would be at the parents' own expense (id.).

A May 11, 2009 progress report composed by the student's home-based ABA provider reflected that the student's level of "manding" per minute had increased (Parent Ex. NN at p. 1). The provider reported that, based on discussions with the student's parents, the student was using more language throughout the day and would "mand" for increased items outside the home instructional setting (id.). According to the provider, demonstrable progress in the student's learner motivation and attention had been attained since the initiation of the home ABA/AVB program in July 2008 (id. at p. 2). However, the provider noted that both data and video recordings showed regression with respect to the student's fluency, "manding," and behavior in April 2009 (id.). The provider remarked that the student had mastered 112 skills in four domains (id.).⁸ The provider concluded that four to six hours of ABA/AVB instruction outside of school was insufficient for the student to make meaningful progress in all domains and to generalize skills across settings (id. at p. 3).

The CSE met on May 12, 2009 for the student's annual review and to develop the student's IEP for the 2009-10 school year (Dist. Ex. 20). Meeting participants included the CSE chairperson who was also the district's director of special education, the school psychologist, the student's special education teacher and related service providers, the student's parents, and a friend of the parents (id. at p. 6; Dist Ex. 21).⁹ In developing the student's 2009-10 IEP, the CSE considered a May 2009 Carbone report, related services reports from May 2009, an April 2009 educational report, and the parents' February 2009 neurodevelopmental evaluation (Dist. Ex. 20 at p. 7).

With regard to the student's present levels of performance, the resultant May 2009 IEP indicated that at the beginning of the 2008-09 school year the student was extremely dependent on staff to complete each task throughout the day (Dist. Ex. 20 at p. 3). According to the IEP, the student had made gains in his overall independence and was able to complete the morning routine with only verbal prompts and to independently enter the classroom and restroom (id.). The IEP indicated that the student required prompts that ranged from gestural to full physical in order to participate in a toileting routine, and the present levels of performance noted that the student's toilet training routine had been recently modified (id.). The IEP noted that the student was working to increase his toy selection and that he was developing a greater interest in play

⁸ The skills referred to were not identified in the provider's report.

⁹ The parents declined the participation of an additional parent member (Dist. Ex. 22).

dough, an alphabet push board and a beetle toy (id. at pp. 3-4). The IEP stated that the student transitioned throughout the daily routine, as well as to and from therapy, with moderate support (id. at p. 4). According to the IEP, in order to participate in individual and group instruction the student required constant adult facilitation and significant amounts of reinforcement (id.). The IEP noted that the student responded well to lessons and activities that incorporated high energy, significant amounts of social praise, and tangible reinforcers (id.). The IEP indicated that the student did not seek attention from peers and adults and if left alone for any period of time the student would engage in self-stimulatory behaviors until redirected (id. at p. 5). The IEP reflected that although the student was internally reinforced by his self-stimulatory behaviors, he was beginning to accept adult facilitation and engage in more appropriate activities (id. at p. 6). However, the student also reportedly engaged in task avoidance, which included closing his eyes and/or staring in another direction (id.). According to the IEP, during these situations the student was prompted to attend and the demand was repeated until compliance was achieved (id.). The IEP indicated that when frustrated the student would yell loudly or squeeze the individual closest to him (id.). As noted in the IEP, staff responded to the student's squeezing behavior by blocking and redirecting the student (id.).

The student's present levels of performance in his May 2009 IEP indicated that the student had made slow gains in his speech and language skills (Dist. Ex. 20 at p. 4). The student was reported to produce single words along the carrier phrase "I want___" to request items (id. at p. 4). The IEP reflected an increase in the student's ability to label preferred items and actions, and to follow basic directions (id.). With respect to the student's physical development, the IEP noted that the student continued to make slow but steady progress toward his IEP goals related to PT (id. at pp. 5-6). The IEP stated that the student demonstrated deliberate attempts at coloring and that, using his left hand, he could trace horizontal and vertical lines with minimal prompts (id. at p. 5). According to the IEP, the student's arousal level had improved as the student appeared more animated and alert throughout OT sessions (id.). Additionally, the IEP reflected that the student was less prone to meltdowns and more compliant in response to verbal instruction (id.). The IEP described the student's improved travel skills and his progress in stair negotiation skills (id. at p. 6). In addition, improvement in balance and jumping, and increased strength was noted (id.).

The May 2009 IEP detailed the student's needs, including his need to develop greater independence with respect to toileting, to decrease his reliance on staff to participate in personal/classroom responsibilities, to decrease his dependence on primary reinforcers (edibles), to increase his ability to attend, to expand his utterances, to engage in parallel play, to seek adult attention to facilitate more varied play, to develop travel skills in the educational setting, to develop simple gross motor skills, to increase muscle strength and exercise endurance, and to improve visual motor coordination, fine motor skills, and self-care skills in the educational setting (Dist. Ex. 20 at p. 6).

According to the May 2009 CSE minutes, district staff reported that the student demonstrated growth during the school year insofar as he responded more quickly and more often (Dist. Ex. 20 at p. 7). The minutes also reflected that the student sat longer, had learned the classroom routine, located the table at lunch and ate independently, played more appropriately with toys, was more engaged during group and overall (although attention varied), was able to

choose a toy or activity, responded after hearing his name, transitioned better from activity to activity, and followed directions more easily (id.). The CSE minutes noted that the student's parents disputed the district staff's appraisal of the student's progress toward his IEP goals (id.). However, in the judgment of the district staff, the appraisal of the student's progress was supported by collected data, observation and professional judgment, leading to the conclusion that there had been improvement in the student's overall performance (id.). Referencing the student's private evaluation, reports, and observation, the parents remarked that the student had made some progress but not meaningful progress (id.). According to the CSE minutes, the parents believed that the student's current educational environment was not sufficient and requested an intensive 1:1 program that included instruction at home, at Carbone, and in a community setting (id.). The meeting minutes reflect that the CSE considered the parents' request but rejected it because the proposed program was too restrictive (id.).

The May 2009 IEP included annual goals and instructional objectives and benchmarks in the areas of study, speech and language, social/emotional/behavioral, motor, cognitive, and ADL skills (Dist. Ex. 20 at pp. 8-12). The CSE recommended that the student continue to be placed in the district's 9:1+3 special class for the 2009-10 school year with the support of a shared (2:1) aide (id. at p. 1). In addition, the CSE recommended that the student receive related services of individual speech-language therapy five times per week, individual OT two times per week, individual PT two times per week, and individual behavior consultation services at home for five hours per week (id. at p. 2). The May 2009 IEP also provided for monthly parent counseling and training and monthly consultations in the areas of speech-language therapy, OT, PT, and behavior (id.). The CSE recommended that the student receive the same special education program and services for the extended school year, with the exception of the consultations for related services and behavior (id.). For the extended school year, the IEP provided for a behavior consultation once every three weeks at home or school (id.). Related services consultations were not listed as a recommended service; however, the IEP indicated that OT and PT consultations to the class would occur weekly as part of the program (id.).

In a letter to the director of special education dated May 13, 2009, the parents remarked that they were pleased with the director's suggestion of adding 1:1 behavioral therapy with supervision to the student's IEP (Dist. Ex. 35). The parents noted that the director had mentioned that the home services could begin if the district could locate the appropriate professionals to provide such services, but also indicated that the director had expressed doubt as to the possibility of locating appropriate therapists and supervisors (id.). The parents stated that the student could not wait for these services and that they would be sending the student to Carbone after school for fifteen hours per week of ABA/AVB services and look to the district to reimburse the parents for the cost of the student's attendance at Carbone (id.). The parents also requested that the district allow an independent evaluator to observe the student in his school program (id.).

On May 13, 2009, the student began attending Carbone for 10 hours per week to receive ABA/AVB therapy (Parent Exs. II at p. 2; XX at p. 1). In order to determine the student's present levels of performance and to develop appropriate program objectives, Carbone conducted a ten-session assessment of the student using the Assessment of Basic Language and Learning Skills (ABLLS) and the Verbal Behavior Milestones Assessment and Placement Program (VB-

MAPP) (Parent Ex. II at p. 2; see Parent Exs. HH, SS, TT). The student's skills related to group instruction were not formally assessed (Parent Ex. II at p. 8). Based on the results of the assessment, Carbone developed an individual treatment plan for the student that included ABLLS goals related to increasing visual performance, receptive language, motor imitation, "manding," labeling/tacting, intraverbals, and personal/self-care skills, as well as reducing problem behaviors (Parent Ex. HH, II at pp. 8-10). Carbone also identified numerous barriers which impacted the student's ability to learn new skills (Parent Ex. SS at p. 2). According to the student's instructor at Carbone, sequence analysis data were recorded on the student's problem behavior and, based upon the data, the student did not require a formal behavior reduction plan (Parent Ex. II at p. 10).¹⁰

By letter dated May 15, 2009, the district director of special education responded to the parents' May 13, 2009 letter and advised them that any program they unilaterally obtained for the student would be at their own expense (Dist. Ex. 36). The director stated that the CSE had recommended that the student receive five additional hours of weekly behavioral support and 45 minutes of monthly behavioral consultation with school personnel, and that such services would be in place on July 1, 2009 pursuant to the student's May 2009 IEP (id.).

In a letter to the district dated May 19, 2009, the parents stated that it was their understanding from the May 2009 CSE meeting that the student could begin receiving the behavioral consultation services prior to July 1, 2009 if the district could locate appropriate providers (Dist. Ex. 37).

By letter to the parents dated June 1, 2009, the district director of special education advised the parents that the student could be observed in the district's elementary school by their own evaluator and that the district would provide the parents and the evaluator with the opportunity to review the district's data (Dist. Ex. 38).¹¹

The district mailed the student's May 2009 IEP and a procedural safeguards notice to the parents on or about June 17, 2009 (Dist. Ex. 40).

In a letter to the district director of special education dated June 17, 2009, the parents provided consent to the district to have the student evaluated by a behavioral consultant (Dist. Ex. 41). The parents also advised the director that they were not in agreement with the May 2009 CSE placement recommendations (id.). Further, the parents noted that unless the district offered the student an appropriate program and placement for the 2009-10 school year, they would accept related services "without prejudice" and obtain 35 hours per week of private ABA therapy, supervision and team meetings, and additional related services for which they would seek reimbursement from the district (id.).

¹⁰ A "Program Change" report from Carbone dated June 8, 2009 indicated that during intensive table teaching (ITT) sessions the student demonstrated poor responding which included long latencies to respond, as well as engaging in problem behaviors in the form of whining, crying, and grabbing (Parent Ex. GG). The report detailed numerous changes that had been made to the student's program (id.).

¹¹ The district also preliminarily addressed the parent's request for an independent evaluation in a letter dated May 15, 2009 (Parent Ex. U).

At the district's request, a BCaBA observed the student in his 9:1+3 special class on June 18, 2009 (Parent Ex. Y). The BCaBA observed the student during a group activity and noted that student's awareness of others in the class and his ability to follow directions by observing his peers was significant (id. at p. 1). The BCaBA reported that during a counting activity the student sat in his chair without difficulty and was observed to sporadically attend to the numbers being held up, as well as attend to the other students (id.). The BCaBA remarked that the student did not spontaneously count out loud and he was nonresponsive when asked to identify a number (id. at p. 2). The BCaBA reported that, when asked questions, the student commonly responded on the second or third direction by turning his head to establish eye contact with the speaker (id.). According to the BCaBA, the student was initially nonresponsive when told it was time for PT, but then transitioned to the PT room without difficulty (id.). The student responded to various contextual directions within the PT session (id.). The BCaBA observed that the student was able to complete his toileting routine with prompting (id. at p. 3). During the observation, the student was noted to have responded to a teacher assistant's greeting by saying "hi" and shifting his eye gaze toward her (id.).

The BCaBA reported that the student worked 1:1 with his teacher on intermixed mastered tasks such as "manding," expressive and receptive colors, shapes, object labeling, numbers, imitation of gross motor movements, and following one-step directions (Parent Ex. Y at p. 3). In her observation report, she noted that the student sat without difficulty through the instructional tasks, which lasted approximately 20 minutes (id.). According to the BCaBA, the student was able to match letters during a sorting task but had difficulty matching non-identical shapes (id.). The student demonstrated difficulty with imitative gross motor movements when the directions did not include the language "do this" (id. at pp. 3-4). Based on observation and anecdotal information provided by staff, the BCaBA concluded that the student had a variable response rate during both 1:1 and group instruction (id. at p. 4). The BCaBA reported that the student's overall response rate and correct response rate increased when samples of primary reinforcers were shown to him prior to directions being presented (id.). The BCaBA stated that although the student was "highly responsive to group directions . . . he appear[ed] to have difficulty demonstrating the same response rate for his known skills in a group setting (id.).¹²

On June 25, 2009, a third observation of the student was conducted in his district placement took place (Dist. Ex. 43). The June 2009 observation was conducted by the private BCaBA from Carbone who had previously observed the student in April 2009 (Dist. Exs. 28; 43). The private BCaBA indicated that at that time of the June observation the student was receiving four to six hours per week of private home-based ABA and 12 hours per week of 1:1 ABA/AVB at Carbone, in addition to his school program (Dist. Ex. 43 at p. 1). The private BCaBA observed the student for 15 minutes during small group math instruction and met with the student's classroom teacher to discuss the content of the student's program and to review the student's objectives, along with data related to his instructional programs (id.). With respect to the math lesson, the private BCaBA reported that the student was seated in a chair with an aide seated behind him, and that there were four other students in the group (id. at p. 2). The private BCaBA noted that the lesson was led by the teaching assistant and the objective of the lesson was identifying patterns and colors (id.). The private BCaBA also noted that the assistant

¹² A copy of the report completed by the district's BCaBA was mailed to the parents on or about August 31, 2009 (Dist. Ex. 52).

interspersed a variety of task objectives into the lesson including imitation of motor movements in a song, labeling colors and objects, and visual performance skills (matching and patterns) (id.).

Based upon her conversation with the student's teacher, the private private BCaBA reported that the student spent approximately 30-60 minutes each day in 1:1 instruction depending on the schedule for that day (Dist. Ex. 43 at p. 2). According to the private BCaBA, the student's 1:1 instruction goals usually included "maintenance and manding," and data was recorded on the frequency of prompted and spontaneous "mands", but not on a daily basis (id.). The private BCaBA reported that cold probe data was collected regarding the accuracy of the student responses on specific targets for the purpose of measuring the student's progress toward his IEP goals (id.). The private BCaBA indicated that a criterion for mastery of the target skills was set as a percent of correct responses across 10 sessions, and that the data was not collected on a daily basis but rather during the weeks leading up to the completion of progress reports (id.). The private BCaBA noted that if the student met the criterion the skill was considered mastered and placed into a maintenance program, but if he did not meet the criterion then the skill continued to be targeted (id.). According to the private BCaBA, "a major concern" was the amount of time the student spent avoiding instruction by engaging in high rates of self-stimulatory behavior (id.). The private BCaBA reported that these behaviors, such as non-contextual vocalizations, hand flapping, and looking away from teachers and teaching materials were observed during both observations and significantly interfered with the student's learning (id.). The private BCaBA noted that no data was collected on the duration or frequency of the student's interfering behaviors (id.). Following her observation, the private BCaBA opined that the student required an intensive educational program designed to incorporate a minimum of 30 minutes of natural environment teaching per hour delivered in a 1:1 format, along with a program with a curriculum designed to use antecedent manipulations to minimize stereotypy and increase the student's cooperation during discrete trial instruction (id.).

In a letter to the district dated June 26, 2009, the parents stated that, upon review of the May 2009 IEP, they disagreed with the district's proposed program; however, they expressed their willingness to meet with the district again to discuss additional programs or services (Dist. Ex. 44). The parents reiterated their intention to accept related services from the district "without prejudice" (id.). Additionally, the parents indicated that the student would not be attending the district's summer program and that the parents intended to provide the student with 35 hours per week of private ABA therapy, supervision and team meetings, as well as additional private related services beginning on July 1, 2009 (id.). The parents again noted that they intended to seek reimbursement from the district for the privately obtained services (id.).

In a response to the parents dated June 30, 2009, the district director of special education reiterated the district's position that it had recommended an appropriate program for the student and that it would not pay for a private program for the student (Dist. Ex. 45). The director further indicated that the district agreed to provide the student with the related services listed on his May 2009 IEP (id.). In addition, the director stated that behavioral consultation services would be provided in the home setting as indicated on the student's May 2009 IEP (id.).¹³

¹³ The district's attempts to arrange behavior consultant services in the student's home for summer 2009 were unsuccessful (Dist. Exs. 46-50; 55).

The student's report card for the third and final marking period of the 2008-09 school year included teacher comments indicating that there was noticeable improvement in the student's level of independence (Parent Ex. DD). The student's teacher noted that although the student had difficulty generalizing learned skills, he had improved his ability to respond quickly and accurately (id.). According to the report card, the student had begun to make more consistent progress in his academic skills as of March 2009 (id.). The report card indicated that the student was making progress with regard to sorting and classifying, understanding and using content vocabulary, working independently, completing assignments in a reasonable amount of time, and following class routines (id.). The student's IEP progress report indicated that the student had achieved 15 of 21 IEP goals for the 2008-09 school year (Dist. Ex. 30).

During summer 2009 the student received 10 hours per week of ABA services at Carbone, 20 hours per week of ABA services at home from a private home-based provider, and related services of speech-language therapy, OT and PT through the district (Parent Ex. XX at p. 1).¹⁴ The supervisor at Carbone developed recommendations for structuring the student's 20-hour per week home-based program, including teaching procedures, which were reviewed with the parents' home-based provider (id. at p. 2). In accordance with the student's Carbone program, the recommended home program targeted the student's "manding" abilities (Parent Exs. II at p. 9; XX at pp. 2-3, 6). In addition to the program recommended by Carbone, the student's home-based provider developed an individual treatment plan for the student related to community activities (Parent Ex. OO). According to the treatment plan, the goal of the community activities was to help the student develop more appropriate play skills by guiding his play, limiting the amount of time the student spent engaged in self-stimulatory behaviors, generalizing the skills that the student learned in natural environment teaching and intensive trial teaching, and fading physical prompts to direct or redirect the student in favor of vocal prompts or gestures (id. at p. 2).

In a letter to the parents dated August 11, 2009, the district director of special education confirmed that based on the parents' correspondence it was her understanding that the unilateral placement obtained by the parents was in lieu of the services recommended by the district (Dist. Ex. 50; see Dist. Ex. 49). The director indicated that the parents should make arrangements directly with the district therapists if they elected to continue receiving related services from the district (Dist. Ex. 50). The director also indicated that the district was prepared to implement the special class placement recommended for the student, but that any program other than the one listed on the student's 2009-10 IEP would be at the parents' expense (id.). The director stated that the district was prepared to arrange for the student to receive 5 hours of ABA support per week, and that arrangements had been made with the student's mother to schedule ABA services (id.).

¹⁴ The Carbone supervisor reported that the private home-based provider began receiving training at Carbone on June 22, 2009 and had completed eight days of training as of July 2, 2009 (Parent Ex. XX at p. 1). The supervisor indicated that the provider had met Carbone competency criteria for home-based staff on "Pairing and Effective Instructional Practices" (id.). According to the supervisor, the purpose of the training was for the home-based provider to learn to implement all relevant instructional objectives to be able to provide in-home ABA services (id.).

For the 2009-10 school year, the student continued to attend Carbone five days per week for two-hour sessions each day, and to receive home-based ABA/AVB for 20-25 hours per week (Parent Ex. PP at p. 2). Additionally, the student received related services of speech-language therapy, PT, and OT from the district (Parent Ex. UU at p. 1). The district's attempts to arrange for consistent behavioral consultation services in the student's home for the 2009-10 school year were unsuccessful (Dist. Exs. 53-56; 61-62).¹⁵

In a due process complaint notice dated November 13, 2009, the parents requested an impartial hearing and challenged the appropriateness and sufficiency of the special education programs that the district had offered to the student for the 2008-09 and 2009-10 school years (Parent Ex. A).¹⁶ With regard to the 2008-09 school year, the parents alleged that the student's aides in the district's classroom were insufficiently trained (*id.* at p. 2). According to the parents, the district's rationale for the student's alleged lack of progress was unacceptable (*id.* at p. 3). The parents asserted that the student made spontaneous verbal requests after home-based services were instituted by the parents (*id.* at p. 3).

The parents contended that the student had not met his IEP benchmarks in a timely manner, and that there was a lack of data regarding the student's performance (*id.*). The parents noted that the student was observed in his district placement in April 2009, and that during that time he engaged in behaviors that interfered with his learning, failed to reliably respond to instructions without prompting, and ignored calls for group responses (*id.*).

With regard to the May 2009 IEP for the 2009-10 school year, the parents asserted that (1) the district relied on data that was not provided to the parents; (2) the district attempted to "spin" the evaluation results from the private evaluator without offering its own comprehensive evaluation results; (3) the district did not list the student's most recent evaluation results; (4) the student's present levels of performance were insufficient and inaccurate; (5) the full CSE did not review all of the student's goals and objectives; (6) the short-term objectives were insufficient; (7) the criteria for mastery of some of the goals and objectives were reduced from the student's prior IEPs; (8) the goals and objectives were "insufficient to set a course for appropriate educational growth"; (9) some goals and objectives were vague and not objectively measurable; (10) the frequency for issuing progress reports was unclear; (11) the district failed to "meaningfully" consider the recommendations of private evaluators and service providers who called for more intensive programming; (12) the district predetermined the student's programming by refusing to consider a sufficiently intensive 1:1 program for the student; (13) the district offered a 9:1+3 program and refused to consider more restrictive options although the student required a more intensive program; (14) the district inaccurately stated that the 1:1 program at Carbone would not provide the opportunity for the student to interact with peers; (15) the IEP did not contain a behavior intervention plan (BIP) based on a functional behavioral assessment (FBA) of the student; (16) the district did not have sufficient behavioral supports in place for the student; (17) the district offered insufficient parent counseling and training; (18) the

¹⁵ On January 15, 2009, the student's father reportedly contacted the agency that provided behavior consultation services and explained that he no longer wished to use the hours authorized on the student's IEP (Dist. Ex. 62).

¹⁶ The district subsequently scheduled a resolution session, which was held on December 11, 2009 (Dist. Exs. 57; 60). The parties did not reach an agreement on a proposed resolution (Dist. Ex. 60; Parent Ex. QQ).

district offered insufficient consultation time for related services; (19) the IEP was not tailored to meet the student's needs; and (20) although the district offered home-based behavioral services, it was unable to provide the therapy hours recommended for the student (Parent Ex. A at pp. 4-5, 7)

The parents also alleged that the private 1:1 ABA/AVB services they obtained for the student were appropriate (Parent Ex. A at p. 7). For relief related to the 2008-09 school year, the parents requested reimbursement for 10 hours per week of ABA/AVA services at Carbone, four hours per week of ABA/AVB supervision services, and two hours per month of team meeting costs (id.). For the 2009-10 school year, the parents requested reimbursement for 35 hours per week of ABA/AVB services that were provided at Carbone, the student's home, and in the community; four hours per week of ABA/AVB supervision services; one hour per month of parent counseling and training; and two hours per month of team meeting costs (id.). Additionally, the parents sought transportation costs for the student for the 2009-10 school year (id.).

An impartial hearing convened on January 19, 2010 and concluded on May 10, 2010 after eight days of testimony (Tr. pp. 1-1405). In an interim decision dated July 8, 2010, the impartial hearing officer rejected the district's closing brief for failure to comply with State regulations, and directed the district to correct the nonconformities and refile its brief. (Answer Ex. A). In a decision dated August 6, 2010, the impartial hearing officer summarized the testimony given at the impartial hearing (IHO Decision at pp. 2-56). With regard to the 2008-09 school year, the impartial hearing officer found that the district had misreported the student's progress and that a lack of data with regard to the student's program made it difficult to verify whether the student made progress while attending the district's 9:1+3 class (IHO Decision at p. 63). However, he also determined that both parties had accurately described the student's weaknesses (IHO Decision at p. 63-64). The impartial hearing officer noted that the district's program had elements that were beneficial to the student, that the student had experienced "ups and downs," and that the student's transition to kindergarten in the 2008-09 school year required a period of adjustment (id. at p. 63). According to the impartial hearing officer, a combination of factors, including the parent's requests for program reviews in the early portion of the 2008-09 school year and the student's need for a three to four month adjustment period for transitioning to the district kindergarten placement, accounted for the student's "lack of progress for the early part of the school year" (id.).

The impartial hearing officer also determined that other factors had affected the student's progress, including class size, the amount of small group instruction, staff skill levels, and methods of service (IHO Decision at pp. 63-64). The impartial hearing officer noted that several observations made by the parents "raised red flags" with regard to the district's program (id. at p. 65).¹⁷ According to the impartial hearing officer, the parent counseling and training provided by the district and the district's delays in using the student's communication book were inadequate

¹⁷ With respect to the impartial hearing officer's statement regarding "red flags," it is unclear whether he was recounting the parents' viewpoint or whether the impartial hearing officer was agreeing with the parents and concluding that the "red flags" were deficiencies in the district's recommended program (see IHO Decision at p. 65).

(id. at p. 66). The impartial hearing officer also noted that teaching methodology, such as "errorless teaching" was not required to be set forth on the student's IEP (id. at p. 76). With respect to the opinion of the developmental pediatrician that the student was "running out of time," the impartial hearing officer found that this viewpoint demonstrated a higher expectation and need to cover greater academic ground than what was required under the Individuals with Disabilities Education Act (IDEA) (id. at p. 74).¹⁸

With regard to the student's progress, the impartial hearing officer found that the student had inconsistencies, was distractible, and experienced periodic regression (IHO Decision at p. 68). He determined that the student had been described as "a very difficult learner with a scattering of skills with fleeting attention" (id.). The impartial hearing officer reviewed the student's progress report on his 2008-09 IEP goals (id.). Upon reviewing the evidence, the impartial hearing officer determined that the district's IEP was "reasonably calculated to provide an educational benefit based upon the amount of progress" (id.).

With regard to the private services unilaterally obtained by the parents, the impartial hearing officer noted that the student progressed while he received his private services and that he used more functional, spontaneous language, had improved eye contact, improved daily living skills, and required less vocal prompting with regard to echoic words (IHO Decision at p. 70-71, 74). The impartial hearing officer determined that the student was working on targets of increasing difficulty and that although the student demonstrated minor aggression, his behavior was stabilizing (id. at p. 71). He described how the student spent greater time attending to task during later private evaluations than he had during earlier evaluation sessions (id. at p. 72). The impartial hearing officer noted that the private parent training services were superior to those offered by the district (id.). The impartial hearing officer noted that the student made slow progress with inconsistencies, "ups and downs" and had scattered scores in his 1:1 program (id. at p. 74).

According to the impartial hearing officer, the private services obtained for the student mirrored the same sort of progress as in the district program (IHO Decision at p. 75), but the intensiveness of the parents' 1:1 program was provided at the expense of exposure to age-appropriate or typically developing peers (id. at p. 74-75). The impartial hearing officer found that the student's private 1:1 services obtained by the parents were not appropriate because they were not provided in the least restrictive environment, specifically when the amount of learning was similar for the student in the district and the private settings (id. at p. 77).

With regard to equitable considerations, the impartial hearing officer noted that the parents provided toys for the district's classroom and communicated information regarding the student's home-based services to the district (IHO Decision at p. 78). Among other things, the impartial hearing officer also noted that the parents provided numerous evaluations of the student to the district and that they were appropriately advocating for the student (id. at pp. 80-81). Accordingly, the impartial hearing officer determined that equitable considerations favored the parents and was not a bar to tuition reimbursement (id. at pp. 78-80). However, because the

¹⁸ The impartial hearing officer discussed methodology and the IDEA standards in the section of his decision that addressed the appropriateness of the private services obtained by the parents (IHO Decision at pp. 76-77).

impartial hearing officer found the district offered the student a FAPE and that the privately obtained services were too restrictive, the impartial hearing officer denied the parents' request for reimbursement for the summer 2009 and 2009-10 school year (id. at p. 81-82).

The parents appeal, contending that the district failed to offer the student a FAPE for the 2008-09 and 2009-10 school years. The parents argue that the impartial hearing officer erred by ignoring facts that established that the district's program proved insufficient and inappropriate for the 2008-09 school year, and that the district "rubberstamped" the program recommendation for the 2009-10 school year and added home-based behavioral services.¹⁹ The parents also argue that the impartial hearing officer applied an incorrect standard and should not have analyzed the student's progress during the 2008-09 school year to determine whether the IEP for the 2009-10 school year was appropriate. According to the parents, the CSE failed to consider the continuum of programming and services for the student and to give sufficient attention to the parent's requests for 1:1 programming. The parents allege that the CSE dismissed a private observation report and a report from the student's home-based ABA provider that were presented to the CSE.

With regard to the May 2009 IEP, the parents assert that the goals and objectives were insufficient, lacked detail and lowered expectations for the student. The parents contend that the impartial hearing officer failed to give sufficient weight to the professionals who opined that the student should be provided intensive 1:1 programming and that the district should have recommended additional 1:1 instruction. In contrast to the district's position that the student made progress on his annual goals, the parents argue that the assistant director at Carbone felt that the student did not demonstrate progress in the areas of attending to task, symbolic play skills, sorting by color, shape and size, and he could not ask for the things he wanted. The parents also assert that the student could point to only two body parts instead of six, and could not use the toilet independently.

The parents also note that the impartial hearing officer correctly found that, although the student's special education teacher met with the parents for 40-60 minutes per month, the parent counseling and training was nevertheless insufficient and that communication between district staff and the parents was inadequate, and these two deficiencies constituted a denial of a FAPE. The parents allege that the student's toileting issues escalated and that the district had no plan to address and reduce inappropriate behaviors exhibited by the student, including rubbing the heads of strangers and chewing on his shirt.

With regard to the private services obtained for the student, the parents allege that they were not overly restrictive and that the impartial hearing officer failed to consider the student's needs and applied an incorrect standard of review. In the student's 1:1 program, the parents assert that he progressed over time and had exposure to other children in the community, including a playground and indoor gym, and though a weekly play date. The parents argue that equitable considerations support their claim for reimbursement for the student's private services. The parents also appeal from the impartial hearing officer's interim order directing the district to

¹⁹ The parents also allege that the special education teacher relied on a document during the CSE meeting that was not shown to the parents (Parent Ex. A; IHO Decision at p. 53). The parents also allege, for the first time on appeal, that the teacher had no training in the Greenspan model.

refile its closing brief and assert that the district was given an unfair advantage because the district had access to the parents' brief and extra time to make the submission.

With respect to the 2008-09 school year, the parents request reimbursement for 10 hours per week of ABA/AVB services and four hours per week of supervision services during May and June 2009. For the 2009-10 school year the parents request reimbursement for 35 hours per week of ABA/AVB services and four hours of services that includes supervision, parent counseling and training, and team meeting costs. The parents also seek transportation costs for the student for the 2009-10 school year.

In its answer, the district denies the parents allegations and contends that the impartial hearing officer correctly concluded that the student's progress in the district's placement during the 2008-09 school year was more than trivial. The district argues that adjustments were made to the student's program throughout the 2008-09 school year, that the student continued to work on his toileting skills, and that the recommended IEP was targeted to the student's individual needs. The district contends that the student made progress in attending, performing in small group lessons, following one-step directions, moving independently around the school building, mathematics, speech-language skills, and playing appropriately with toys. According to the district, the student's recommended program for the 2009-10 school year was designed to be similar to the 2008-09 school year because the student progressed during the 2008-09 school year; however, the district made changes to the 2009-10 IEP to accommodate the parent's request for greater focus on 1:1 intensive teaching. The district also asserts that the individuals responsible for instruction at the student's unilateral placement were under qualified.

The district asserts that the impartial hearing officer improperly determined that the parent counseling and training was insufficient and that the district's communication with the parents is inadequate. Subject to limited exceptions, the district asserts that the same considerations and criteria that apply to a determination regarding the district's placement also apply to a determination of whether the student's private services were appropriate. The district contends that the student did not make meaningful progress in his private services and that the impartial hearing officer correctly determined that the private services were inappropriate because the student was deprived of exposure to peers and proper role models. The district also argues that the parents failed to cooperate with the district and had no intention of accepting the placement offered by the district. With regard to closing briefs, the district asserts that the parents were not prejudiced because the district did not alter the substance of its brief upon resubmission. The district requests that the impartial hearing officer's decision be affirmed.

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).

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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

I will first address the parents' request for reimbursement for 10 hours of ABA therapy at Carbone from May 13, 2009 through June 30, 2009 (Pet. ¶ 95). Although the parents petition for review contains clear allegations that the impartial hearing officer erred in determining that the IEP recommended for the 2009-10 school year failed to include sufficient 1:1 support for the student, noticeably absent from the parents' petition for review is any allegation that the impartial hearing officer erred by failing to award the parents relief for the 2008-09 school year. Two points were raised in the petition for review that address the 2008-09 school year. First, the parents assert in a footnote that no further recommendations were made for the "remainder of [s]pring 2009" in the May 2009 IEP (Pet. ¶ 24 n.7).²⁰ Although the allegations demonstrate that the parents had expected the student to make greater progress during the 2008-09 school year, it remains unclear whether the parents were challenging 1) the services recommended by the district as inappropriate at the time they were made in March 2008, 2) services that the district

²⁰ The parents' due process complaint notice before the impartial hearing officer contained several assertions regarding the 2008-09 school year including that "both on a procedural and substantive level the [d]istrict failed to offer [the student] a FAPE for 2008-09"; that "[a]ides were insufficiently trained to work with [the student]"; that the district failed to provide the student with additional services in the winter of 2008-09; that the student was "not meeting IEP benchmarks in a timely manner"; and that the district failed to consider the recommendations for more intensive programming than the district offered the student for 2008-09 school year (Parent Ex. A at pp. 2-4).

failed to recommend in some or all of the IEPs generated during the 2008-09 school year (Parent Exs. D-F), and/or 3) whether the district failed to implement the student's IEP during the 2008-09 school year in a way that was "material" (see A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see also Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]; Application of the Bd. of Educ., Appeal No. 10-013; Application of a Student with a Disability, Appeal No. 10-008; Application of a Student with a Disability, Appeal No. 09-130; Application of a Student with a Disability, Appeal No. 09-088).

At a second point in the petition for review, the parents assert that they do not dispute the impartial hearing officers' finding that the parent counseling and training provided during the 2008-09 school year was "inadequate" but claim that this was in and of itself a denial of a FAPE (Pet. ¶ 51). State regulations require that a petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). With regard to the 2008-09 school year, the impartial hearing officer found that the parent training and counseling was inadequate but determined that notwithstanding this inadequacy the student made progress during the 2008-09 school year (IHO Decision at pp. 66, 81). The parents do not assert why they disagree with the impartial hearing officer's decision not to award relief related to the 2008-09 school year or why they believe that reimbursement for 10 hours of ABA services per week from May 13, 2009 through June 30, 2009 would be an appropriate remedy for the inadequate provision of parent counseling and training. In this case, I find that neither the footnote discussed above nor the parent's assertion regarding the parent counseling clearly indicate the reasons why they are challenging the impartial hearing officer's decision or why they are entitled to the requested relief and, therefore, I will uphold the impartial hearing officer's determination and dismiss their reimbursement claim with regard to the 2008-09 school year. (8 NYCRR 279.4[a]; see R.R. v. Scarsdale Union Free Sch. Dist., 2010 WL 565659, 3 [2d Cir. 2010] [declining to address an argument raised on appeal in a footnote only]).

Turning next to the parties' arguments regarding the 2009-10 school year, as further described below, I find that the parents cannot prevail on their claims that the May 2009 CSE improperly dismissed evaluative materials and concerns raised by the parents, inappropriately repeated aspects of the student's 2008-09 IEP, and failed to recommend adequate 1:1 support for the student because the district has established that it has complied with the IDEA such that the student was offered FAPE.

The hearing record shows that the student was exhibiting significant delays across all areas of development at the time the May 2009 IEP was created (Dist. Ex. 20; Parent Ex. BB). The student demonstrated delayed cognitive skills; significant weaknesses in receptive and expressive language and adaptive behavior; limited social skills; and deficits in fine motor and gross motor skills (Dist. Ex. 20 at pp. 3-6; Parent Ex. BB at pp. 2, 3, 5). The student also had difficulty attending and engaged in task avoidance and self-stimulatory behaviors that interfered

with learning (Dist. Exs. 20 at p. 6; 28 at pp. 2-3). In order to successfully participate in individual and group instruction the student required constant adult facilitation, an extensive rate of prompting, and significant amounts of reinforcement (Dist. Ex. 20 at pp. 3-4). Although the parents contend that the impartial hearing officer erred in considering the student's progress during the 2008-09 school year, I find this was a relevant area of inquiry for purpose of determining whether the May 2009 IEP was appropriately developed, particularly since the parents expressed in detail their concerns with respect to the student's rate of progress at the May 2009 CSE meeting (Dist. Ex. 20 at p. 7; see Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368, [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation" at p. 18 [NYSED Office of Special Education, February 2010]).²¹

The hearing record contains a description of the student's 9:1+3 classroom during the 2008-09 school year by the student's special education teacher, who also participated in the May 2009 CSE meeting to develop the student's IEP for the 2009-010 school year (Dist. Ex. 20 at p. 6). The student's special education teacher testified that during the 2008-09 school year a typical day in the 9:1+3 special class began with students entering the classroom, unpacking their backpacks, hanging up their items, and using the restroom (Tr. p. 31; see Dist. Ex. 14). After completing their morning routine, the students moved to a rug area where they had a short amount of time to choose a toy and play with it (Tr. p. 31). During this time, staff members engaged in "pairing" and attempted to get students to select toys and engage in appropriate play (*id.*).²² Following rug time, the class as a whole transitioned to morning meeting, which lasted for approximately 25-30 minutes (*id.*).²³ After the morning meeting, the special education teacher divided the class into two separate groups with one group receiving 1:1 instruction in a room next door while the other half of the group participated in group instruction, including language arts and math, and center time (Tr. p. 34). According to the special education teacher individual instruction lasted from 45-minutes to one hour (Tr. pp. 34-35). During center time staff worked with students on play skills, sharing, turn taking, and trying to build interest in activities that the students would not typically choose (Tr. p. 34). The special education teacher reported that following individual and group instruction the students engaged in a snack period in which they raised their hands and requested the snack they wanted (Tr. p. 36). Snack was followed by another period of individual and group instruction in which the students who had already received individual instruction switched places with the students who had received group instruction and vice versa (Tr. p. 37). At the end of the group and individual sessions the

²¹ Located at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideFeb2010.pdf> .

²² As described in the hearing record, "pairing" is where the instructor pairs herself with a positive set of conditions (Tr. p. 536, 941-42; see Tr. p. 31).

²³ The teacher reported that staff took turns running the morning meeting so that students would be able to generalize acquired skills and adapt to different teaching styles (Tr. p. 32). While one staff person was leading the meeting four to five other staff members provided support to the students (Tr. pp. 32-33). For example, the teacher indicated that if she presented a question to a student during morning meeting and the student did not respond after several requests, she would pass the instruction to the person supporting the student so that she could move on with the rest of the lesson (Tr. p. 33). Morning meeting activities included things such as calendar concepts, number recognition, and weekly themes (*id.*).

students had 10-15 minutes to work on personal self-help skills, such as using the restroom or locating their lunch bag and getting in line for lunch (id.).

The special education teacher testified that the students from the 9:1+3 class joined the mainstream kindergarten classes for lunch, which was then followed by recess (Tr. p. 38). According to the teacher, during a portion of the 2008-09 school year, recess included a period of "reverse mainstreaming" in which second grade students from a general education class were invited to join the students in the 9:1+3 special class for classroom centers or playground activities (Tr. pp. 38-39). The special education teacher reported that reverse mainstreaming allowed the staff to work on exposing the students in her class to typical peers and to facilitate interaction and the development of social skills (Tr. p. 39).

The special education teacher indicated that the students also went to specials such as art, music or gym (Tr. p. 40). The 9:1+3 classroom staff accompanied the students to specials to assist the students with attending and participation and also to follow through on behavior plans (id.). After specials the students were divided among centers for small group instruction (Tr. p. 41). At the end of the day, students used the restroom, packed their items to go home and transitioned from the classroom to dismissal which took place in the cafeteria (id.). The special education teacher reported that Fridays included a "maintenance and manding" session where staff worked on targets that students had already mastered and also on having students request desired items (Tr. p. 35). According to the special education teacher, at the beginning of the school year the related services providers presented the teacher with a schedule and classroom staff was responsible for transporting students to and from their related services (Tr. pp. 41-42).

In addition to the student's cognitive and social delays, the hearing record shows that, there is little disagreement that during the 2008-09 school year, the student also exhibited a lack of motivation, avoidance behaviors, difficulty attending and the need for a high level of reinforcement, including the use of edibles (Tr. pp. 63-64, 74, 268, 292-93, 520-21, 526-27, 910-12, 1168-69, 1212-14). The student's special education teacher described the changes made to the student's program during the 2008-09 school year in order to address the student's needs, including the introduction of work boxes, the use of edible reinforcers and modifying the student's participation in groups (Tr. pp. 63, 66-67, 73-75, 127, 136-37, 232-33).

The district staff in the student's classroom collected data in a variety of ways during the 2008-09 school year; however, it is difficult to ascertain the degree of the student's progress solely from the ABA therapy data that was entered into the hearing record (Dist. Exs. 32, 34; Parent Ex. FF). As the parents have accurately pointed out, the hearing record also shows that during the 2008-09 school year the student's special education teacher did not consistently measure the student's progress toward his IEP goals and benchmarks using the criteria outlined in his IEP (compare Parent Ex. FF at pp. 66-69 with Dist. Ex. 30). Aside from the ABA data book, the student's special education teacher testified that she took personal notes regarding the students, but that her notes for all the students were "scrabbled" on the same page and were not included in the student's individual data book (Tr. p. 188). The teacher indicated that she reflected the substance of these personal notes in her reports (Tr. pp. 188-89). She also testified that the student had demonstrated progress in some areas, but also that his performance at school was inconsistent (Tr. pp. 59-64; 189-204, 210-22).

With respect to PT, notes maintained by the student's physical therapist suggest that the student made progress toward all and achieved many of his gross motor goals on his IEP (Dist. Ex. 33; see Dist. Ex. 30 at pp. 5-6). I also note that the assistant director at Carbone testified regarding the student's performance in May and June 2009, which was consistent with some, but not all, of the ratings and comments reported in the district's IEP progress report, and that when the student started at Carbone she had observed that the student had (1) achieved some goals (attending and following one step directions; identifying nouns; following a one-step orally presented directive by accurately performing four individual tasks), (2) made progress toward several goals (attending to a task without distraction for four minutes duration during small or large group lessons; play appropriately with a toy, displaying preferences for playing with selective toys; correctly point to six body parts upon command; independently use the toilet and practice correct hygiene), and (3) that the student did not demonstrate progress toward several goals (identify six basic colors) (Tr. pp. 912-16; Dist. Ex. 30; see Tr. pp. 411-13).

Furthermore, information presented by the special education and related services providers at the sub-CSE meeting in December 2008, indicated that the student's attention to task had improved, his eye contact had become more consistent, he was initiating and labeling pictures and objects more frequently, and he had made functional gains relative to physical and occupational therapy (Dist. Ex. 16 at pp. 5-6). Likewise the student's report card indicated that the student demonstrated progress relative to academic goals such as identifying objects, colors and letters; identifying numbers; sorting and classifying; following directions; and performing ADLs (Parent Ex. DD). Teacher comments further indicated that the student had made notable improvements in his "independence skills" and that he was able to independently doff and hang up his jacket about 80% of the time and he had become more self-sufficient with respect to the lunch routine (id.). Additional information contained in the May 2009 IEP indicated that the student demonstrated growth during the 2008-09 school year in that he responded more quickly and more often, sat longer, learned the class routine, located his table at lunch and ate independently, and played with toys more appropriately (Dist. Ex. 20 at p. 7). District staff reported that although the student's attention varied he was more engaged within the group overall, and that the student was able to choose a toy/activity, responded after hearing his name, transitioned from activity to activity better, and followed direction more readily (id.). Staff further reported that the student was more related and aware of his surroundings (id.). According to the May 2009 CSE meeting minutes, the student's parents indicated that the student made some progress, albeit they stressed that this progress was not meaningful (id.).²⁴

Although the parents contend that the impartial hearing officer erred in his determination that the student progressed during the 2008-09 school year, having reviewed the evidence in the hearing record and the impartial hearing officer's decision, I find that he appropriately and thoroughly considered the evidence related to the student's performance and progress during the

²⁴ Notably, with regard to the student's rate of progress, the director of the Carbone Clinic testified that during the year the student attended the Carbone, supervisors intervened 63 times to make changes to the student's program (Tr. pp. 1218-19). The director testified that the number of program changes was two to three times more than that of the most difficult learners enrolled in Carbone (id.). According to the director, Carbone had to make the changes because the student was "so hard to teach" (Tr. p. 1219).

2008-09 school year as part of his analysis of the 2009-10 school year (IHO Decision at pp. 1-18, 23-27, 34, 57-68; Newington, 546 F.3d 111, 114 [2d Cir. 2008] [explaining that a district holds an annual review "'to determine whether the annual goals for the child are being achieved,' and to revise the IEP as needed based on the child's progress and anticipated needs"]). I also note that the purpose of assessing the student progress in the prior school year was to ascertain and develop the May 2009 IEP and address, as appropriate, any lack of expected progress toward his annual goals (see 20 U.S.C. § 1414[d][4][A][ii][I]). I also find that the evidence in the hearing record supports the conclusion that the student made some progress, albeit slow and inconsistent, that was more than merely trivial and that the May 2009 IEP, viewed at the time it was developed, would likely provide the student with the opportunity to progress rather than regress (Frank G., 459 F.3d at 364; D.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 598 [2d Cir. 2005]; Mrs. B v. Milford Board of Education, 103 F.3d 1114, 1120 [2d Cir. 1997]). I also note that the statement of the student's present levels of performance in the May 2009 IEP sufficiently described his academic achievement and functional performance and how the student's disability affected his progress in relation to the general education curriculum (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see also 8 NYCRR 200.1[ww][3][i]).

With regard to the parties' dispute over the annual goals set forth in the May 2009 IEP, the IDEA requires that an IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). The May 2009 IEP included annual goals and benchmarks targeting the student's ability to refocus with minimal assistance, follow two-step directions, transition between classroom activities, look at a speaker, engage in cooperative play, expand utterances, verbally identify himself by first and last name, initiate solitary play, localize and focus on an object, color within a specified area, trace the boundaries of lines, maintain attention to task, perform general conditioning exercises, throw beanbags without losing his balance, ascend and descend stairs, broad jump, sort pictures, label body parts, place objects in a container (count), and develop toileting skills (Dist. Ex. 20 at pp. 8-12).

A private psychologist who evaluated the student in October 2009 testified that the goals and objectives contained in the May 12, 2009 IEP included some skills that were appropriate for the student (Tr. pp. 1058, 1065). However, he questioned the number of motor goals compared to the number of speech-language and social/emotional/behavioral goals contained in the IEP (Tr. pp. 1065-67). He opined that the development of speech-language skills and social/emotional/behavioral skills were "key" for the student and suggested that goals in those areas should be expanded (Tr. p. 1067). The psychologist further testified that it was not clear how some of the proposed objectives would be measured (Tr. pp. 1067-69).

The proposed May 2009 IEP contained both new goals and revised goals when compared to the student's 2008-09 IEP (compare Dist. Ex. 12 at pp. 6-11 with Dist. Ex. 20 at pp. 8-12). As described by the student's special education teacher, the new goals reflected the student's achievement during the previous school year and the revised goals reflected the areas in which

the student continued to have difficulty and where slightly different goals or new mastery criteria were needed (see Tr. pp. 81-83; Dist. Ex. 20).

The student's father testified that at the time of the May 2009 CSE meeting the proposed goals were not discussed in detail and that the parents were not involved in selecting criteria for measuring the student's mastery of IEP goals (Tr. pp. 1314-15). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Central Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Edu., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL3697318, at *1).

In this case, the special education teacher acknowledged that on the final version of the student's 2009-10 IEP the criteria for mastery had been decreased and that she was the person who had made the decision to do so (Tr. pp. 246-47). According to the teacher, the criteria were changed due to the student's inconsistency and the need to develop goals that were attainable by the student (Tr. pp. 247-49). I note that nothing in the IDEA requires parental presence during the actual drafting of the written education program document, including the actual scribing of annual goals (E.G. v. City Sch. Dist. of New Rochelle, 606 F.Supp.2d 384, 388-389 [S.D.N.Y. 2009]; see Bougades v. Pine Plains Cent. Sch. Dist., 2009 WL 2603110 at *6 [S.D.N.Y. 2009] rev'd on other grounds 2010 WL 1838710 [2d Cir. 2010]). I have also carefully reviewed the annual goals contained in the May 2009 IEP, as well as the documents considered by the CSE when developing the IEP, and conclude that the goals, as written, adequately target the student's identified needs, describe how the student's progress will be measured, and the IEP adequately explains how periodic reports on the student's progress will be provided to the parents three times during the year (Dist. Ex. 20 at pp. 7-12; see 34 C.F.R. § 320[a][2]-[3]; 8 NYCRR 200.4[d][2][iii][a]-[c]).

Turning next to the parents' assertions regarding the student's behaviors, such as rubbing strangers' heads and that the district did not offer a plan to reduce inappropriate behaviors (Tr. pp. 1341-42, 1386),²⁵ if a student's behavior impedes his or her learning or the learning of others, the CSE must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior" when developing, reviewing and revising an IEP (20 U.S.C. § 1414[d][3][B][i]; see 34 C.F.R. § 300.324[a][2][i]; 8 NYCRR [d][3][i]). Here, the hearing record showed that the student engaged in self-stimulatory and avoidance behaviors, had difficulty attending, and took a long time to respond to demands/requests/prompts (Tr. pp. 48, 55, 521, 539, 846, 852-53, 1168, 1208). Taking into consideration the type of classroom the student was attending, the special education teacher indicated that she did not believe a formal behavior intervention plan was necessary for the student during the 2008-09 school (Tr. pp. 55-56). According to the special education teacher, the students enrolled in her class for the 2009-

²⁵ The parents assert that they sought assistance with instances of the student chewing his shirt; however, the special education teacher explained to the parent that she had not observed that particular behavior in school (Tr. pp. 1341-42, 1386).

10 school year demonstrated characteristics typical of children with autism, such as difficulties attending, attention seeking behaviors, and self-stimulatory behaviors (Tr. p. 108). The special education teacher acknowledged that the student's self-stimulatory behavior interfered with his learning, but noted that that was typical of all of the students, which indicated why they were placed in a the 9:1+3 class (Tr. p. 152). The special education teacher stated that although there were no students with individual behavior intervention plans there were behavior plans "built within the classroom" (Tr. pp. 108-09).²⁶ According to the special education teacher, in a small group setting attending problems were dealt with through the pace of instruction and by providing additional support and prompting to students, changing activities, and redirecting students (Tr. p. 109). The special education teacher reported that if one student's attention waned to the point that it became disruptive to others she would break the students down into smaller groups and move some of the students to a different activity (Tr. p. 109-10). The special education teacher testified that ideally staff would first ignore a student who demonstrated attention seeking behaviors in small group and further indicated that staff had a plan so that one student's attention seeking behavior did not interfere with other students trying to learn (Tr. p. 110). According to the special education teacher, staff could implement strategy changes they needed through a staff meeting and then observe the student and determine if there were things that needed to be altered (Tr. p. 56). The special education teacher testified as to how she employed ABA/AVB principles, including pairing and error correction, in her classroom and also described how she used reinforcement to elicit responses from the student (Tr. pp. 30, 31, 63-66, 74-75, 90, 104-5, 141-42, 160, 173-74, 176, 178, 179). Under the circumstances of this case, I find that any perceived failure to conduct an FBA did not render the May 2009 IEP procedurally inadequate. The May 2009 IEP contains services that are designed to address the student's behavior and the proposed placement was the kind in which specific behavioral interventions and supports were available to address the student's needs (A.C., 553 F.3d at 172 [holding that a violation of a regulation requiring an FBA does not compel the conclusion that an IEP is therefore legally inadequate]; Connor v. New York City Dept. of Educ., 2009 WL 3335760 at *4 [S.D.N.Y. Oct. 13, 2009]; M.N. v. New York City Dept. of Educ., Region 9 (Dist. 2), 700 F.Supp.2d 356, 366 [S.D.N.Y. 2010]). In light of the forgoing evidence, I find that the district's recommended placement included behavioral supports that were designed to address the student's needs.

Turning next to the parties dispute regarding the student's placement recommendation and need to be instructed in a 1:1 setting, to address the student's academic, behavioral, and social needs, the May 2009 CSE recommended that the student continue to be placed in a 9:1+3 special class with the support of a shared (2:1) aide (Dist. Ex. 20 at p. 1). In addition, the CSE recommended that the student receive related services of individual speech-language therapy five times per week to help address his language and communication deficits; individual occupational therapy two times per week to address the student's fine motor, self-care and attending weaknesses; and individual physical therapy two times per week to address the student's delays in gross motor and travel skills (id. at pp. 2, 4-6). In addition to direct therapy services, the CSE

²⁶ The special education teacher provided an example of how she addressed a student's self-stimulatory behaviors through blocking or redirecting and, depending on the behavior plan, by reinforcing the student at certain intervals when they were not engaging in self-stimulatory behaviors (Tr. p. 110). According to the teacher, when the student in this case engaged in self-stimulatory behavior he would be blocked and redirected and when he engaged in task avoidance the demand would be continued until he complied (Tr. p. 145).

recommended that classroom staff receive monthly consultations from the student's related service providers (*id.* at p. 2). For the 2009-10 school year, the May 2009 CSE recommended an increase in the student's speech-language therapy from three individual sessions per week to five individual sessions per week and also recommended the addition of behavior consultation services to facilitate the generalization of skills from home to school (compare Dist. Ex. 12 at p. 2 with Dist. Ex. 20 at pp. 2, 7). The recommended behavior consultation services included five hours per week of individual services provided to the student in his home along with a 45-minute per month consultation between the home provider and school (Tr. pp. 299-302; Dist. Ex. 20 at pp. 2, 7). In addition to direct services for the student, the May 2009 IEP provided for monthly parent counseling and training (Dist. Ex. 20 at p. 2). In order to prevent substantial regression, the CSE recommended that for summer 2009 the student receive extended year services in the form of placement in a 9:1+3 special class with a shared (2:1) aide, individual speech-language therapy five times per week, individual occupational therapy two times per week, individual physical therapy two times per week and five hours per week individual behavior consultation services at home (*id.*). For the extended school year the IEP also provided for a home/school behavior consult once every three weeks and parent counseling and training on a monthly basis (*id.*).

The hearing record also indicates that the 9:1+3 special class recommended by the district was composed of students in grades one through three, the majority of whom would be classified as students with autism (Tr. p. 27). The teacher of the proposed class testified that she was certified as a special education teacher, that she had received training from the director of Carbone and that she was a BCaBA (Tr. pp. 17-20, 22, 26; see Dist. Ex. 64). The teacher further testified that one of the teacher assistants assigned to the 9:1+3 class had been with the class since its inception and the other teacher assistant was licensed as a special education teacher and had been working in the class for ten years (Tr. pp. 27-28, 99). In addition the classroom aides had experience working with students with disabilities (Tr. pp. 29, 97-99). The teacher characterized her class as an "ABA class with a small ratio" (Tr. p. 132). As detailed above, the student had attended the same 9:1+3 special class for the previous school year (2008-09).²⁷

In view of the evidence in the hearing record, including evidence that the student had made more than trivial progress under a similar IEP in the previous school year, I find that the district's May 2009 IEP recommending a 9:1+3 class with a shared 2:1 aide, the increase in speech-language therapy services, and the addition of 1:1 home-based behavior consultation services was reasonably calculated to enable the student to receive educational benefits and offered the student a FAPE in the LRE. Although it is understandable that the parents may prefer the private services they obtained and the manner in which they were delivered and the evidence in the hearing record even suggests that the student might benefit further from additional services, I find that the hearing record as a whole supports the conclusion that that

²⁷ The special education teacher also testified that for the 2009-10 school year classroom staff requested that students not be removed for therapy during intensive teaching sessions so that students would receive a full 60 minutes of instruction (Tr. pp. 85, 239-40). In addition, the special education teacher determined that either she or a teaching assistant would supervise the instruction at all times (Tr. pp. 85, 239-40). However, it appears that these particular adjustments were not discussed with the parents until the parties' resolution session (Tr. pp. 239-41).

those services are not necessary components of a FAPE (see Walczak, 142 F.3d at 132; M.N., 700 F.Supp.2d at 368).

Having determined that the district offered the student a FAPE, I need not reach the issue of whether the privately obtained educational services were 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).

Lastly, although the parents contend that they were prejudiced because the parties' closing briefs were not submitted to the impartial hearing officer simultaneously as originally intended (Pet. Ex. A), I note that the impartial hearing officer took reasonable precautions in his interim decision and that overall, the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the interim or final decisions of the impartial hearing officer (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]).

I have considered the parties remaining contentions and find that it is unnecessary to address them in light of my decisions herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
November 18, 2010**


**JUSTYN P. BATES
STATE REVIEW OFFICER**