



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-032

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]**

### **Appearances:**

Mayerson & Associates, attorneys for petitioners, Gary S. Mayerson, Esq., and Brianne N. Dotts, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Karyn R. Thompson, Esq., of counsel

### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the McCarton School (McCarton) for the 2009-10 school year. Respondent (the district) cross-appeals from the impartial hearing officer's order to award reimbursement to the parents for private speech-language therapy and private occupational therapy (OT). The appeal must be dismissed. The cross-appeal must be sustained.

The student reportedly demonstrates delays in cognition, self-regulation, communication, adaptive behavior, play skills, and social skills as well as in his receptive, expressive, and pragmatic language (Dist. Exs. 2; 7; 8; 9; 10; Parent Ex. H). At the time of the impartial hearing, the student was attending McCarton (Tr. p. 808). The Commissioner of Education has not approved McCarton as a school with which school districts may contract to instruct students with disabilities (Tr. p. 646; 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 proceeding (Dist. Ex. 2 at p. 1; see 34 C.F.R. § 300.8 [c][1]; 8 NYCRR 200.1[zz][1]).

## Background

The student attended a district preschool program subsequent to an evaluation by the Committee on Preschool Special Education (CPSE) (Tr. pp. 808-09).<sup>1</sup> According to the hearing record, the student has attended McCarton since he was five years old (Tr. p. 808). During the 2008-09 school year, the student attended a classroom at McCarton with five other students (Dist. Ex. 10 at p. 1). He received 40 hours of 1:1 instruction along with related services of four 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of speech-language therapy in a group of two with 1:1 support, and five 45-minute sessions per week of individual OT (Dist. Exs. 8 at p. 1; 9 at p. 1; 10 at p. 1).

A July 7, 2008 Stanford-Binet Intelligence Scales-Fifth Edition (SB-V) score summary report was completed by McCarton staff when the student was ten years old (Dist. Ex. 7). Administration of the SB-V yielded a full scale IQ of 46, a nonverbal IQ of 51, and a verbal IQ of 47 (*id.*). In addition, SB-V results included standard scores of 47 in fluid reasoning, 55 in knowledge, 56 in quantitative reasoning, 56 in visual spatial, and 57 in working memory (*id.*).<sup>2</sup>

By decision dated July 18, 2008, an impartial hearing officer awarded tuition reimbursement to the parents for McCarton for the 2007-08 school year, as well as reimbursement for ten hours per week of home-based applied behavior analysis (ABA) instruction and two 1:1 45-minute sessions of OT per week (Parent Ex. B at pp. 3-4, 6-9).<sup>3</sup>

In a January 23, 2009 McCarton educational progress report, the student's head teacher described the student's learning style, functioning levels, and progress in the areas of academics, communication, social skills, adaptive behavior, and community skills (Dist. Ex. 10). The head teacher indicated that due to the student's difficulties with attention and self-stimulatory behavior, the student required highly individualized instruction based on the principles of ABA in addition to a predictable routine, visual support, positive reinforcement, systematic prompting, and repetition (*id.* at p. 1). According to the educational progress report, the student exhibited delays in cognition, communication, and socialization (*id.*). The head teacher also indicated that the student was often distracted by other students and activities within the classroom (*id.*). Additionally, the student required many behavioral redirections, reminders, and prompting to complete tasks and interact with peers (*id.*). The head teacher further reported that the student continuously engaged in an assignment for 10 to 12 minutes, with prompts in order to maintain his attention (*id.*). According to the head teacher, the student required a sensory break every 10 to 15 minutes to decrease the frequency of his self-stimulatory behaviors, such as hand tapping, during instruction (*id.* at p. 2).

The January 2009 educational progress report further revealed that although the student demonstrated steady progress in learning readiness and academics, his performance remained

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<sup>1</sup> According to the student's mother, the student attended a district "CPSE program" prior to his enrollment at McCarton (Tr. pp. 808-09).

<sup>2</sup> The hearing record includes a July 2009 SB-V score report but does not include a corresponding narrative evaluation report (Dist. Ex. 7).

<sup>3</sup> When examined in the context of the hearing record, a review of the July 2008 decision indicates that the parents were seeking tuition reimbursement for McCarton.

inconsistent across different settings (Dist. Ex. 10 at p. 2). With respect to language, the student's teacher reported that the student demonstrated a relative strength in the area of receptive language; however, he exhibited marked delays in expressive language (id.). The student demonstrated the most strength in the areas of visual performance and organization (id.). According to the head teacher, the student also made progress in reading and writing, and she further noted that the student had mastered 26 new spelling words (id.). The head teacher also reported that the student had learned to follow multiple written directions containing up to 17 words (id.). She further noted that the student comprehended one to two sentences and answered simple "wh" and yes/no questions; however, his level of reading comprehension greatly decreased when reading a paragraph (id.). With respect to math, the head teacher indicated that the student continued to learn basic number sense and arithmetic skills, and could add and subtract two-digit numbers with a calculator (id.).

In addition, the head teacher reported that the student demonstrated progress in his overall communication abilities with visual support (Dist. Ex. 10 at p. 3). The head teacher noted an increase in the student's spontaneous greetings to instructors and commenting on objects/events; however, the student continued to require prompts to speak in complete sentences rather than one-word utterances, as well as prompts to increase his voice volume (id.). Although the student demonstrated progress in the areas of social skills, the head teacher explained that the student continued to require adult support during social interactions with peers and when engaging in cooperative leisure activities (id.). For example, with teacher facilitation, the student was learning to engage in turn-taking activities with peers (id.). Overall, the head teacher reported that in the context of learned routines and activities, the student's independent functioning and social interaction had increased (id.). She further advised that the continuous use of visual support and repetition of skills were essential in order to promote the student's independence (id.). With respect to adaptive behavior, the student performed basic self-care functions such as using the bathroom and washing his hands, although he continued to require some reminders for thoroughness (id.). According to the head teacher, while in a community setting, the student was learning to stay within arms length of an adult rather than darting or wandering away (id. at p. 4). The head teacher recommended the continuation of a 1:1 model with the student, daily data collection, and ongoing evaluation of him (id.).

A January 29, 2009 McCarton OT progress report provided information regarding the student's functioning and progress as well as long-term therapy goals (Dist. Ex. 8). The report reflected that the student's OT sessions addressed sensory processing, gross motor, fine motor, activities of daily living (ADLs), and pre-vocational skills (id. at pp. 1-5). The therapists explained that the student's sensory regulation needs were addressed throughout his school day by providing opportunities for physical and sensory-based activities, as well as an individualized sensory diet (id. at p. 1). According to the progress report, the student engaged in non-purposeful body movements such as finger tapping, hand clapping, and body rocking (id. at p. 2). The therapists reported that the student's non-purposeful behavior decreased when he engaged in gross and fine motor activities that provided proprioceptive input (id.). The therapists added that the student demonstrated progress in the areas of sensory processing, ADLs, and fine and gross motor skills (id. at pp. 1-5). With respect to gross motor skills, the occupational therapists stated that the student had made improvements in the areas of coordination, balance, and trunk strength (id. at p. 2). According to the therapists, with regard to fine motor skills, the student demonstrated progress in computer typing skills, cutting, and drawing (id. at p. 3). The therapists noted that the student typed a three to five word list onto the computer, cut within a 1/8

to 1/4 inch of a target, and copied simple pictures; however, they further observed that his cutting and drawing skills were negatively affected by his lack of attention and impulsivity (id.).

With respect to ADL skills, the therapists indicated that the student was learning to tie his shoes and cut his food (Dist. Ex. 8 at p. 3). They further stated that with visual cues and minimal assistance, the student was able to thoroughly brush his teeth (id.). Additionally, according to the therapists, the student attended a pre-vocational group one session per week that included sorting and delivering addressed envelopes to staff members, filing peer worksheets, shelving library books, and developing skills related to money (id. at p. 4). The therapists described the student's attention to tasks as "good," and further noted that his ability to complete tasks with less assistance had improved (id.). Overall, although the therapists found that the student had demonstrated progress with his pre-vocational skills, they observed that he required further development of such skills (id.). The therapists recommended that the student continue to receive five 45-minute sessions of OT per week to address his needs in the areas of sensory processing, self-care, gross motor, fine motor, and pre-vocational skills development (id. at p. 5).

A January 2009 speech-language progress report from McCarton described the student's functioning and progress in the areas of receptive, expressive, and pragmatic language as well as his behavior and play/leisure skills (Dist. Ex. 9). The speech-language pathologist reported that the student engaged in off-task behaviors such as hand tapping, staring, and leaving his seat during table top activities (id. at p. 1). In addition, she reported that the student's attention was negatively affected by external noise such as people walking into the classroom (id.). To address the student's difficulties with attention, the speech-language pathologist stated that she provided the student with visual supports and movement breaks (id.). According to the speech-language pathologist, the student maintained attention for up to five minutes during a structured language-based task by exchanging eye contact and responding to demands (id.). The speech-language pathologist further indicated that the student followed three-step related directions, identified complex size concepts for objects, comprehended comparative term endings for five words, and exhibited an understanding of antonyms and the subject pronoun "we" (id. at pp. 1-2).

With respect to receptive language, the report revealed that the student's goals addressed maintaining attention to structured language tasks, understanding and following directions, improving understanding of syntactic skills, and expanding linguistic concepts (id. at p. 1). The speech-language pathologist noted that the student produced up to five-word phrases and that he continued to benefit from verbal modeling and visual supports to expand his mean length of utterance (id. at p. 2). The speech-language pathologist also indicated that the student began to use a louder vocal volume during speech and that he exhibited an increased use of single words and carrier phrases to initiate a desired activity (id.). Regarding his pragmatic language skills, the speech-language pathologist reported that the student's goals focused on improving his social communication skills (id.). First, the speech-language pathologist noted that the student appropriately initiated verbal greetings paired with eye contact; however, with peers, he required and relied on verbal prompting in order to initiate a verbal greeting (id.). The speech-language pathologist also reported that the student needed visual supports and verbal prompting during peer interactions (id.). Additionally, the speech-language pathologist indicated that the student's expressive language goals addressed expansion of utterance length and expressive vocabulary, improvement of linguistic concepts, improvement of syntax, and responding to questions appropriately (id.). The speech-language pathologist also indicated that the student demonstrated progress regarding play and leisure skills (id.). For example, she reported that the student was

beginning to engage in symbolic play during play activities (id. at p. 3). Moreover, according to the speech-language pathologist, the student was able to choose one activity and with visual supports, attend for five minutes (id.). The speech-language pathologist recommended that the student continue to receive four 60-minute sessions per week of individual speech-language therapy and one 60-minute session per week of speech-language therapy in a group of two with 1:1 support (id.). Recommendations also included opportunities for peer interaction to enhance social communication skills, the use of visual supports to facilitate communication, and opportunities to generalize his expressive language and play skills (id.).

On March 10, 2009, a district special education teacher conducted a classroom observation of the student at McCarton and interviewed his special education teacher (Dist. Ex. 6). According to the district's teacher, when the observation started the student was playing with a dollhouse, where she observed the student placing furniture in the various rooms without prompting (id. at p. 1). Although the student's teacher understood him, the district's teacher reported that the student "spoke in an almost inaudible hushed tone" (id.). The observation report also indicated that there were four teachers and four students present during lunch time (id.). According to the report, the student followed the teacher's directive to prepare his lunch (id.). The student walked to the window, but was redirected by the teacher to return to the table and proceeded to cut his sandwich and eat it (id.). With teacher guidance, the student cleaned his area after lunch (id. at pp. 1-2). The student then participated in a holiday activity with prompts (id. at p. 2). The district's teacher further reported that the student transitioned smoothly to the next activity with another teacher (id.). The student participated in the lesson and appropriately responded to his teacher's questions (id.).

In addition to the classroom observation, the district's special education teacher interviewed the student's McCarton special education teacher (Dist. Ex. 6 at p. 2). The McCarton teacher estimated that the student demonstrated first grade level decoding skills and kindergarten level comprehension skills (id.). According to the student's teacher, the student read over 200 sight words and he knew sound/letter correlations for consonants (id.). Although his teacher explained that the student could identify and read simple vowel sounds, she noted that he demonstrated difficulty with putting sounds together to make new words (id.). The student's teacher further reported that the student could read three-sentence paragraphs (id.). Regarding math, the student's teacher estimated that his skills were at a kindergarten to lower first grade level (id.). His teacher also indicated that the student could identify coins and bill values, but that he could not yet make change (id.). According to his teacher, the student counted up to 100, and added to 20 with the use of manipulatives; however, written equations usually required repetition and teacher intervention (id.). Additionally, his teacher noted that with the use of a word bank, the student could formulate a sentence (id.). In addition, the teacher stated that the student capitalized the first letter of sentences, and with prompting, he used a period at the end of a sentence (id. at p. 3). Lastly, the student's teacher advised that the student exhibited a need for encouragement to engage with peers and teachers and cautioned that if the student was pushed to speak, he could get agitated (id.).

On May 6, 2009, a district school psychologist conducted a classroom observation of the student at McCarton (Dist. Ex. 5). The observation report indicated that there were five students and four adults present at the time of the observation (id. at p. 1). The observation report reflected that the student received 1:1 instruction while working on an assignment and that he looked around the room while directions were read to him (id.). To assist the student in the

writing assignment, the school psychologist noted that he was provided with hand-over-hand assistance (id.). Although the school psychologist observed that the student was looking at his work, she further indicated that he was watching many individual lessons that were simultaneously taking place around the room (id.). After the writing assignment was complete, the school psychologist observed that the student was provided with an edible reinforcement (id.). As the 1:1 math lesson began, the school psychologist stated that the student's attention was directed at another teacher rather than the math lesson (id.).

The observation report further reflected that the teacher asked the student to count objects; however, the school psychologist could not hear the student's response (Dist. Ex. 5 at p. 1). The student then engaged in a speech-language therapy session with another student while an additional adult was positioned behind the two students (id.). The school psychologist noted that the speech-language therapist was assisting and prompting the students to talk with each other and she further observed that the student in the instant case spoke very quietly (id. at p. 2). The observation report reflected that with prompting, the student in the instant case responded to the other student regarding a "Connect 4" game (id.). The school psychologist further stated that with continued prompts, the student in the instant matter engaged with the other student (id.). Next, the school psychologist reported that following a break, the student asked to listen to music (id.). After listening to the music, the school psychologist noted that the student engaged in a "[v]elcro toss game" (id. at p. 3). According to the observation report, the student flinched or turned away when the ball was thrown to him (id.). Lastly, the school psychologist noted that the speech-language pathologist prompted the student to engage the other student and to speak clearly (id.).

On May 14, 2009, the Committee on Special Education (CSE) convened for the student's annual review and to develop his individualized education program (IEP) for the 2009-10 school year (Dist. Ex. 2). Meeting participants included a district school psychologist (who also acted as district representative), the student's mother, a district special education teacher, and an additional parent member (id. at p. 2). Additionally, McCarton staff, including the director, a speech-language pathologist, and an occupational therapist, took part in the meeting by telephone (id.).

The May 2009 CSE determined that the student was eligible for special education services as a student with autism, and recommended that the student be placed in a 6:1+1 special class in a specialized school with a full-time individual behavior management paraprofessional (Dist. Ex. 2 at pp. 1, 25). Related services recommendations included four 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of speech-language therapy in a group of two, and five 45-minute sessions per week of individual OT (id. at p. 25). In addition, the May 2009 CSE recommended that the student participate in adapted physical education with a student-to-staff ratio of 6:1+1 (id. at p. 7). The May 2009 CSE also considered a placement in a 12:1+1 special class in a community school for the student; however, the CSE opined that the student required greater support at that time (id. at p. 24). In addition, the May 2009 CSE considered and rejected the option of a 6:1+1 special class in a specialized school without a behavior management paraprofessional for the student because the student required additional support at the time (id.).

The academic performance and learning characteristics contained in the May 14, 2009 IEP reflected that based on a McCarton teacher report/observation, the student's reading and

writing skills were at the late first through early second grade level and his math skills were at the first grade level (Dist. Ex. 2 at pp. 3-4). Academic management needs enumerated in the May 2009 IEP included a highly structured setting, "visual prompts/representations (i.e. schedule;" redirection and verbal prompting; clear and consistent expectations; positive, immediate, and consistent reinforcement; repetition, review, and practical application; chunking; frequent breaks; and a step-by-step approach to learning (id. at p. 4).

With regard to the student's present levels of social-emotional performance, based on teacher report, the May 2009 IEP described the student's attention as "poor." (id. at p. 5). According to the May 2009 IEP, the student engaged in behaviors such as humming, hand tapping, noncontextual vocalizations, and leaving the class without permission (id.). The student's social-emotional management needs incorporated in the May 2009 IEP included clear class rules and routines, visual and verbal prompts, redirection, positive reinforcement, and support during social interactions (id.). Consequently, the May 2009 CSE determined that the student's behavior seriously interfered with instruction and required additional adult support (id.). Moreover, a behavioral intervention plan (BIP) attached to the resultant IEP described the student's behaviors that interfered with learning, which included lack of attention, hand tapping, nonfunctional vocalizations, and leaving the classroom without permission (id. at p. 26). The BIP identified strategies and supports to address the student's interfering behaviors including visual and verbal prompts, redirection, positive reinforcement, visual schedule, predictable routine, and instruction regarding asking permission to leave the class (id.).

The May 2009 IEP contained 15 annual goals and 84 corresponding short-term objectives related to reading, writing, math, language, communication, fine motor, sensory processing, prevocational skills, ADL skills, gross motor, play skills, and attention (Dist. Ex. 2 at pp. 8-22). Additionally, the May 2009 CSE determined that due to global delays, the student was eligible to participate in alternate assessment (id. at p. 25).

In a letter to the parents dated June 11, 2009, the district summarized its May 2009 recommended classification, program, and related services, and assigned the student to a specific school (Parent Ex. J). The district also provided the parents with the contact information of an individual with whom they could speak in the event that they wanted to further discuss the district's decision or arrange for another meeting (id.).

On June 22, 2009, the parents visited the assigned school (Parent Ex. I at p. 1). By letter dated June 23, 2009, the parents advised the district that they found that the proposed program was inappropriate for the student because: (1) the assigned school did not offer ABA instruction; (2) the assigned school did not have sufficient 1:1 teaching and support that the student required; (3) the children in the proposed classroom were much more advanced than the student; (4) the assigned school did not offer the student the level of support that he needed in order to transition from McCarton; (5) the assigned school did not offer the level of support that the student needed to prevent regression; (6) the assigned school did not have a sensory gym, which the parents claimed was an integral part of the student's program; and (7) the classroom staff were not appropriately trained to meet the student's needs (id.). The parents further informed the district that unless the student was offered a timely and appropriate program, the student would continue to attend McCarton for the 2009-10 school year (id.). The parents stated that they intended to seek reimbursement for the student's tuition at McCarton, as well as for three hours per week of

additional 1:1 home-based ABA therapy, two hours per week of additional 1:1 OT, and four hours per week of additional 1:1 speech-language therapy (id.).

On August 10, 2009, the student's mother signed a contract enrolling the student in McCarton for the 2009-10 school year (Parent Ex. M).

During the 2009-10 school year, the student attended a McCarton classroom with five other students where he received 40 hours of individual instruction along with related services of four 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of speech-language therapy in a group of two with 1:1 support, and five 45-minute sessions per week of individual OT (Parent Exs. Z at p. 1; BB at p. 1).

By letter dated October 13, 2009, the student's mother gave her consent to the district to conduct educational observations of the student at McCarton and to conduct new evaluations as needed (Parent Ex. E at p. 2).

### **Due Process Complaint Notice and District Response**

By due process complaint notice dated March 3, 2010, the parents sought an impartial hearing, requesting as relief, among other things, tuition reimbursement for McCarton for the 2009-10 school year (Parent Ex. A at p. 4). The parents argued that the district deprived the student of a free appropriate public education (FAPE) for the 2009-10 school year, that McCarton was appropriate for the student's educational needs and that equitable considerations supported their claim for relief (id. at p. 1). In particular, the parents asserted, among other things that: (1) the district failed to timely and properly evaluate and assess the student's present levels of performance; (2) the district failed to develop "critical assessment reports" that should have been used as the basis for the development of the May 2009 IEP; (3) during the May 2009 CSE meeting, the district failed to discuss a specific educational placement location for the student; (4) the assigned school was not reasonably calculated to meet the student's needs; (5) the functioning levels of the students at the assigned school were inappropriate for the student; (6) the assigned school lacked a sensory gym, which the parents alleged was necessary to offer the student a FAPE; (7) the district failed to address the student's "generalization deficits," nor did it promote the student's self-sufficiency and independence; (8) the district failed to develop a transition plan; (9) the district failed to meaningfully consider private evaluations and failed to include the parents in the development of the student's IEP; (10) the district failed to develop an appropriate functional behavioral assessment (FBA) and BIP; (11) the district failed to create goals and objectives for the student that were "clear, unambiguous, adequate, sufficiently challenging and individualized for [the student];" (12) the district failed to set forth any methods of measurement in the IEP to determine the student's progress toward the recommended goals and objectives; (13) the district failed to provide a copy of the IEP to the parents on May 14, 2009 at the conclusion of the CSE meeting; (14) the district was not "ready, willing and able" to fulfill the student's related services mandates with personnel who were appropriately trained, experienced and supervised; (15) the district failed to offer parent training and counseling in accordance with State regulations; and (16) the district engaged in impermissible predetermination of the student's program and ultimately made a recommendation that was not individualized to meet the student's educational needs (id. at pp. 2-4).

On March 12, 2010, the district responded to the parents' due process complaint notice (Dist. Ex. 1). Among other things, the district alleged that the program summarized in its June 11, 2009 letter to the parents was reasonably calculated to enable the student to obtain meaningful educational benefits (id. at p. 2).

### **Impartial Hearing Officer Decision**

On May 10, 2010, an impartial hearing convened, and after eight days of testimony concluded on January 21, 2011 (Tr. pp. 1-947). On February 15, 2011, the impartial hearing officer rendered a decision (IHO Decision at p. 22). The impartial hearing officer found that the witnesses presented by the district convincingly testified "that the proposed placement would have provided the [student] with a FAPE for the 2009-2010" school year (id. at p. 18). Regarding the 6:1+1 proposed program recommendation, the impartial hearing officer found that the May 2009 CSE's recommendation was made following the consideration of student's progress reports from McCarton, two classroom observations, and a Stanford-Binet testing summary (id. at p. 19). Notwithstanding the parents' concerns that the assigned school would not have provided the student with an opportunity for ABA instruction, the impartial hearing officer found that the hearing record did not demonstrate that ABA instruction was the only methodology that was effective for autistic children (id.). He further determined that the evidence did not show that the district failed to meaningfully consider the parents' private evaluations and develop clear IEP goals and objectives (id. at pp. 19-20). Subsequently, although the impartial hearing officer determined that the district failed to develop an FBA, he further found that the May 2009 CSE developed a BIP based on McCarton evaluations, which the impartial hearing officer concluded "appropriately negate[d] the absence of an FBA as a fatal flaw to the IEP process" (id. at p. 20). He further noted that the evidence showed that the CSE could reasonably rely on McCarton evaluations and assessment reports of the student's progress (id.). Additionally, although the parents alleged that the May 2009 CSE failed to provide them with a written IEP before the meeting concluded, the impartial hearing officer stated that the district was not legally required to do so (id.).

Turning next to the district's decision-making regarding the assigned school, the impartial hearing officer first noted that it was not clear from the evidence how the information from the May 2009 IEP was transmitted to the placement referral form or when the May 2009 IEP was sent to the placement personnel (IHO Decision at p. 20). Although the impartial hearing officer found an "apparent vagueness" in the placement referral process, he concluded that such vagueness did not refute the fact that the assigned school satisfied the recommendation contained in the May 2009 IEP (id. at p. 21).

With regard to the grouping of the students in the recommended classroom, the impartial hearing officer determined that there was no evidence to support the parents' claim that the class was composed of students who were more advanced than the student in the instant case (IHO Decision at p. 19). In addition, although the parents complained that the assigned school lacked a sensory gym, the impartial hearing officer concluded that the hearing record did not demonstrate that the proposed program required a sensory gym instead of an ordinary gym in order to provide the student with a FAPE (id.). Regarding the parents' allegation related to the lack of generalization, self-sufficiency and independence in the proposed program, the impartial hearing officer did not find any evidence to support their claim (id.).

Next, despite the parents' assertion that the proposed program was insufficient given the lack of a transition plan, the impartial hearing officer found that the hearing record demonstrated that there was a transition plan that would have been implemented at the assigned school as part of the admissions process (IHO Decision at p. 19). The impartial hearing officer also determined that the evidence showed that the district's witnesses testified that there was parent training and counseling available, despite the parents' claim to the contrary (id. at p. 20). Lastly, the impartial hearing officer noted that there was no legal authority to support the parents' claim that the district violated the Jose P. consent order (id.).<sup>4</sup>

The hearing officer concluded that the district met its obligation to offer the student a FAPE for the 2009-10 school year; however, the impartial hearing officer bifurcated his FAPE determination by also determining that the district did not meet its obligation to provide the student with a FAPE with regard to related services (IHO Decision at p. 21). Noting that the assigned school would not have been able to fulfill the student's related services mandate, the impartial hearing officer found that although the district's witnesses testified that the district would have furnished the parents with related services authorizations (RSAs) in order to make up any deficiencies in the provision of the student's related services, the provision of RSAs was "far from a guarantee that the parent[s] would have been able to obtain a speech and language provider or an OT provider" (id.). He further ascertained that that the "RSA process" puts the burden solely on the parents to secure a provider (id.). Moreover, the impartial hearing officer concluded that the "strong likelihood [wa]s that the parent[s] would not have been able to find a provider" and that the student would not have received a "major portion" of his prescribed related services during the 2009-10 school year at the assigned school (id.). Additionally, the impartial hearing officer determined that the parents showed that the assigned school was an "underserviced site with respect to OT and speech and language," which would have further exacerbated its difficulties in fulfilling its students' related services needs, particularly in the instant case, where the student's related services mandates were high (id. at pp. 21-22). In light of his determinations, the impartial hearing officer denied the parents' request for tuition reimbursement at McCarton and ordered that the district reimburse the parents for four hours per week of 1:1 speech-language therapy and two hours per week of 1:1 OT for the 2009-10 school year (id.).

### **Appeal for State-Level Review**

The parents appeal the impartial hearing officer's decision to the extent that he found that the district offered the student a FAPE and failed to order an award of tuition reimbursement to the parents for their placement of the student at McCarton for the 2009-10 school year. In reaching his determination, the parents' assert that the impartial hearing officer ignored the evidence that showed "material prong I FAPE deprivations." In particular, the parents argue that the district failed to provide them with a copy of the May 2009 IEP during or prior to the conclusion of the May 14, 2009 CSE meeting. In addition, the parents assert that the district failed to develop an FBA and then unilaterally developed a BIP after the CSE meeting without

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<sup>4</sup> See Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]. The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

parental participation. The parents also allege that the district's recommended placement in a 6:1+1 special class was not reasonably calculated to provide the student with a FAPE, where as here, the evidence showed that the student required 1:1 instruction, and the recommended program did not offer the student any opportunity for ABA instruction. The parents also claim that the district failed to have any discussion regarding methodology during the May 2009 CSE meeting, which resulted from a failure of the district to consider the student's needs and "learning style." Next, the parents contend that during the May 2009 CSE meeting, the district failed to develop or discuss a transition plan for the student from McCarton to the public school. Additionally, the parent's claim that the district failed to offer parent training and counseling at the May 2009 CSE meeting.

Regarding the assigned school, the parents allege that the students in the proposed classroom were much higher functioning than the student in the instant matter. The parents further argue that the district failed to identify a specific assigned school during the CSE meeting. Lastly, the parents maintain that the assigned school was not reasonably calculated to meet the student's special education needs, particularly in light of the assigned school's history of failing to fulfill its students' related services mandates.

With regard to the appropriateness of McCarton, the parents argue that it was reasonably calculated to address the student's special education needs. In pertinent part, the parents maintain that the student made meaningful progress at McCarton during the 2009-10 school year. Lastly, the parents assert that equitable considerations support an award of tuition reimbursement because they provided timely notice to the district that they were rejecting the proposed placement and would be seeking funding for the student's tuition at McCarton.

In its answer, the district submits that the impartial hearing officer correctly found that it offered the student a FAPE, and his denial of an award for tuition reimbursement for McCarton should stand. Regarding the provision of a FAPE to the student, the district maintains that the recommended 6:1+1 program would have been appropriate for the student. Specifically, the district asserts that the parents' claim that the recommended program would not have provided enough 1:1 instruction lacks merit. Next, the district maintains that during the May 14, 2009 CSE meeting, it conducted an FBA based upon McCarton data and that it included the parents and McCarton staff in the development of the student's BIP. Moreover, the district contends that the resultant BIP was appropriate to address the student's behavior needs. The district further asserts that contrary to the parents' claims, the hearing record demonstrates that in the event that the student had enrolled in the assigned school, he would have received all of his related services at the school. Lastly, the district maintains that although there is no legal authority that required it to include a transition plan in the May 2009 IEP, a review of the hearing record demonstrates that the assigned school would have assisted the student with any transition needs.

In addition, the district argues that McCarton was not appropriate for the student because it was an overly restrictive setting that did not provide the student with mainstreaming opportunities. The district also asserts that equitable considerations should preclude an award of relief to the parents because the hearing record reflects that they never intended to enroll their son in public school. Rather, the district maintains that the hearing record reveals that the parents had planned to continue the student's education at McCarton.

The district cross-appeals the impartial hearing officer's determination to the extent that notwithstanding a finding that the student was offered a FAPE, the impartial hearing officer went on to award reimbursement to the parents for the cost of related services. The district asserts that absent a finding that there was a denial of a FAPE, there was no basis upon which to make an award of additional services. Regardless, the district asserts that the hearing record demonstrated that the assigned school would have met the student's related services mandates and that it would have employed outside agencies in the event there were not enough district providers to meet the student's needs. Accordingly, the district maintains that the impartial hearing officer's finding regarding the related services was erroneous.

The parents submitted an answer to the district's cross-appeal denying many of the allegations raised by the district.

### **Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The

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

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## Discussion

### **Provision of a Draft IEP to the Parents at the Time of the May 2009 CSE Meeting**

Turning to the first prong of the Burlington/Carter test, I will determine whether the district complied with the procedural mandates set forth in the IDEA and implementing regulations (see Cerra, 427 F.3d at 192). The parents allege that the district failed to furnish them with a copy of the resultant IEP prior to the conclusion of the May 14, 2009 CSE meeting. The IDEA does not require parental presence during the actual drafting of the written education program document (E.G., 606 F.Supp.2d 384 at 388-89). Moreover, there is no legal authority requiring districts to produce an IEP at the time that the parents demand, districts must only ensure that a student's IEP is in effect by the beginning of the school and that the parents are provided a copy (J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

In the instant case, while the hearing record shows that the May 2009 CSE did not provide the student's mother with a copy of the resultant IEP at the time of the CSE meeting, the hearing record further reveals that the May 2009 CSE was in part composed of the student's mother, his teachers and related services providers from McCarton and that the CSE reviewed the documentation provided by McCarton regarding the student (Tr. pp. 68-69, 649, 774; Dist. Ex. 2 at p. 2). According to the hearing record, the CSE meeting lasted over two hours, during which time all participants were present and afforded an opportunity to participate in the development of the student's IEP and discuss his needs (Tr. pp. 69-70, 75, 775). Further, the hearing record reflects that the May 2009 IEP was based on information that was gathered at the CSE meeting (Tr. pp. 76, 667). I also note that the parents do not claim that the district failed to provide them with a copy of the IEP before the start of the school year. Further, even assuming for the sake of argument that the district somehow improperly delayed delivery of the IEP, there is no evidence in the hearing record that such a delay impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or caused a deprivation of educational benefits in this case (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.H., 2010 WL 3242234, at \*2; Application of the Dep't of Educ., Appeal No. 10-070). Under these circumstances, I decline to find a denial of a FAPE based on the parents' allegation that they did not receive the IEP at the time of the May 2009 meeting.

### **FBA/BIP**

When developing an IEP, 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]). With regard to the parents' contention that the district failed to conduct an FBA and that it developed the student's BIP after the CSE meeting without parental participation, as detailed below, the hearing record fails to support their allegation.

The school psychologist testified that she and the special education teacher who attended the CSE meeting drew up the forms constituting the student's written IEP and BIP by reviewing the meeting minutes following the May 2009 CSE meeting (Tr. pp. 76-77, 605; Dist. Ex. 2 at p. 26; see Dist. Ex. 3). According to the school psychologist, an FBA was completed at the May

2009 CSE meeting based upon the data provided by McCarton staff (Tr. pp. 83-84; Dist. Ex. 3 at p. 2). Specifically, the hearing record demonstrates that the May 2009 CSE discussed the behavioral data and corresponding strategies provided by the McCarton staff, which were used to complete the student's BIP (Tr. pp. 83-84, 598-601; Dist. Ex. 3 at p. 2). The school psychologist further testified that the information provided by McCarton staff was sufficient to develop an appropriate BIP for the student because McCarton staff was familiar with the student's behavior (Tr. pp. 83-84). Under the circumstances, the hearing record illustrates that the BIP was developed with both information akin to an FBA and with meaningful parental participation. There is no need to disturb the impartial hearing officer's conclusion with respect to the parents' claims regarding the absence of a formal FBA or the process of developing the student's BIP (see A.C., 553 F.3d at 172-73; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at \*6 [S.D.N.Y. Mar. 30, 2011]; E.M. v. New York City Dep't of Educ., 2011 WL 1044905 at \*7 [S.D.N.Y. Mar. 14, 2011]; E.Z.-L. v. New York City Dep't of Educ., 2011 WL 207974, \*8 [S.D.N.Y. Jan. 24, 2011]; M.N. v. New York City Dep't of Educ., Region 9 (Dist. 2), 700 F. Supp. 2d 356, 366 (S.D.N.Y. 2010); A.H. v. New York City Dep't of Educ., 652 F. Supp. 2d 297, 312 [E.D.N.Y. 2009], rev'd on other grounds 2010 WL 3242234; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*11 [N.D.N.Y. Aug. 21, 2008], aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]).

I further note that the student was attending McCarton at the time of the May 2009 CSE meeting and conducting an FBA to determine how the student's behavior related to that environment would have diminished value where, as here, the CSE did not have the option of recommending that the student be placed at McCarton and was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]). Instead, had the student attended the assigned school, the school psychologist stated that the student's special education teacher at the assigned school would have conducted "an extensive workup" and convened a meeting to discuss the student's behavior (Tr. pp. 618-19; see M.H. v. New York City Dep't of Educ., 712 F. Supp. 2d 125, 158-59 [S.D.N.Y. 2010]). The district's special education teacher also testified that he collected data regarding student behavior and was familiar with the implementation of BIPs (Tr. p. 212). The hearing record reveals that the district's special education teacher reviewed the BIPs of incoming students and modified them as needed to address the students' needs (Tr. p. 213). The district's special education teacher stated that the student's BIP was sufficient; however, if the BIP needed to be modified, the CSE would reconvene to amend it (Tr. pp. 235-36). He further noted that he collaborated with the school staff and parents regarding the implementation of BIPs (Tr. pp. 212-13). Additionally, the district's special education teacher explained that he maintained "constant communication" with parents regarding a student's BIP to assist in the carryover of behavioral skills into the home environment (Tr. pp. 212-13). Based on the above, I decline to find that the student was denied a FAPE with respect to this issue.

### **Adequacy of the May 2009 IEP**

The hearing record also reveals that McCarton staff, in conjunction with McCarton evaluative data and progress reports, informed the May 2009 CSE with respect to the student's functioning and behavior (Tr. pp. 76-77, 81). According to the school psychologist, the CSE participants, including the student's mother and staff from McCarton, used the student's McCarton IEP to develop the district's May 2009 IEP annual goals (Tr. p. 86).<sup>5</sup> In addition, the

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<sup>5</sup> The McCarton IEP used by the May 2009 CSE to develop the district's IEP is not contained in the hearing

school psychologist testified that the McCarton speech-language pathologist and occupational therapist assisted in the development of the May 2009 IEP annual goals in the areas of language processing, fine and gross motor skills, self-regulation, self-care skills, and prevocational skills (Tr. pp. 89-91, 648, 672-76). The school psychologist testified that there were no objections during the discussion of IEP annual goals at the CSE meeting (Tr. pp. 93-94). The student's mother added that the McCarton reports provided sufficient information regarding the student's educational performance (Tr. p. 799). The school psychologist testified that the IEP was appropriate for the student, including the annual goals which she opined were both measurable and appropriate for the student to attain within one year (Tr. pp. 92, 609).

The May 2009 CSE reviewed the McCarton July 2008 SB-V testing report, the district's March and May 2009 classroom observation reports, and the McCarton January 2009 educational, OT, and speech-language progress reports (see Tr. pp. 68-69; Dist. Exs. 5; 6; 7; 8; 9; 10). With regard to the May 2009 IEP, the student's present levels of performance in the areas of academic achievement and functional performance showed that the student's math skills were at a first grade level (Dist. Ex. 2 at p. 4). In addition, the student demonstrated late first through early second grade skills in word identification/decoding, reading comprehension, and writing (id. at pp. 3-4). The May 2009 IEP further reflected that the student demonstrated decoding skills and was learning 50 new sight/functional words (id. at p. 3). The May 2009 IEP also reflected that the student wrote one original sentence with visual aides and teacher prompts (id.). According to the May 2009 IEP, the student added and subtracted two-digit numbers with a calculator (id.). The May 2009 IEP indicated that the student's difficulties with attention negatively affected his progress in reading, writing, and math (id.). With respect to speech-language skills, the May 2009 IEP stated that the student understood complex size concepts, some antonyms, and some comparative term endings (id.). In addition, the student demonstrated progress in the use of phrases to request items or activities with limited verbal support (id.). With regard to pragmatic language, the May 2009 IEP reflected that the student exhibited difficulty giving and responding to peer direction (id.).

The challenged IEP also included information regarding the student's present levels of social/emotional performance, noting that the student exhibited behaviors including humming, hand tapping, noncontextual vocalizations, and leaving the classroom without permission (Dist. Ex. 2 at p. 3). According to the May 2009 IEP, the student's ability to function independently and to socially interact had increased within the context of familiar routines and activities (id.). In addition, the May 2009 CSE noted that the student continued to demonstrate progress in sensory processing, self-care skills, and fine and gross motor skills (id. at p. 7).

Contrary to the parents' contention that the district's recommended 6:1+1 program was not reasonably calculated to provide the student with a FAPE, as set forth in greater detail below, a careful review of the hearing record supports the impartial hearing officer's determination that the proposed program contained in the May 2009 IEP offered the student a FAPE.

The May 2009 CSE recommended that the student be placed in a 6:1+1 special class in a specialized school with a full-time individual behavior management paraprofessional (Dist. Ex. 2 at pp. 1, 25). To address the student's academic needs, the May 2009 CSE recommended a highly structured setting, visual prompts/schedule, redirection, clear/consistent expectations,

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record (Tr. p. 88).

positive/immediate/consistent reinforcement, repetition, review, practical application of skills, chunking, frequent breaks, and a step-by-step approach to learning (*id.* at p. 4). Additionally, to address the student's social/behavioral needs, the CSE recommended clear classroom rules/routines, visual/verbal prompts, redirection, positive reinforcement, and support during social interactions (*id.* at p. 5). Based on the evaluative information available to the May 2009 CSE, I find that the May 2009 IEP accurately described the student's academic, social, and behavioral needs, and provided program accommodations and strategies to address his identified needs. Additionally, a review of the May 2009 IEP reveals that the student's annual goals and corresponding short-term objectives were consistent with the student's identified needs in reading, writing, math, language, communication, fine motor skills, sensory processing, prevocational skills, ADL skills, gross motor skills, play skills, and attention (*id.* at pp. 8-22). A district special education teacher testified that the IEP annual goals were measurable and that he would amend them based on the student's ongoing needs (Tr. pp. 235-36). The special education teacher testified further that the annual goals did not include methods of measurement in order to provide the student's teacher with "room to work" regarding assessment options (Tr. p. 237). Upon review of the hearing record, I find that the May 2009 CSE addressed the student's needs through appropriate program accommodations and strategies listed in the May 2009 IEP in conjunction with appropriate measurable goals targeting the student's special education needs.

### **6:1+1 Special Class**

With regard to the parents' challenge to the IEP, State regulations require that the CSE must indicate on an IEP the recommended special education placement and services from a continuum of services set forth in the State regulations and the class size of the recommended placement, if appropriate (8 NYCRR 200.4[d][2][v][a][b]; see 8 NYCRR 200.1[qq], [ww], [bbb] [defining special education, related services, and supplementary aids and services], 200.6 [regarding the continuum of special education placements for non-preschool students], 200.16[i] [regarding the continuum of services for preschool students]; see also 34 C.F.R. §§ 300.39[a][1][i], 300.115; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419, cert. denied, 130 S. Ct. 3277 [2010]). The State regulations further mandate that the recommended special education programs and services are selected in order for the student to advance appropriately toward attaining the annual goals in the student's IEP, to be involved and progress in the general education curriculum to the extent appropriate, and to be educated and participate with other students with disabilities and non-disabled students in academic and nonacademic activities (8 NYCRR 200.4[d][v][a][1-3]; see 34 C.F.R §§ 300.114, 300.320[a][4]). Among other things, an IEP must also include the date of initiation of the program and services, the anticipated frequency, duration and location for each of the recommended programs and services, any assistive technology devices or services the student requires, a statement of any individual testing accommodations, and whether the student is eligible for 12-month special services and/or programs (8 NYCRR 200.4[d][v][b], 200.4[d][vi], 200.4[d][x]).

In this case, the parents argue that the impartial hearing officer erred in finding that the proposed 6:1+1 special class placement was reasonably calculated to address the student's special education needs. As set forth herein, I find that the hearing record does not substantiate their claim. Rather, a careful review of the hearing record reveals that the 6:1+1 special class was designed to offer a FAPE to the student, because the proposed placement was designed to provide an appropriate level of academic and social-behavioral support for him.

Testimony by the school psychologist supports the CSE's recommendation of a 6:1+1 special class and 1:1 behavior management paraprofessional for the student (Tr. pp. 97-98). She testified that the 6:1+1 special class was appropriate for the student because he would have been provided with small group instruction and opportunities to socialize, and the 1:1 behavior management paraprofessional would have offered him additional support (Tr. pp. 97-98; Dist. Ex. 2 at p. 4). The school psychologist further testified that the 6:1+1 special class was appropriate for the student because he possessed many strengths, but a "great deal of support ... [wa]s needed in order to maximize his learning and ability to function within the classroom setting" (Tr. p. 98; see Dist. Ex. 2 at pp. 4-5). Based on the above, the hearing record demonstrates that the recommended 6:1+1 program offered to the student was reasonably calculated to enable him to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192 [2d Cir. 2005]).

### **1:1 Support**

The parents further contend that the recommended program in the May 2009 IEP would not have provided sufficient 1:1 instruction to meet the student's needs. As set forth below, the recommendation of a 6:1+1 special class combined with the provision of a 1:1 behavior management paraprofessional was appropriately designed to address the student's academic and social/emotional needs.

Here, according to the school psychologist, based on the information that the CSE had at the time of the meeting, the May 2009 CSE determined that the student did not require a full-time 1:1 special education teacher to address his needs (see Tr. p. 648). As stated above, the student's ability to complete tasks with less assistance had improved (Dist. Ex. 8 at p. 4). In addition, according to McCarton staff, the student demonstrated improvement in the areas of self-regulation, fine and gross motor skills, and attention as well as receptive and expressive language (Tr. pp. 481-82, 515-16; Dist. Ex. 8 at pp. 1-5). Additionally, the student engaged in group activities and had exhibited an increase in independent functioning and social interaction within the context of familiar routines and activities (Dist. Ex. 2 at p. 5). I further note that although the student demonstrated steady progress in learning readiness and academics, his performance was inconsistent across different settings (Dist. Ex. 10 at p. 2). The hearing record also revealed that the student often received instruction within a group setting but that he required 1:1 support for the provision of prompts, visual support, and assistance regarding generalization of skills (Tr. pp. 870-71). The hearing record shows that the recommended program was designed to provide the student with instruction across different settings (Tr. pp. 98, 179, 307-08; see Dist. Ex. 2 at pp. 12-13).

Similarly, the school psychologist testified that the recommended 6:1+1 special class would have allowed the student opportunities for social interaction with peers, including general education students during school assemblies (Tr. pp. 98, 179-80; see Dist. Ex. 2 at pp. 14, 16). The May 2009 CSE believed that a 6:1+1 special class "was as restrictive as would be appropriate for this student" and a more restrictive setting would have been "overly restrictive" (Tr. p. 95). In addition, the hearing record reflects the use of a language-based approach to learning at the assigned school that included instruction provided within natural environments such as the cafeteria (Tr. pp. 307-08). In addition to the opportunities for social and language development, the students at the assigned school received one 30-minute session per day of 1:1 instruction (Tr. pp. 209, 259). Furthermore, the student would have received the support of a 1:1

behavioral management paraprofessional to address his academic and behavioral needs (Tr. pp. 98, 166). Accordingly, I find that the CSE's recommendation of a 6:1+1 special class in conjunction with a 1:1 behavior management paraprofessional and the recommended program accommodations and strategies would have provided the student with sufficient individualized support such that he was offered a FAPE in the LRE.

### **Transition Plan**

The parents also assert that the district failed to develop a transition plan for the student with respect to his transition from McCarton's ABA-based program to the district's TEACCH-based program. Although the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another,<sup>6</sup> in the instant case, a review of the hearing record reflects that had the student attended the district placement, the district would nevertheless have offered the student specialized services to assist him in transitioning from McCarton to the district recommended class (see E.Z-L., 2011 WL 207974, at \*9; M.S., 734 F. Supp. 2d at 280). Here, the hearing record supports the impartial hearing officer's conclusion that the district presented testimony showing a transition plan that was in place at the assigned school as part of the admissions process (IHO Decision at p. 19). The school psychologist testified that the district's 6:1+1 special class program assisted students during transitions from other programs (Tr. pp. 586, 660-61). In addition, the student's 1:1 behavior management paraprofessional would have assisted the student with the transition from McCarton to the assigned school (Tr. pp. 586, 660). The assistant principal (assistant principal 1)<sup>7</sup> further testified that students at the assigned school demonstrated success upon transitioning from an ABA-based program to a TEACCH-based program (Tr. pp. 139-40). Assistant principal 1 also testified that the assigned school facilitated transitions in several ways including district staff meetings with the parents, providing parents with a tour of the school, and discussing student preferences (Tr. pp. 127-28). In addition, McCarton staff would be welcome to engage with the district staff and the student to assist with the student's transition (Tr. pp. 142-43, 189-90). Additionally, the district employed autism coaches, trained in both ABA and TEACCH, to assist students with transitions (Tr. p. 246). I further note that during the March 2009 district observation, the school psychologist indicated the student transitioned well between activities (Dist. Ex. 6 at pp. 1-2). Accordingly, the hearing record reflects that the district would have provided for transition services in order to facilitate the student's placement in the assigned school.

### **Parent Training and Counseling**

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<sup>6</sup> Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 C.F.R. § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 C.F.R. § 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.).

<sup>7</sup> The hearing record indicates that assistant principal 1 was assigned to the district's recommended 6:1+1 special class during July and August 2009 (Tr. p. 108).

I now turn to the parents' claim that the district failed to offer the student parent training and counseling at the May 2009 CSE meeting. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]). As described below, I agree with the impartial hearing officer that the hearing record reflects that parent training and counseling would have been available at the assigned school (IHO Decision at p. 20; see M.N., 700 F. Supp. 2d at 368 [determining that the failure to specify parent counseling and training on the student's IEP did not result in a denial of a FAPE]; M.M. v. New York City Dep't of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008] [same]; but c.f., R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at \*21 [E.D.N.Y. Jan. 21, 2011] adopted at 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]).<sup>8</sup>

In the instant matter, the hearing record is unequivocal that the provision of parent training and counseling was not memorialized on the May 2009 IEP (Dist. Ex. 2). However, the hearing record further reveals that during the May 2009 CSE meeting, the CSE advised the student's mother that parent training and counseling were provided at the assigned school (Tr. pp. 96, 650; Dist. Ex. 3 at p. 3). Testimony from assistant principal 1 also reveals that parent training and counseling was offered at the assigned school (Tr. p. 128). In addition, testimony from assistant principal 1 reveals that during the extended school year, the district referred parents to outside agencies for parent counseling and training (Tr. p. 129). He added that in the event that parents request assistance, the parent coordinator would coordinate with an outside agency to provide assistance tailored to the needs of the students (id.). Under the circumstances presented herein, the district should have complied with the State regulations by identifying parent counseling and training on the May 2009 IEP; however, given that parent counseling and training was available at the assigned school, the district's failure to incorporate it into the challenged IEP did not result in any substantive harm, nor did it, in this case, rise to the level of a denial of a FAPE to the student.

### **Assigned School**

A district must have an IEP in effect at the beginning of each school year for each student with a disability in its jurisdiction (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at \*6; Application of the Bd. of Educ., Appeal No. 10-006; Application of a Student with a Disability, Appeal No. 09-111; Application of a Student with a Disability, Appeal No. 08-157; Application of a Student with a Disability, Appeal No. 08-088). I note that in this case, the parents decided to unilaterally place the student at McCarton prior to the time that the district was required to implement the IEP in July 2009 (Dist. Ex. 2 at p.

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<sup>8</sup> To the extent that RK may be read to hold that the failure to adhere to the procedure of listing parent counseling and training on an IEP constitutes a per se, automatic denial of a FAPE, I note that Second Circuit authority does not appear to support application of such a broad rule (see A.C., 553 F.3d. at 172 citing Grim, 346 F.3d at 381 [noting that it does not follow that every procedural error renders an IEP inadequate]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, \*16 [E.D.N.Y., Oct. 30, 2008]).

2; Parent Ex. A). A meaningful analysis of the parents' claims with regard to the functional grouping of the student in the public school placement would require me to determine what might have happened had the district been required to implement the student's IEP. However, I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y., 584 F.3d at 420). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at \*11). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

In this case, the issue regarding functional grouping within the district's classroom identified in the June 11, 2009 letter to the parents is in part speculative because on June 23, 2009, it became clear that the parents would not accept the services recommended by the district in the IEP and that they intended to enroll the student in McCarton (Parent Ex. I). If the student had attended the school identified in the June 2009 letter, it is unclear whether the district would have attempted to adjust classroom assignments to comply with the functional grouping requirements, sought a variance to the requirements in accordance with State regulations, or done nothing. Insofar as the parents did not accept the recommendations of the CSE or the program offered by the district, I note that the hearing record, in its entirety, does not support the conclusion that, had the student attended the assigned school, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192; see 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, 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

Even if the district was required to prove proper implementation of the May 2009 IEP at the assigned school, the evidence in the hearing record, such as it is, does not support that the district would have failed to provide the student with a FAPE. I note that when recommending a program for the student in the May 2009 IEP the CSE determined the instructional levels with respect to reading, writing, and mathematics (Dist. Ex. 2 at p. 4). Additionally, the information set forth on the student's IEP and evidence in the hearing record regarding the special education teacher's classroom practices, the functional grouping in the assigned school, as well as the evidence regarding the provision of related services, support a determination that the district was capable of implementing the student's IEP consistent with State regulations.

### **Proposed 6:1+1 Classroom**

Turning to the parents' challenge to the lack of ABA methodology in the district's program, as noted above the May 2009 CSE recommended that the student attend a 6:1+1 special

class in a specialized school for the 2009-10 school year (Dist. Ex. 2 at p. 1). Furthermore, the Analysis of Comments accompanying the federal regulations implementing the IDEA states that "[t]here is nothing in the Act that requires an IEP to include specific instructional methodologies" and that the IEP team may, if appropriate, determine that specific instructional methods are necessary for a particular student (Statement of Special Education and Related Services, 71 Fed. Reg. 46665 [Aug. 14, 2006]).<sup>9</sup> In this case, within the 6:1+1 special class, the district's special education teacher testified that instruction was provided based on a modified curriculum and through ongoing assessment of the students (Tr. pp. 201-02, 215-16). Furthermore, the special education teacher testified that he employed the Treatment and Education of Autistic and Related Communication Handicapped Children (TEACCH) methodology within the class (Tr. p. 201). According to the special education teacher, TEACCH provided students with a routine and visual structure as well as individual instruction and opportunities to engage in learning at workstations (*id.*). By implementing the TEACCH methodology in the classroom, the special education teacher further explained that they were "trying to promote independence" (Tr. p. 201). In order to promote independence with students, he testified that he began by targeting his students' needs, and started by working with students on a 1:1 basis to promote them to work independently (Tr. pp. 209-10). He further noted that 1:1 instruction was one of the main components of the TEACCH program, and that the students received one 30-minute session per day of 1:1 instruction (Tr. pp. 209, 259).

Moreover, to address the student's communication and sensory processing needs, the district's special education teacher stated that he would utilize strategies such as visual cues/symbols, communication systems, listening programs, a sitting disc, and weighted vests (Tr. pp. 204-05). Notwithstanding the parents' claims below that the proposed program failed to offer the student opportunities for generalization, the hearing record reflects that the special education teacher provided differentiated instruction to the students and that he also offered instruction to promote generalization of skills (Tr. p. 222).<sup>10</sup> The special education teacher further indicated that in order to address the student's delays in attention, sensory regulation, and academics, he would incorporate the use of modeling, role-playing, read alouds, visual cues, verbal/physical prompts, structured setting, individual schedule, peer consistent expectations, repetition, review, practical application of skills, frequent breaks, positive reinforcement, classroom responsibility/role, music, redirection, and sensory tools (Tr. pp. 228-34; Dist. Ex. 2 at pp. 3-5). Although it is understandable that the parents may have preferred a different educational methodology or strategy upon the implementation of the student's IEP, in view of the forgoing evidence, I decline to hold that the failure to provide the student with an ABA methodology in the proposed classroom in this case resulted in a denial of a FAPE. (see Rowley, 458 U.S. at 199

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<sup>9</sup> Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; Application of a Student with a Disability, Appeal No. 10-056; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

<sup>10</sup> In Thompson R2-J Sch. Dist. v. Luke P. (540 F.3d 1143, 1155 [10th Cir. 2008]) the Court held that generalization of skills across environments was not required to provide the student with a FAPE. I need not consider that particular facet of the issue in order to reach a decision in this case.

[noting that IDEA does not require that an IEP furnish "every special service necessary to maximize each handicapped child's potential"]; A.H., 2010 WL 3242234, at \*3).

### **Functional Grouping**

The parents argue that the students in the proposed classroom that they visited were much higher functioning than the student in this case. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]–[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. Of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

As indicated herein, the hearing record supports the impartial hearing officer's determination that the evidence did not support this allegation (IHO Decision at p. 19). In July 2009 the assigned 6:1+1 special class consisted of five students with autism (Tr. p. 205, see Tr. p. 305). The students ranged in age from 10 through 12 years old, and their instructional levels in reading and math ranged from early first grade through early second grade (Tr. pp. 205-06, 241-42). At the time of the May 2009 CSE meeting, the student was 11 years old and he demonstrated first grade skills in math and late first through early second grade skills in word identification/decoding, reading comprehension, and writing (Dist. Ex. 2 at pp. 1, 3-4). Within the 6:1+1 special class, there were three verbal and two nonverbal students (Tr. p. 206). With respect to the student's verbal skills, he produced up to five word phrases (Dist. Ex. 9 at p. 2). The district's special education teacher of the assigned class testified that the student would have been a "good candidate" for the 6:1+1 special class based on his strengths, needs, annuals goals, performance characteristics, and age (Tr. pp. 206-07). Based on the foregoing, I am persuaded that the student could have been suitably grouped for instructional purposes within the 6:1+1 special class (see M.P.G., 2010 WL 3398256, at \*10-\*11 [noting that student was not denied a

FAPE when the hearing record showed that the student was suitably grouped for instructional purposes]; W.T. v. New York City Dep't of Educ., 716 F. Supp. 2d. 270, 290-292 [S.D.N.Y. 2010] [holding that a district did not fail to offer a FAPE where the age range within a student's proposed class exceeded 36 months because the student could have been functionally grouped with other similarly-aged students within the class who had sufficiently similar instructional needs and abilities in both reading and math]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

### **School Identification**

Turning next to the parents' argument that during the May 2009 CSE, the district failed to identify a specific school placement, I note that in general, the IDEA requires parental participation in determining the educational placement of a student (see 34 C.F.R. §§ 300.116, 300.327, 300.501[c]). Under the IDEA, a placement team, which is a group of persons including the parents, who are knowledgeable about the child, the meaning of the evaluation data, and the placement options; is responsible for selecting an educational placement that is consistent with the student's IEP (see 34 § CFR 300.116). Although not required under federal law, certain states such as New York permissibly assign this function to the "IEP team" or, in other words, the CSE (see 8 NYCRR 200.4[d][2]–[4]).<sup>11</sup> However, the assignment of a particular school may be an administrative decision, provided that it is made in conformance with the CSE's educational placement recommendation (Letter to Veazey, 37 IDELR 10 [OSEP 2001]). The Second Circuit has established that "'educational placement' refers to the general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at \*2 [2d Cir. March 30, 2010]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII], 34 C.F.R. § 320[a][7], 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (T.Y., 584 F.3d at 419-20). In this case, the evidence in the hearing record shows that the student's mother had input into and participated in developing the student's IEP, which, as discussed above, included the student's educational placement recommendation (Tr. pp. 70, 75-76, 580, 605, 647, 649). Accordingly, the hearing record reflects that although the district did not identify a specific school placement on the challenged IEP, the district met its obligation to offer the student a FAPE by seeking parent participation in developing a program for the student and recommending an assigned school prepared to implement the proposed program.

### **Related Services**

#### **Provision of Related Services at Assigned School**

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<sup>11</sup> Although no longer formally applicable, this point was also addressed by the United States Department of Education in federal regulations implementing IDEA 1997, which explained that it was permissible to use the IEP team as the placement team (see prior 34 C.F.R. Part 300, Appendix A, Question 37 [implementing the Individuals with Disabilities Act Amendments of 1997, Pub.L.No.105-17, 111 Stat. 37 amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub.L.No.108-446, 118 Stat. 2647]).

Next, the parents argue that given the assigned school's history of IEP implementation problems regarding related services recommendations, placement of the student in the assigned school was not reasonably calculated to address the student's special education needs. Here, I take note of testimony by district staff showing that the assigned school would not have been able to provide the student with all of his related services as prescribed on his May 2009 IEP using district employees and evidence showing that there had been students who did not receive their mandated amount of related services because efforts to obtain a related service provider through the district's providers, outside providers, or the RSA process failed (Tr. pp. 120, 402-03). However, I find that this evidence does not warrant a finding that the district was not "ready, willing and able" to implement the student's IEP. First, case law supports a finding that data indicating that a school has not always delivered full special education services to its students does not mean that the school would have been unable to provide the services to another student whose IEP is being challenged in a due process proceeding (see *M.S.*, 2010 WL 3377667, at \*6-\*7). Moreover, it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control according to a June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents:

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

(<http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html>, Question 5; see <http://www.p12.nysed.gov/resources/contractsforinstruction/>).

Notwithstanding the above, further review of the hearing record provides strong support for the conclusion that the staff at the assigned school would have implemented the related services recommendations on the student's May 2009 IEP had he attended the assigned school. The related service coordinator testified that the student would have received all of his related services had he attended the assigned school in July 2009 (Tr. p. 372). The related service coordinator added that students obtained their related services through district providers and contracted with outside providers as needed (Tr. pp. 312, 344-45, 359, 361-62). Furthermore, assistant principal 1 testified that the district's related service providers collaborated with the outside related service providers when a student received related services from an outside provider (Tr. p. 151). Additionally, the hearing record reflects that the related service coordinator provided parents with an RSA and a list of related service providers when outside providers were not available (Tr. p. 312). The related service coordinator stated that RSAs were provided to parents in an effort "to take that burden off ...parent[s]" (Tr. p. 419). Moreover, the

related service coordinator provided assistance to parents with the RSA process, including contacting related service provider agencies (Tr. pp. 418-20). The assistant principal (assistant principal 2)<sup>12</sup> testified that, although the special education service reports in evidence at the impartial hearing indicated that students were undeserved, the student in the instant matter would not have been underserved because his related services would have been arranged through outside providers, if needed (Tr. p. 342). Lastly, I note that testimony from the district's special education teacher reveals that all of his students from the 2009-10 school year received their related services from district providers (Tr. pp. 226, 289). In sum, the hearing record does not support a finding that related services were unavailable at the assigned school, or that the district would have denied the student a FAPE under the circumstances of this case, even if the district had to issue an RSA to the student to complete the provision of the related services listed on the May 2009 IEP due to a shortage of district providers.

### **Impartial Hearing Officer's Award of Related Services Costs**

I will now consider the district's argument that the impartial hearing officer erred to the extent that he awarded the parents reimbursement for privately obtained related services.<sup>13</sup> As noted above, the hearing record does not compel the conclusion that the district would have failed to implement the related services aspects of the student's IEP in a manner that constituted a denial of a FAPE. Thus, absent a determination that there was a denial of a FAPE, the district correctly asserts that no basis existed upon which to predicate an award of additional services in the form of reimbursement for privately obtained related services (see 34 C.F.R. § 300.148[a]; Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student with a Disability, Appeal No. 08-078). Consequently, in the absence of any other basis, the impartial hearing officer's award to the parents for reimbursement of the cost of the student's speech-language therapy and OT must be annulled.

### **Conclusion**

Having determined that the district offered the student a FAPE for the 2009-10 school year, it is not necessary to reach the issue of whether McCarton was appropriate for the student or whether equitable considerations support the parents' claim 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 Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

### **THE APPEAL IS DISMISSED.**

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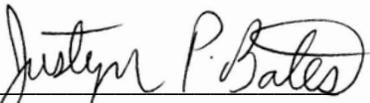
<sup>12</sup> The hearing record indicates that the assistant principal 2 was assigned to the district's 6:1+1 special class during the 2009-10 school year (Tr. p. 299).

<sup>13</sup> While not necessary for a rendering of my decision, I note that with respect to the award for related services, the impartial hearing officer awarded relief to the parents without completing a Burlington/Carter analysis with respect to the appropriateness of the parents' privately obtained speech-language therapy and OT or whether equitable considerations favored an award of relief.

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the portion of the impartial hearing officer's decision dated February 15, 2011 that awarded reimbursement to the parents for privately obtained speech-language therapy and OT is annulled.

**Dated:** Albany, New York  
June 6, 2011

  
**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**