



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-089

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

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, Esq., of counsel

### **DECISION**

Petitioners (the parents) appeal from a decision of an impartial hearing officer which determined that respondent's (the district's) April 28, 2010 individualized education program (IEP) for the student was appropriate. The district cross-appeals from those portions of the impartial hearing officer's decision which found that the summer 2010 portion of the recommended educational program was inappropriate, and which also awarded the parents various forms of relief. The appeal must be dismissed. The cross-appeal must be sustained in part.

### **Background**

At the time of the impartial hearing, the student was attending a district 6:1+1 special class in a special school and receiving related services of speech-language therapy, occupational therapy (OT), physical therapy (PT), and counseling (Tr. pp. 339, 342, 430, 782, 947, 1013, 1017; Parent Ex. C). The student exhibits deficits in cognition, attention, academics, language, social interaction, sensory processing, fine and gross motor skills, and in self-help skills (Dist. Exs. 6 at pp. 1-2; 7 at p. 1; 8 at pp. 2-8; 9; 12 at pp. 1-3; Parent Exs. C at pp. 10-14; N at pp. 3, 5). The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On January 29, 2009, a district school psychologist completed a psychoeducational update of the student (Parent Ex. FF at pp. 1, 5). According to the update report, the student had previously undergone a neurodevelopmental evaluation and received diagnoses of a pervasive developmental disorder and a language communication disorder (id. at p. 2). The student's current functioning was described as including some ability in readiness skills such as matching, recognizing his name, and the letters of the alphabet; communication with one word utterances; ability to follow one and two step directions; and exhibited deficits in focus, retention of information, and independent completion of tasks (id. at p. 2). Three classroom observations were summarized in the update report, which reflected that the student did not always respond to teacher directives, often needed individualized instructions and redirection from the teacher, that the student exhibited poor eye contact and self-stimulatory behavior, and that his interaction with his classmates was limited (id. at p. 5). The update report also reflected that final recommendations would be made at a multidisciplinary team conference (id.).

On February 5, 2009, the student underwent an evaluation by a district physical therapist which included observations of the student in the sensory gym and while negotiating throughout the school hallways and stairs, and an interview with the student's classroom staff regarding his ability to function in the classroom setting (Parent Ex. EE at p. 1). A clinical assessment of the student's functioning in the areas of range of motion, muscle tone and strength, motor performance, stair negotiation, recreational skills, ambulation, sensory status, and task behavior reflected among other things, that the student demonstrated difficulty with appropriate posture; displayed decreased ball playing skills, balance skills, and coordination for age-appropriate gross motor activities; and that he frequently bumped into things and tripped when walking and negotiating stairs (id. at pp. 1-2). The physical therapist recommended that the student receive PT services twice per week to improve the student's stair negotiation, trunk control, balance, and coordination skills (id. at p. 2).

On February 27, 2009, a speech pathologist conducted a reevaluation of the student's speech-language functioning to assess the student's need for continued speech-language therapy (Parent Ex. DD at p. 1). The resulting evaluation report included a parent interview which reflected that the student's mother wanted the frequency of the student's speech-language services increased (id.). The student's mother reported that the student was using single words to communicate; however, he did not use gestures to communicate his wants and needs, and that although she believed the student's speech was improving, it was improving at a slow pace (id.). The teacher interview portion of the evaluation report reflected that the student utilized pictures to follow directions in the classroom and that he required a lot of prompting to verbalize and to choose activities (id.). The student's teacher also reported that the student may be aggressive toward others if bothered by their noise level, that he may "go after" a toy that he wants, and that although his attention span was limited unless an adult was sitting with him, he was able to function independently for short periods of time (id.). The speech-language pathologist reported that during her evaluation she observed the student separate easily from classroom activities; exhibit fleeting eye gaze, limited attention and focus to language-based tasks, minimal interaction with the evaluator; and that he appeared to be in his "own world" (id. at p. 2).

The speech-language evaluation report also indicated that informal testing techniques and specific subtests of formal instruments were administered to determine the student's level of language functioning (Parent Ex. DD at p. 2). The student's receptive, expressive, and pragmatic language skills were reported to be severely delayed (id. at pp. 2, 3). The student's articulation was deemed within age expected levels (id.). The speech-language report indicated that the student was eligible for speech-language therapy services based on his rate of progress, discrepancy in skills from same-age peers, and instructional needs (id. at pp. 3, 4).

On May 21, 2009, the Committee on Special Education (CSE) met to review the student's program (Parent Ex. BB at pp. 1, 2).<sup>1</sup> In the resultant IEP, the CSE recommended a 12-month 6:1+1 special class in a special school and related services of two 30-minute individual PT sessions per week and three 30-minute individual OT sessions per week (id. at p. 17). The May 2009 CSE modified the student's recommended speech-language therapy services from two 30-minute group (of 3) sessions to three 30-minute individual sessions per week (id. at pp. 2, 17).<sup>2</sup> The IEP reflected that the student's behavior seriously interfered with instruction and required additional adult support, and a behavioral intervention plan (BIP) was attached to the IEP to address the student's distractibility and aggressive behavior (id. at p. 18).

In August 2009, the student underwent a private neurodevelopmental evaluation (Parent Ex. N at pp. 1, 9). Administration of the Stanford-Binet Intelligence Scale-Fifth Edition (SB5) and Wechsler Individual Achievement Test-Second Edition (WIAT-II) yielded a full scale IQ of 42 (very low) and commensurate scores in the low to very low range on academic tasks (id. at pp. 3, 5). The student's performance on a variety of other administered instruments revealed deficits in graphomotor integration skills, adaptive behavior, receptive and expressive communication, interpersonal relationship skills, play and leisure skills, and coping skills (id. at pp. 6-7). Based on observations and parent report, the student received an overall score of 35 on the Childhood Autism Rating Scale (CARS) with mild to moderate abnormality in behavior exhibited across all areas and most pronounced impairment in relating to people, verbal communication, and emotional response (id. at p. 7). The evaluation report reflected a diagnosis of an autistic disorder and indicated that based on the student's delays in cognition, language, auditory processing, and adaptive behaviors and due to his distractibility, self directedness and low frustration tolerance, he required a highly supportive academic program that utilized applied behavior analysis (ABA) (id. at pp. 7, 9). Recommendations included among other things, a 12-month full time ABA-based school program of approximately 40 hours per week to be implemented at home and at school (id. at p. 8). The evaluation report further indicated that if such school program was not available for September 2009, the student should remain in his then-current school for five half-days weekly accompanied by an ABA therapist, with the remainder of his ABA hours delivered at home, and receive five 60-minute individual sessions of speech-language therapy per week, three 60-minute individual sessions of feeding therapy per week, four 60-minute sessions of OT per week, two 30-minute sessions of PT per week, auditory

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<sup>1</sup> The May 21, 2009 IEP indicated that an earlier IEP dated March 26, 2009, which is not included in the hearing record, had previously been developed for the student (see Parent Ex. BB at pp. 3-16, 18).

<sup>2</sup> The hearing record also reflects that on November 4, 2009, the parent agreed to amend the student's May 2009 IEP without convening a CSE meeting, and modified the student's speech-language therapy services from three 30-minute individual sessions to one 30-minute individual and two 30-minute group (of 2) speech-language therapy sessions per week (Dist. Ex. 10).

integration therapy, and monthly interdisciplinary meetings among the parents and the student's providers to review his progress and modify his program accordingly (id. at p. 8).

The hearing record reflects that the student continued attending school in the district in a 6:1+1 special class during his second grade 2009-10 school year (Tr. pp. 132, 497; Dist. Exs. 1 at pp. 8-14; 6 at pp. 1-3; 7 at pp. 1-2; 8 at pp. 2-8; 10).

On October 28, 2009, the student underwent an evaluation by a private occupational therapist to assess his fine motor, gross motor, and sensory processing abilities (Parent Ex. M at p. 1). The resultant report reflected that the student exhibited global delays in fine and gross motor skills, self-regulation, and modulation, deficits in communication and adaptive behaviors, difficulty transitioning, and short attention to task (id. at p. 14). Recommendations included auditory training intervention, five 45-minute individual OT sessions weekly, and implementation of a sensory diet at home and at school (id.). The report also included 13 goals to be addressed during the student's OT sessions (id. at pp. 15-16).

The student underwent a private educational and behavioral evaluation by an ABA educational supervisor on October 29, 2009 (Parent Ex. L at pp. 1, 9). The resulting evaluation report reflected observed behaviors that included high rates of hand flapping, jumping up, pacing, and noncompliance to the tasks presented (id. at p. 2). The evaluator recommended that an analysis be conducted to further identify the functions of the behaviors exhibited by the student and that an appropriate behavior treatment plan be developed and implemented across all environments (id. at p. 3). The evaluation report indicated that during the assessment, the student required highly structured continuous interaction, redirection, a fast rate of instruction, and frequent reinforcement in order to independently complete and comply with tasks presented (id. at pp. 3, 8). The Assessment of Basic Language and Learning Skills (ABLLS-R) was completed to assess the student's skills and revealed delays in all of the domains tested (id. at pp. 1, 8). The student's performance was reportedly affected by his varying attention and level of motivation, requiring adult redirection for the student to attend and stay on task (id. at p. 8). The evaluation report recommended that a functional form of communication be established for the student to decrease frustration levels and problem behavior associated with language deficits; that the student receive a 12-month intensive ABA (primarily 1:1 discrete trial) school program of approximately 30 hours per week; 20 hours of 1:1 ABA therapy at home to address behaviors and activities of daily living (ADL) skills, ensure generalization of skills across environments, and to avoid regression; and OT and speech-language therapy (id. at pp. 3, 9).

On November 5, 2009, a speech-language evaluation of the student was conducted by a private speech-language pathologist (Parent Ex. K at p. 1). The resulting evaluation report reflected that the student's mother provided background information regarding the student's developmental and educational history and his functioning in the home (id. at pp. 1, 5). Behavioral observations noted the student's limited eye contact, short attention span, and need for tangible reinforcement (e.g., toy cars) after each task completion, especially as the task demands became more difficult (id. at p. 2). Despite frequent breaks, the student reportedly became very upset when demands were placed on him, and he frequently whined and grabbed the clinician's face (id.). Self-stimulatory behaviors, including hand play and visual tracking were observed during the evaluation, as was immediate and delayed echolalia (id.). Formal

language testing was completed using the Preschool Language Scale-4 (PLS-4) (id.).<sup>3</sup> Although test items were administered multiple times throughout the evaluation because of the student's difficulty attending; his expressive, receptive, and pragmatic language skills and play skills were found to be severely delayed (id. at pp. 2-5). The student demonstrated skills ranging between the three and four year old level (id. at pp. 3, 4). The student was unable to use language to request assistance, ask questions, or to answer yes/no questions (id. at p. 6). His articulation was determined to be intelligible at the single-word level in known contexts and the student's mother reported that she was able to understand him most of the time (id. at p. 5). According to the evaluation report, the parent reported that the student was typically orally defensive and a "very picky eater," with only a limited repertoire of foods in his diet (id.). The evaluator recommended a "new foods protocol;" five 60-minute individual sessions of speech-language therapy weekly to address receptive, expressive, pragmatic, play, and articulation skills; implementation of the picture exchange communication system (PECS); oral motor therapy; and a reevaluation in one year to assess the student's progress (id. at p. 6).

In a letter dated January 15, 2010, the parents informed the district that they intended to place the student at the McCarton Center and would seek funding from the district and any other appropriate relief (Parent Ex. J at p. 1). The parents indicated that the letter was to serve as notice to the district that they intended to secure the services of direct and intensive 1:1 ABA, ABA supervision and consultation, 1:1 speech language therapy, 1:1 OT, and parent counseling and training at the McCarton Center and would seek to hold the district financially responsible for the services (id.).

By letter and facsimile dated February 9, 2010, the parents provided the district with private evaluation reports including the August 2009 neurodevelopmental evaluation report, the October 2009 educational and behavioral evaluation report, an October 2009 OT evaluation report, and a November 2009 comprehensive speech and language evaluation report, all from the McCarton Center (Parent Ex. W). The letter reflected that all of the reports indicated that the student required a more intensive program and that in the absence of an appropriate program recommendation by the district, the parents intended to secure the recommended services from the McCarton Center and seek reimbursement from the district "on a going forward basis" (id.).

In an undated report, the student's performance in his second grade 6:1+1 special class at the district was summarized by his special education teacher (Dist. Ex. 6 at p. 1).<sup>4</sup> The teacher report reflected that the student demonstrated isolated academic skills such as reading sight words and writing simple words and numbers at a first grade level; however, he did not have word attack phonetic skills, was not able to add numbers or problem solve with numbers, required visual cues to process for comprehension, and demonstrated minimal focus in social studies and science (id. at pp. 1-2). The student was reported to speak in one or two word

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<sup>3</sup> The speech-language evaluation report reflected that the student was outside the PLS-4 age range (birth to 6 years, 11 months) and that the evaluator provided testing modifications including frequent breaks, repetitions and hand over hand instruction and as such, the results of the testing provide criterion-referenced information about the student's language comprehension and expressive language skills but could not be translated into standard scores or percentile ranks (Parent Ex. K at pp. 2-3).

<sup>4</sup> According to the special education teacher's report, it was completed per request of the school-based support team and an evaluation of the student was in progress (Dist. Ex. 6 at p. 1).

utterances where the words were typically understood but meaning was not always conveyed (*id.* at p. 2). The special education teacher indicated that although the student retained concepts once they were learned, his classroom performance was affected by his distractibility, poor focus, reliance on visual schedules to follow verbal directions, and need for frequent redirection (*id.*). The report also indicated that the student exhibited self-stimulatory behaviors consisting of arm and hand flapping, which occurred when he was excited in both positive and negative circumstances (*id.*). With regard to self-help skills, the student was also reported to take care of his toileting needs and put on his jacket with prompting (*id.*). His social interactions included saying the names of his peers and teacher and approaching a teacher when he needed something (*id.*).

On March 1, 2010, the student's physical therapist provided a PT report as part of the student's reevaluation (Dist. Ex. 9). The report reflected the student's PT goals and indicated that the student exhibited ongoing deficits in ball skills, balance skills, and coordination for age appropriate gross motor activities, and recommended continuation of two 30-minute individual PT sessions per week (*id.*).

On March 25, 2010, the student's speech-language pathologist prepared a report of the student's progress (Tr. p. 782; Dist. Ex. 12 at pp. 1, 3). The progress report reflected that the student was enrolled in a class which followed the TEACCH approach and provided language stimulation throughout the school day (Dist. Ex. 12 at p. 1).<sup>5</sup> The student also received two 30-minute group (of 2) sessions and one individual session of speech-language therapy weekly (*id.*). The speech-language pathologist reported that the student communicated via spoken English and the use of picture symbols (*id.*). Observations of the student in his classroom, the cafeteria and in a small group speech-language therapy session revealed that the student was able to follow many one-step directions given by his teacher, appeared to enjoy the morning circle time, responded to his name by making eye contact, was mostly attentive and cooperative although he required verbal and visual cues to maintain focus, and that he was a pleasant student who was eager to learn (*id.*). The progress report further indicated that although results of formal testing reflected severe expressive and receptive language delays, the student had made steady progress in both areas as well as in his pragmatic language abilities (*id.* at p. 2). According to the speech-language pathologist, the student had reduced his echolalic and irrelevant vocalizations as well as the amount of prompting he required in order to transition and attend to task (*id.* at pp. 1-2). The student learned well in a 1:1 setting, demonstrated the ability to complete all workstation tasks independently, and was beginning to participate and attend more in group activities (*id.* at pp. 2-3). However, the student exhibited significant difficulty generalizing and applying new skills in larger settings and required maximum prompting to do so (*id.*). The speech-language pathologist recommended that the student continue to receive speech-language services at his then-current frequency (*id.* at p. 3).

On March 26, 2010 and April 7, 2010, a district school psychologist conducted classroom observations of the student (Dist. Ex. 5 at pp. 1, 3). In March 2010, the student was observed

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<sup>5</sup> TEACCH is an acronym for "Treatment and Education for Autistic and other Communication Handicapped Children" (Tr. p. 51). The hearing record defines TEACCH as a language-based program which utilizes visual supports and picture schedules and is designed to progress students' skills from direct 1:1 instruction, to work stations, to small and whole group instruction, and into the community and the home (Tr. pp. 78, 775-76, 780).

while the class was engaged in their morning routine (id. at p. 2). The school psychologist noted that the student was seated in a chair that prevented him from falling backwards as he tended to slide down in his chair (id.). She indicated that although the student was able to follow the teacher's directions, at times he required directions repeated several times and had difficulty staying focused (id.). However, the student was able to sing songs by rote with his classmates and was aware of and utilized a chart to look for the answers to questions asked of him (id.). During drama class, with physical redirection the student was able to remain seated and take part in acting out a story (id.). The psychologist noted that at one point the student accidentally ripped a page of the book and then spontaneously apologized (id.). The April 2010 observation took place immediately following spring break (id. at p. 3). The school psychologist reported that she observed the student sitting appropriately in his chair without sliding down, waiting his turn to sing "The Morning Song" and that although he responded to his name, instructions were repeated three times before the student joined in singing with his peers (id.). When the class sang the "ABC's" the student fell behind in the song but was able to place his hand on the letters as the class labeled them (id.). The student was able to check his schedule, proceed to the appropriate workstation, complete his work independently, and recheck his schedule for his next activity (id.). According to the observation report, when the student was in the library area he looked at a book only briefly before wandering away and spinning in a far corner of the room (id.). However, the student responded to the teacher's verbal redirection to return to the library area and was able to read a few pages from his book (id.). The district school psychologist noted that although the student had been out of school for 10 days, he demonstrated the ability to return to the class routines and had not forgotten what he had previously learned (id.).

On April 10, 2010, the student's occupational therapist completed a "[s]chool [f]unction [e]valuation" of the student (Dist. Ex. 8 at pp. 1-8). The evaluation report indicated that the student was receiving three 30-minute individual OT sessions per week to address weaknesses in fine motor, visual motor, graphomotor, and visual perceptual skills and his core (postural) muscles (id. at p. 2). In the report, the occupational therapist described areas of concern related to the student's learning and behavior, movement, hand skills, sensation, and life skills (id. at pp. 1-8). Regarding learning and behavior, the student willingly went to OT and was usually cooperative during sessions (id.). However, he exhibited significant difficulty focusing and sitting still for tasks such as writing, cutting and craft activities; although when interested in an activity, the student participated more readily (id.). In the area of movement, the occupational therapist indicated that the student exhibited low tone, poor muscle strength, hyper-mobile joints, and deficits in his core and upper extremity strength, which affected his performance in seated deskwork and in a variety of resistive tasks (id. at p. 3). According to the evaluation report, despite these weaknesses the student was able to negotiate the building without physical safety concerns (id.). The evaluation report further noted that in reference to hand skills, the student demonstrated a weak and immature grasp and was able to trace letters but demonstrated difficulty copying (id.). In describing the areas of concern regarding sensation, the occupational therapist reported that the student was "fidgety," highly distractible, sensitive to loud or sharp-pitched sounds, exhibited nonpurposeful hand and body movements, and had difficulty attending and sitting in his seat (id.). With regard to life skills, the evaluation report indicated that the student was able to feed himself independently with a spoon but had a limited repertoire of foods, could don his jacket occasionally, and could request assistance to put his shoes on (id. at

p. 4). The evaluation report included results from completion of the teacher questionnaire portion of The Sensory Profile (id. at pp. 4, 6).

The occupational therapist determined that the student had "significant difficulty with his ability to process sensory information effectively" and "muscular weakness in both his core muscles and upper extremities," and included recommendations for the student to receive OT and a sensory diet that included heavy work activities (Dist. Ex. 8 at p. 8).<sup>6</sup>

The CSE convened at the request of the parents on April 28, 2010 for a review of the student's program (Tr. p. 101; Parent Ex. C at p. 1).<sup>7</sup> The CSE meeting attendees included the assistant principal who also acted as the district representative; the school psychologist; a regular education teacher; the student's special education teacher, occupational therapist, and speech-language pathologist; and via telephone, the parents (Parent Ex. C at p. 9). The April 2010 CSE discussed the student's needs and developed a statement of present levels of performance and learning characteristics in the areas of academics, speech-language and social/emotional performance, and health and physical development (id. at pp. 10-14). The academic and social/emotional management needs on the April 2010 IEP indicated that the student was a multisensory learner who benefited from a picture symbol-based program to aid his understanding and his ability to communicate his needs (id. at p. 10). The IEP included modifications consisting of an individualized visual schedule for transitioning from one activity to another, a first/then board to make expectations clear, and a PECS book to communicate wants/needs more independently, as well as repeated simplified verbal language using a gentle voice, modeling, positive reinforcement, exposure to a variety of learning settings (1:1, small and large groups) to build independence and generalization of skills, and a small structured class in a specialized school with related services (id.). Health/physical management needs included verbal and visual cues to remain seated and to sit up in a chair and continuous reminders to walk in line in order to stay focused and remain with the group (id. at p. 13). Regarding social/emotional management needs, the IEP reflected that the student's distractibility and inattention could be managed by the classroom teacher and paraprofessional and that parent training was offered (id. at p. 12). Annual goals were included in the April 2010 IEP to address the student's needs in the areas of attending; comprehension; math; social interaction; feeding; graphomotor, fine motor, and gross motor skills; adapted physical education; and communication (id. at pp. 15-21).

The April 2010 CSE recommended the student be placed in a 12-month 6:1+1 special class in a special school with related services of OT, PT, and speech-language therapy (Parent Ex. C at pp. 1, 24). The IEP reflected that the CSE had considered but rejected a general education setting because the student's academic and social delays warranted a more restrictive setting (id. at p. 23). The CSE also considered a 12:1+1 special class placement, rejecting it because the student was overwhelmed by noise and stimulation and required a smaller class

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<sup>6</sup> The hearing record reflects that the student's occupational therapist also completed an OT triennial report on March 25, 2010, which reflected information that was also included in the April 10, 2010 occupational therapy school function evaluation (compare Dist. Ex. 7 at pp. 1-2, with Dist. Ex. 8 at pp. 2-3).

<sup>7</sup> According to the assistant principal, a March 2, 2010 due process complaint notice addressing the 2009-10 school year resulted in the April 28, 2010 CSE meeting (Tr. pp. 102-03, 105-06, 109-11).

setting (*id.*). The CSE also considered a day treatment program, rejecting it because the student's social skills were not so delayed as to warrant such a program (*id.*).

By notice to the parents dated May 3, 2010, the district summarized the provisions of the April 2010 IEP and identified the school to which the student was assigned (Parent Ex. E).

By letter dated June 10, 2010, the parents notified the district that they were rejecting the April 2010 IEP as well as the assigned school offered by the district (Parent Ex. D at p. 1). The parents asserted, among other things, that the IEP did not offer sufficient and individualized speech-language therapy, lacked appropriate behavioral support and goals to address the student's interfering behaviors, and lacked sufficient home-based support and assistance to aid in the student's generalization of skills (*id.*). The parents informed the district that they intended to place the student at the McCarton Center, and would seek funding for the student's tuition for the 2010-11 school year (*id.*). The parents also noted that the services from the McCarton Center were "anticipated to include" 1:1 ABA, ABA supervision and consultation, 1:1 speech-language therapy, 1:1 OT, and parent counseling and training (*id.*). The parents stated that they intended to "secure and provide" the services and would "seek to hold the district . . . financially responsible" (*id.*).

The hearing record reflects that the student attended a district program for summer 2010 (Tr. p. 1421; *see* Parent Ex. PP at pp. 1-16). An update of the student's progress dated August 2010 reflected a rating of 4, which correlates to "[p]rogress made; goal not yet met" for 7 of his 13 goals; a rating of 3, which correlates to "[l]ittle progress made" for his remaining 6 goals; and a rating of A, which correlates to "[a]nticipate meeting goal" for all 13 annual goals contained in the student's April 2010 IEP (Dist. Ex. 2 at pp. 1-7). The hearing record also reflects that the student continued to attend the district's 6:1+1 program in September 2010 (Tr. pp. 341-42, Parent Ex. Y at pp. 1-6).<sup>8</sup>

### **Due Process Complaint Notice**

By amended due process complaint notice dated July 7, 2010, the parents requested an impartial hearing alleging numerous procedural and substantive errors that they contended denied the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. A at pp. 3-6).<sup>9</sup> Among other things, the parents asserted that the district failed to: (1) conduct timely and proper evaluations prior to the April 2010 CSE meeting; (2) conduct a functional behavioral assessment (FBA) and develop a BIP; (3) discuss the recommended placement or private evaluations with the parents; (4) conduct the CSE meeting with all of the required participants; (5) make provisions for parent counseling and training on the IEP; (6) develop appropriate goals and objectives for the student; (7) offer home-based services to the student; (8) develop a transition plan for the student; (9) recommend an appropriate placement

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<sup>8</sup> The student's 6:1+1 special class in September 2010 was located across the street and was comprised of a different teacher, paraprofessional, and related service providers than the 6:1+1 special class he attended in summer 2010 (Tr. pp. 497, 800, 970).

<sup>9</sup> The parents' original due process complaint notice was dated July 1, 2010 (Parent Ex. B).

for the student; or (10) identify the location of the student's special class at the CSE meeting or on the IEP (*id.* at pp. 2-5). The parents further asserted that the district knowingly assigned the student to a school that had a history of not fulfilling IEP mandates and that the parents were denied a meaningful opportunity to participate in the creation of the student's educational program, placement, and choice of the assigned school (*id.* at p. 6). For relief, the parents sought, among other things, 1:1 ABA therapy at home and at school, ABA "supervision and coordination," 1:1 speech-language therapy, feeding therapy, OT, PT, parent counseling and training, transportation to and from school, and compensatory education for services the student should have received during the 2009-10 school year (*id.* at p. 7).

On September 22, 2010, the district responded to the parents' due process complaint notice (Dist. Ex. 13).

### **Impartial Hearing and Decision**

An impartial hearing convened on September 27, 2010 and concluded on May 12, 2011, after 12 nonconsecutive hearing days (Tr. pp. 1, 209, 296, 321, 480, 692, 922, 1089, 1135, 1267, 1389, 1469; IHO Decision at p. 4). At the November 18, 2010 impartial hearing date, the district moved to dismiss the parents' compensatory education claim for the alleged failure of the district to provide appropriate services during the 2009-10 school year (Tr. pp. 324-35, 471-74; IHO Exs. I-IV). In an interim decision dated January 21, 2011, the impartial hearing officer granted the district's motion in part, dismissing the parents' claim for compensatory education for any time period prior to the April 28, 2010 IEP because such claim was not properly raised in the due process complaint notice (IHO Ex. III at pp. 1, 2). The impartial hearing officer denied that part of the district's motion relating to the parents' compensatory education claim arising from April 29, 2010 through June 30, 2010 (*id.* at p. 2).

In a decision dated June 15, 2011, the impartial hearing officer determined that although the district made mistakes with regard to the summer 2010 portion of the April 2010 IEP, the district offered the student a FAPE for the 2010-11 school year (IHO Decision at p. 18). More specifically, she determined that the procedural errors in this matter, "individually or in the aggregate," did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits, and accordingly, the April 2010 IEP was not defective (*id.* at pp. 13-14). The impartial hearing officer also determined that the parents had an opportunity to meaningfully participate during the CSE meeting, and that their concerns with regard to feeding therapy and PECS were addressed by the CSE with the addition of a feeding goal and the provision of PECS in the IEP (*id.* at pp. 9, 11-12). The impartial hearing officer also noted that the parents were provided the opportunity to comment on the goals and on the proposed program (*id.*).

With regard to the parents' contention that the CSE failed to perform an FBA and create an appropriate BIP, the impartial hearing officer determined that the student did not require an FBA (IHO Decision at pp. 12-13). In making her determination, the impartial hearing officer noted that it was undisputed that the student had difficulty focusing, was easily distractible, required frequent prompts, did not like loud noises, and engaged in self-stimulatory behaviors; however, she found that the hearing record showed that the student had made progress in these

areas, was easily redirected and brought back to task, and that the student's behavior, while not extinguished, had decreased during the 2009-10 school year, and the April 2010 IEP specified strategies to address the student's behavior (id.). Furthermore, the impartial hearing officer determined that the parents' assertion that they were not involved in the placement process was without merit as the parents did not claim that the district was untimely in developing the IEP or assigning the student in a school (id. at p. 13).

The impartial hearing officer further determined that it was undisputed that the April 2010 IEP did not include a recommendation for parent counseling and training and that there was an "extended failure" to provide parent counseling and training at the assigned school, which had likely exacerbated the parents' difficulties assisting the student at home (IHO Decision at pp. 14-15). However, she found that the lack of parent counseling and training "d[id] not warrant the invalidation of the IEP" in this case because the lack of training could be addressed with the provision of services at home (id. at p. 15).

In addressing the parents' assertion that the program offered by the district was inadequate because the student required an intensive 1:1 ABA program and additional services in order to make appropriate gains, the impartial hearing officer determined that the April 2010 CSE was comprised of the student's then-current teacher and related services providers and based on their experience with the student, they believed he had progressed using the TEACCH approach employed by the district (IHO Decision at pp. 15-16). She further determined that the related services providers and instructional staff who had been working with the student "persuasively testified" that the student was able to learn in a classroom, had met or was expected to meet his IEP goals, and had made appropriate educational gains (id. at p. 16). Further, the impartial hearing officer noted that although McCarton Center personnel had testified that the student required 1:1 instruction, that he could not learn in a classroom setting, and had made "absolutely" no progress since August 2009, she also noted that none of the McCarton personnel had actually taught the student (id. at p. 15).

With regard to the recommended related services in the April 2010 IEP, the impartial hearing officer noted that the evidence submitted by the district regarding this issue was "principally limited to the program at the school" that the student attended from September 2010, and there was "virtually no evidence presented concerning the student's program during summer 2010" (IHO Decision at pp. 16-17). She further determined that there was "no evidence that the student's related service mandates were provided in their entirety" during summer 2010 (id. at pp. 17-18). The impartial hearing officer found that, as the student would have been placed in a different building in summer 2010 than in September 2010, the district bore the burden to demonstrate the appropriateness of the summer 2010 placement and it did not meet this burden (id.). However, she concluded that this failure "did not render the IEP substantively deficient" because the program was appropriate and reasonably calculated to provide meaningful educational benefits and "the placement for the period from September 2010 onward was similarly appropriate" (id. at p. 18). Therefore, the impartial hearing officer determined that the district offered the student a FAPE for the 2010-11 school year (id.). Additionally, the impartial hearing officer determined that the parents' claim that the student's trip to and from school was excessive in length was not raised in the due process complaint notice and although it was a

"concern," was not a basis for finding that the district's placement was inappropriate (*id.* at pp. 18-19).

Regarding the parents' compensatory education claim for the time period of April 29, 2010 to June 30, 2010, the impartial hearing officer concluded that the alleged deprivation of services for two months was not a gross violation of a FAPE and that the parents' requested relief of ABA instruction was "not tailored to meet the circumstances of this case in which the student was . . . in a school setting using TEACCH methodology" (IHO Decision at pp. 20-21).

The impartial hearing officer ordered the district to reconvene the CSE to: (1) review the student's transportation needs with respect to a shorter commute; (2) provide the parents with home-based 52 week parent counseling and training services; (3) provide authorizations for or otherwise provide related services to the student to address a lapse of services during summer 2010, including authorization of the equivalent of 1.75 hours each day of 1:1 instruction; and (4) conduct an auditory integration evaluation or issue authorizations for a private evaluation to be obtained by the parents (IHO Decision at pp. 20-21).

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

The parents appeal, asserting that the impartial hearing officer erred in determining that the district offered the student a FAPE for the 2010-11 school year. The parents also assert that the impartial hearing officer erred because she did not address the parents' claims regarding the student's annual goals, the alleged need for home-based related services for the student,<sup>10</sup> and the parents' participation in the selection of the location of the student's 6:1+1 special class. Additionally, the parents contend that the impartial hearing officer erred because the district's recommended 6:1+1 placement was not appropriate because the student required 1:1 instruction, the district failed to provide the student with adequately trained and qualified personnel, the district failed to conduct an FBA and develop a BIP, and the district did not develop a transition plan for the student. The parents challenge the impartial hearing officer's failure to render findings against the district regarding the transportation services provided to the student. The parents further contend that the impartial hearing officer failed to address their claims regarding the McCarton Center, whether equitable considerations supported their requested relief, and the issue of compensatory services for the two-month period at the end of the 2009-10 school year. Additionally, the parents challenge the impartial hearing officer's interim decision limiting the scope of the compensatory education claim to from April 2010 through June 2010. As a remedy, the parents request that the impartial hearing officer's decision be reversed "and/or substantially modified" and they seek funding on a 52-week basis for certain related services, ABA therapy, monthly team meetings, parent counseling and training, and transportation to and from school with a shorter trip duration.

The district filed an answer and cross-appeal, asserting that it offered the student a FAPE for the 2010-11 school year and that the impartial hearing officer properly denied the parent's request for compensatory education services. The district also asserts that the McCarton Center was an inappropriate placement for the student because it was overly restrictive and would not

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<sup>10</sup> In some instances such services were referred to as "extended day services" (Parent Ex. A).

have provided the student with the related services mandated on his IEP, and that equitable considerations do not favor the parents' requested relief. In its cross-appeal, the district contends that the impartial hearing officer erred in awarding parent counseling and training, and in her determinations regarding the student's summer 2010 program. As a remedy, the district requests that the parents' appeal be dismissed in its entirety and that the portions of the impartial hearing officers' decision that granted the parents partial relief be overturned.

### **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

### April 2010 CSE Process

#### CSE Composition – Additional Parent Member

The parents assert that the lack of an additional parent member at the April 2010 CSE meeting constituted a procedural violation of the IDEA and that the parents did not waive the attendance of such a member. Although not required by the IDEA (20 U.S.C. § 1414[d][1][B]; see 34 C.F.R. § 300.321), New York State law requires the presence of an additional parent member at the CSE meeting that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-105; Application of the Dep't of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-060; Application of the Bd. of Educ., Appeal No. 05-058). New York law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]). Under New York State law, CSE subcommittees have the authority to perform the same functions as the CSE, with the exception of instances in which a student is considered for initial placement in a special class, or a student is considered for initial placement in a special class outside of the student's school of attendance, or whenever a student is considered for placement in a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4]). State law further provides that when a district is permitted to convene a CSE subcommittee, the subcommittee need not include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]-[5]).

In this case, the hearing record shows that there was no additional parent member at the April 2010 CSE meeting (Parent Ex. C at p. 9). The parents participated via telephone and did not execute a waiver for the absence of the additional parent member (Tr. pp. 135-36; see Dist. Ex. 1 at p. 2). Although the student's father testified that he did not know that he had the right to have an additional parent member at the CSE meeting (Tr. p. 1399), the hearing record shows that the parents were familiar with the CSE process, had participated in the development of prior IEPs for the student, and prior to the April 2010 CSE meeting had filed a due process complaint notice concerning a prior IEP (Parent Exs. P; BB; MM). Moreover, the parents were afforded the opportunity to ask questions, provide input, and participate in the CSE meeting (Tr. pp. 46-47, 1437). Under these circumstances, I find that the lack of an additional parent member did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419).

## Parental Participation

The parents assert that they were deprived of the opportunity to participate in the decision regarding the placement of the student because this decision was not made during the CSE meeting, but rather, was made outside of the CSE meeting by a placement officer. 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. v. New York City Dep't of Educ., 584 F.3d 412, 419-20, cert. denied, 130 S. Ct. 3277 [2010]; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at \*2 [2d Cir. Mar. 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). Further, the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veasey, 37 IDELR 10 [OSEP 2001]). In this case, the hearing record demonstrates that the district, prior to the start of the new school year, provided the parents with notice of the location where the district sought to implement the April 2010 IEP (Parent Ex. E). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP; however, they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y., 584 at 420). In this case, there is no evidence that the parents were precluded from participating in the educational placement decision which was conducted in conjunction with the April 2010 CSE meeting. While it is understandable that the parents may have had a high degree of interest in selecting a particular classroom or teacher to which their child will be assigned, their claim that they were not permitted to engage in the selection of the particular classroom is unavailing insofar as neither the IDEA nor State regulations afford parents such a high degree of control over the implementation of an IEP.<sup>11</sup> Therefore, I find the parents' argument to be without merit.

## Evaluative Data

The parents also assert that they were not afforded meaningful participation in the development of the student's IEP because the CSE did not discuss the McCarton Center evaluations they had obtained regarding the student and had provided to the CSE prior to the April 2010 CSE meeting. A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be

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<sup>11</sup> I have also considered and find no reason to disturb the impartial hearing officer's conclusion that the student's teacher and paraprofessional were adequately trained to provide services to the student (IHO Decision at p. 10).

conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2]). Additionally, a CSE must consider independent educational evaluations obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 C.F.R. 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion (T.S. v. Ridgefield Bd. of Educ. 10 F.3d 87, 89-90 [2d Cir. 1993] citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; K.E. v. Indep. Sch. Dist. No 15, 2010 WL 2132072, at \*19 [D. Minn.]; James D. v. Bd. of Educ. of Aptakasic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

Here, the hearing record reflects that although the parents requested at the April 2010 CSE meeting that the CSE consider the results of their private evaluations, these evaluations were available, but not discussed in detail during the CSE meeting (Tr. pp. 80-81, 139, 1403). The hearing record also shows that the CSE chairperson received the McCarton evaluations in advance of the meeting (Tr. pp. 80-82). However, the hearing record does not show that these evaluations were discussed prior to the meeting (Tr. p. 82). I find that although the CSE members did not discuss the parents' privately obtained evaluations, as described below, this procedural error did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

A review of the private evaluations reveals that overall, they contained information regarding the student's needs and learning characteristics that was not inconsistent with information contained in the district's reports that were reviewed and discussed at the April 2010 CSE meeting (compare Dist. Exs. 6; 7; 8; 9; 12, with Parent Exs. K; L; M; N; FF). For example, the reports reflected similarities with regard to the student's cognitive ability; academic skills; severe delays in receptive, expressive, and pragmatic language skills; gross and fine motor skills; sensory processing and regulation deficits; attention deficits; and self-stimulatory behaviors (Dist. Exs. 6 at pp. 1-2; 7 at p. 1; 8 at pp. 2-4, 8; 9; 12 at pp. 1-3; Parent Exs. C at pp. 10-13; K at pp. 1-6; L at pp. 4-9; M at p. 14; N at pp. 3, 5, 6, 7; FF at p. 1).

However, despite these similarities, the private evaluations reflected differences regarding the extent to which the student's behaviors affected the student's instruction. The October 2009 private educational and behavioral evaluation reflected that during the evaluation the student exhibited various impeding factors including stereotypic behaviors, frequent rates of noncompliance, limited motivators, a lack of instructional control and a lack of generalization of instructions necessary to respond, to the extent that the McCarton evaluators determined that he required an "intensive ABA (primarily discrete trial) school program" (Parent Ex. L at pp. 8-9). The October 2009 private OT evaluation indicated that the student began to cry when tasks became difficult and the November 2009 private speech-language evaluation indicated that the student required 1:1 correspondence of demands to reinforcers as demands increased and despite frequently provided breaks, the student frequently whined and grabbed for the clinician's face during the evaluation (Parent Exs. K at p. 2; M at p. 1).

However, other evidence contained in the hearing record reflects that the student's behavior was not an impeding factor and that he had previously demonstrated ability to respond successfully to other forms of intervention and instruction. Reports from the student's then-current teacher and speech-language pathologist during the 2009-10 school year indicated that the student worked well in his 6:1+1 special class placement where he received individualized instruction using TEACCH, that he was able to function independently and complete all tasks at his workstation, and that he was able to participate in small group activities for up to four minutes (Dist. Exs. 6 at p. 2; 12 at pp. 2-3; Parent Ex. C at p. 10). This was corroborated by testimony from the student's special education teacher from the 2010-11 school year who testified that the student was able to participate in a variety of instructional settings, including a 1:1 setting, small groups and large groups using a visual schedule, which included a symbol for each activity and each transition in which the student participated (Tr. p. 399). The teacher indicated that by the time of the impartial hearing, the student demonstrated group skills that he did not have at the beginning of the school year, such as imitating peer actions, requesting a specific song during circle time, spontaneously calling a peer by name, and spontaneously taking the teacher's hand to initiate a dance (Tr. pp. 361-65). The student's teacher further testified that she was able to refocus the student when he exhibited self-stimulatory behaviors and that the student's behaviors did not impede instruction or prevent him from participating in classroom activities (Tr. pp. 401, 404, 558; see Tr. p. 125). She stated that she addressed the student's distractibility and inattention by providing him with challenging activities and that she used verbal prompts to redirect the student back to task (Tr. p. 399). She testified that she might also show the student the symbol for the current activity again to remind him of where to focus his attention and that to get him to sit down in his seat, she might physically assist him to his seat or just touch him and say "it's time to sit" (Tr. pp. 399, 645).

Testimony by the student's occupational therapist indicated that she sometimes provided him with heavy work activities to calm him at the beginning of her session if he was fidgety or jumpy when he arrived; however, she indicated that she did not have difficulty getting the student to sit down and do the work asked of him (Tr. pp. 1028, 1035). According to the student's physical therapist, 90 percent of the time the student's behaviors did not impede his sessions with her (Tr. p. 1006). The student's physical therapist testified that she utilized verbal and manual cues with the student when he was distracted in order to refocus him (Tr. p. 987). She indicated that when the student was distracted, he did not want to do the activity presented,

preferring to play with and focus on something else (*id.*). However, she stated that the student was "not really a behavioral kid" and that she was able to address his distracted behavior with verbal cues and manual cues (Tr. pp. 987-88). She also stated that when the student initially entered the room he often perseverated on a toy and that she was able to redirect him using the first/then strategy where the student is told he must first do a requested activity and then he will be able to have the preferred item (Tr. p. 999). The physical therapist indicated that the student was "very good" with her, especially since he had become more comfortable with her and she had learned what he liked to work for (Tr. p. 1006). The hearing record shows that despite his distractibility and interfering behaviors, the student was able to function more appropriately and independently in various school settings than he was during the private evaluations.

Based on the evidence above, although the private evaluations were not discussed at the CSE meeting, testimony by the district representative reflected that the concerns enumerated in the parents' March 2, 2010 due process complaint were in fact discussed at the April 2010 CSE meeting including the frequency of the student's speech-language therapy and OT services, the addition of PECS and a feeding goal to the student's IEP,<sup>12</sup> and opportunities for parent training (Tr. pp. 87, 115-16). Moreover, the CSE otherwise had before it sufficient information upon which to base its recommendations for the student – information that largely reflected what was contained in the private evaluations. Therefore, there is no reason to disturb the impartial hearing officer's conclusion that the parents were afforded a meaningful opportunity to participate in the development of the student's IEP and that there was no denial of a FAPE on this basis (IHO Decision at pp. 11-12).

## **April 2010 IEP**

### **Annual Goals**

With regard to the adequacy of the April 2010 IEP, I note that the impartial hearing officer failed to make a determination regarding the parents' challenges to the annual goals and short-term objectives in the student's April 2010 IEP. An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]). For students who participate in the New York State alternate assessment, the IEP "shall include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal" (8 NYCRR 200.4[d][2][iv]).

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<sup>12</sup> The hearing record indicates that the student's previous May 21, 2009 IEP also included an annual goal that addressed the student's feeding skills (Parent Ex. BB at p. 9).

In this case, the hearing record demonstrates that the student's April 2010 IEP contained 12 annual goals and 35 short-term objectives to address the student's needs in the areas of attending, auditory comprehension, labeling, math, peer interactions, feeding (tolerating new foods), sensory processing, fine motor, gross motor, adapted physical education, and expressive, receptive, and pragmatic language (Parent Ex. C at pp. 15-21). A careful review of the IEP reveals that the annual goals and short-term objectives were clearly linked to the student's needs and abilities, which were accurately described in the present levels of performance on the student's IEP (*see id.* at pp. 10-14, 15-21). I note also that the annual goals and short-objectives contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress or gauge the need for continuation or revision, and contained adequate evaluative criteria. For example, the student's attending skills were addressed by an annual goal and three corresponding short-term objectives that described the expected behavior from the student, the conditions under which the student was expected to exhibit the behavior, the actions required by staff, and the specific manner by which his progress would be measured (*id.* at p. 15). As such, the parents' allegations regarding the student's goals are unfounded.

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

Turning next to the parents' assertions that the 6:1+1 special class placement was inappropriate because the student required an intensive 1:1 ABA based educational placement and, 1:1 instruction, I note State regulations call for a 6:1+1 special class to be designed to address the needs of students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). As described above, the hearing record reflects that the student's teachers were successfully using the TEACCH methodology<sup>13</sup> with the student where language stimulation is provided throughout the course of the school day, and further reflects that the student was receiving speech-language services of two 30-minute group (of 2) sessions and one individual session per week (Dist. Ex. 12 at p. 1). The hearing record further reflects that the student was able to independently complete his workstation activities, participate in small and whole group instruction for a limited amount of time, and that he had developed several new skills as a result of his participation in group settings (Tr. pp. 361-65, 399; Dist. Exs. 6 at p. 2; 12 at pp. 2-3; Parent Ex. C at p. 10). The hearing record reflects that the student received 1:1 instruction with his teacher daily for 15 to 20 minutes to address his reading using the SMILE program (Tr. pp. 354-55).<sup>14</sup> His teacher also testified that the student received other 1:1 instruction as well (Tr. p. 355). She testified that at times she utilized the 1:1 instruction time to introduce new material to the student, to work on writing, to reinforce a concept that the student

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<sup>13</sup> 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 generally 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]; *A.S. v New York City Department of Educ.*, 10-cv-0009 [E.D.N.Y. May 25, 2011]; *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>14</sup> The SMILE program is described in the hearing record as a phonics-based reading program (Tr. pp. 99-100).

was not understanding or to conduct the Brigance-II assessment; and that she also addressed the student's IEP goals by breaking them down, instructing the student in a 1:1 setting until he learned a task and then moving the task into the student's work station where the student would complete the task independently (Tr. pp. 354-55, 359). Testimony by the assistant principal indicated that the student was provided with 1:1 instruction throughout the day, although the amount of 1:1 instruction the student received varied each day (Tr. p. 88). She indicated that 1:1 instruction was provided in small increments of time to accommodate the student's short attention span (*id.*). For example, the student might receive 15 to 30 minutes of 1:1 instruction, then participate in a small or whole group activity and then return to the 1:1 setting (*id.*). The assistant principal estimated that the student received approximately five hours per week of 1:1 instruction and also indicated that the students in the 6:1+1 class received individualized attention throughout the day (Tr. pp. 118-19).

The hearing record does not support the conclusion that the student's services should consist of only 1:1 instruction in order to be offered a program that was reasonably calculated to enable the student to receive educational benefits. The evidence above shows that the recommendation for placement in a 6:1+1 special class was appropriate for the student for the 2010-11 school year.<sup>15</sup>

### **Special Factors in an IEP and Interfering Behaviors**

Turning next to the parties' dispute regarding the student's need for an FBA and a BIP, under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; *see* 8 NYCRR 200.4[d][3][i]; *see also* E.H., 2009 WL 3326627; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; Tarlowe, 2008 WL 2736027, at \*8; W.S., 454 F. Supp. 2d at 149-50; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at \*1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380 ; *see also* Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as

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<sup>15</sup> I also find unpersuasive the parents' claim that the impartial hearing officer failed to address extended day or home-based related services. She addressed this claim by determining that parent counseling and training was available to address the parents' concerns and that the lack of OT and speech language therapy in the student's home did not render the IEP deficient (IHO Decision at pp. 14-15). I disagree that the evidence shows that the district was required to offer the student home-based OT and speech-language therapy services in addition to school-based services in order for his IEP to be reasonably calculated to enable the student to receive educational benefits.

appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (*id.*). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or Pre-school Committee on Special Education (CPSE) "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to [8 NYCRR 201.3]" (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual

alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).<sup>16</sup> Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, the hearing record shows that the student's then-current teacher, occupational therapist, and speech-language pathologist participated in the April 2010 CSE meeting (Parent Ex. C at p. 9). As noted in the discussion above regarding the evaluative data and the student's interfering behaviors, the evidence in the hearing record does not support the conclusion that the student's behaviors interfered with instruction to the extent that he required a BIP. The student's teacher, occupational therapist, physical therapist, and speech-language therapist all testified that the student's behaviors were successfully managed with the strategies described above that were reflected on the IEP and that his behaviors did not impede his ability to receive instruction (Tr. pp. 399, 401, 404, 526, 556, 559, 987-88, 1006; see Tr. pp. 125, 176-77; Parent Ex. C at p. 12). Likewise, the April 2010 IEP reflected that the CSE considered whether student's behavior seriously interfered with instruction and concluded that it could be addressed by the special education teacher; therefore, a BIP was not developed (id.). The student's teacher testified that the student was able to participate in classroom activities and in the schedule, was able to do his 1:1 work and his small group work, could participate in all areas of the day, and was able to respond to a verbal redirection and then continue on with his work (Tr. pp. 765-76). She also testified that the frequency and intensity of the student's behaviors were not such that the student was not able to learn and make progress – information that was reflected in data she was collecting regarding his academics (Tr. pp. 526-27).

Based on the above, I find that the CSE had sufficient information about the student's behavior from his teachers and service providers who were working with the student at the time the CSE developed the April 2010 IEP, appropriately reflected his social/emotional needs on the IEP and strategies to address those needs, and properly determined that he did not require an FBA or the development of a BIP to address his behavioral needs in order to confer educational benefits upon the student.

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<sup>16</sup> The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

## **Transition Plan**

With regard to the parents' contention that the district failed to develop a transition plan for the student, the IDEA does not specifically set forth the provisions requiring a school district to formulate a "transition plan" as part of a student's IEP when a student moves from one school to another.<sup>17</sup> However, assuming that the district should have developed a plan, under the circumstances of this case, I find that for the reasons discussed below, any perceived lack of transition support by the student's teacher did not rise to the level of a denial of a FAPE to the student.

In this case, although the student changed classrooms from the summer to the 10-month portion of the 2010-11 school year, he remained in a 6:1+1 special class. The evidence in the hearing record does not show that the student demonstrated particular difficulty with transitions. The April 2010 IEP reflected that the student utilized verbal cues and an individual symbol/word wall schedule or visual schedule to help him transition independently throughout the day and a first/then board to make expectations clear (Parent Ex. C at pp. 10-11, 12; see Dist. Ex. 6 at p. 2). The student's speech-language pathologist indicated in her March 2010 progress report that the student had shown improvement in his ability to transition and that he no longer required the level of prompting that was necessary at the beginning of the school year (Dist. Ex. 12 at p. 2). The student's ability to follow his schedule and move from one activity to the next was also noted in an April 7, 2010 observation of the student by the school psychologist (Dist. Ex. 5 at p. 3). The student's teacher testified that the student did very well with transitions because he understood what came next from his visual schedule (Tr. p. 378). The student's occupational therapist testified that the student was "pretty good at transitioning," that she was able to sit him down, have him start doing work, and that he was "fine" (Tr. p. 1035). The student's speech-language pathologist testified that she used a mini-schedule with the student in her room and that when she transitioned him from the cafeteria to her room, she provided the student with a "cue" that had a picture of her on it so the student knew where he was going (Tr. p. 844). She also testified that the student demonstrated the ability to transition from using the colored classroom schedule to using her schedule (Tr. p. 847). Accordingly, the parents' claim regarding the need for a transition plan is unavailing.

## **12-Month Services—Summer 2010**

The April 2010 IEP reflected that the recommended programs and services were to be implemented for a one year period of duration, from April 29, 2010 through April 28, 2011 (Parent Ex. C at p. 9). The April 2010 IEP reflected that during summer 2010 the student was to

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<sup>17</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.).

receive the same program and services as was recommended for the 10-month school year – a 6:1+1 - special class in a special school with related services of speech-language, OT, and PT - (id. at pp. 1, 24). The impartial hearing officer determined that the district did not provide evidence at the impartial hearing regarding the appropriateness of the student's summer 2010 program; however, this did not "render the IEP substantively deficient" because the program and services recommended for the 10-month school year were appropriate and were similar to the recommended summer program (IHO Decision at pp. 17-18).

The district asserts that the impartial hearing officer exceeded the scope of the inquiry because the issue of the summer 2010 services was not delineated in the parents' due process complaint notice. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at \*6-\*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 09-140). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; see Lago Vista Indep. Sch. Dist. v. S.F., 50 IDELR 104 [WD Tex. Oct. 24, 2007]; see also John M. v. Bd. of Educ., 502 F.3d 708, 713 [7th Cir. 2007]).

In this case, although the parents amended their due process complaint notice on July 7, 2010, the amended complaint cannot be reasonably read to include a claim that the summer 2010 program was not appropriate for the student (Parent Ex. A). As such, I find that the impartial hearing officer exceeded the scope of the due process complaint notice when she determined that the district failed to meet its burden to demonstrate that the summer 2010 program was appropriate. Even if I found that the appropriateness of the summer 2010 program was appropriately raised, for the reasons set forth below, the impartial hearing officer nevertheless applied the incorrect standard in making such a determination. The impartial hearing officer determined that because the district had provided the summer program to the student "in another location with different staff and students" it was "required to demonstrate the placement was appropriate and it did not" (IHO Decision at p. 18). This reasoning goes to the question of whether the district adequately implemented the IEP, not whether the program and services as recommended were appropriate.

To rise to the level of a denial of a FAPE, more than a de minimus failure to implement all elements of the IEP must be established, and instead it must be demonstrated that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at \*3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing claims challenging the implementation of

an IEP under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

In this case, the hearing record reflects that due to construction during summer 2010, the student attended class in a building across the street from the school building where he attended class beginning in September 2010 (Tr. p. 497).<sup>18</sup> The hearing record also reflects that the student had a different classroom teacher, classroom paraprofessional, occupational therapist, speech-language pathologist, and physical therapist than he had beginning in September 2010 (Tr. pp. 342, 830, 947, 1082, 1278; see Parent Ex. PP at pp. 2, 3, 5-11, 16). Although the hearing record does not specifically reflect the frequency and duration of the related services that the student received during summer 2010, testimony by the assistant principal at the assigned school indicated that during the 2010-11 school year the student "receiv[ed] all of his mandated related services through full time DOE providers" (Tr. p. 184). The student's participation in the district's summer 2010 program was reflected in an August 2010 update of his annual IEP goals and objectives in the areas of adapted physical education, speech-language, PT, OT, academics, interaction, and attending skills (Dist. Ex. 2 at pp. 1-7). The update reflected that the student made progress toward six of his annual goals and made little progress toward the remaining six annual goals, and that it was anticipated that he would meet all of his annual goals given more time (*id.*). The results of the October 2010 administration of the Brigance Inventory of Early Development Second Edition (Brigance-II) also reflected progress that the student made between May 2010 and October 2010, including during summer 2010 (Parent Ex. V at pp. 117-131). Under these circumstances, even assuming for the sake of argument that the matter had been raised and the evidence showed that the district failed to strictly implement certain aspects of the recommended program and related services during summer 2010, the evidence does not support the conclusion that such a failure affected the student in a material way and therefore, I find that it did not result in denying the student a FAPE (see D.D-S. v. Southold Union Free School Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dept. of Educ., 2011 WL 4001074, at \*9 [S.D.N.Y. Aug. 19, 2011]).

### **Parent Counseling and Training**

With regard to the parents' argument that the district failed to offer parent counseling and training as part of the April 2010 IEP, State regulations require that an IEP indicate the extent to

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<sup>18</sup> The fact that the notice provided to the parents did not indicate that the student would receive services in the building across the street during summer 2010 did not result in a denial of a FAPE (see S.H. v. New York City Dept. of Educ., 2011 WL 666098, at \*5 [S.D.N.Y. Feb. 15, 2011]).

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 lack of parent counseling and training on the April 2010 IEP did not warrant invalidation of the IEP (IHO Decision at pp. 14-15; 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>19</sup>

In the instant matter, although the April 2010 IEP does not clearly identify parent counseling and training on the services portion of the IEP, it states as part of the student's social/emotional management needs that "[p]arent trainings are offered" (Parent Ex. C at p. 12).<sup>20</sup> Additionally, the assistant principal testified that the district's "speech department" at the assigned school offered trainings to parents related to language and communication concerns and that the specific topics addressed were driven by the parents who attended the meetings (Tr. pp. 64-65). She further testified that parents who attended the trainings were sent home with "real-life things to help them at home," for example, an actual first-then board (Tr. p. 65). The hearing record reflects that in addition to the trainings offered by the speech department, the district offered parent trainings on a variety of topics including among other things, food refusal, the Get Ready to Learn Program, communication goals in the home, planning for the future of students with disabilities, and parent networking; and that parents were notified of these trainings via flyers that were sent home in the students' notebooks (id.; see Parent Ex. V at pp. 52-55, 58, 60, 63). The assistant principal testified that at the April 2010 CSE meeting, she confirmed with the parents that they had received notification of the parent trainings (Tr. p. 116). However, she further testified that the parents stated at the CSE meeting that they did not participate in the offered parent trainings because the school was "too far" (Tr. pp. 65-66). The assistant principal further testified that in the past the school had made various accommodations for parents upon their request, such as providing information to parents over the telephone and video taping school staff modeling strategies and use of materials with students (Tr. p. 66). Testimony by the student's speech-language pathologist also indicated that if the parents requested after school workshops, they would try to accommodate the request (Tr. p. 938).

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<sup>19</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]).

<sup>20</sup> Federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (34 C.F.R. § 300.320[d][2]).

Under the circumstances presented herein, the district could have more clearly complied with State regulations by identifying parent counseling and training among the list of services offered on the April 2010 IEP; however, given the evidence that parent counseling and training was available at the assigned school, such availability was noted on the IEP, and the parents in this case were unlikely to avail themselves of the services in any event, the extent of any failure on the district's part to more clearly recommend parent counseling and training on 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.

### **Transportation Services**

With regard to the parents' claim regarding inadequate transportation services offered by the district, I note that the impartial hearing officer did not improperly fail to make findings of a violation as the parents suggest. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process request unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see M.P.G., 2010 WL 3398256, at \*8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at \*6-7 [D. Hawaii Apr. 30, 2008]; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Upon review of the parents' amended due process complaint notice commencing this case, and as already noted by the impartial hearing officer, I find that it may not be reasonably read to raise issues regarding an alleged failure or violation on the part of the district, notwithstanding that the parents sought transportation to the private services as relief in their complaint (Parent Ex. A), nor did the parents obtain the district's agreement to expand the scope of the hearing to address the violation now alleged. Accordingly, the impartial hearing officer appropriately declined to award relief with respect to transportation.

### **Compensatory Education**

Turning to the parent's request for compensatory education and allegations of error on the part of the impartial hearing officer, within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students who otherwise remain eligible for special education if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at \*23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]). Likewise, State Review Officers have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005];

Application of a Student with a Disability, Appeal No. 09-111; Application of the Bd. of Educ., Appeal No. 09-054; Application of a Student with a Disability, Appeal No. 09-044; Application of a Student with a Disability, Appeal No. 09-035; Application of a Student with a Disability, Appeal No. 08-072).

In this case, I concur with the impartial hearing officer's determination to limit the scope of the parents' compensatory education claim to matters arising after the April 2010 IEP was created. The parents' due process complaint may not be reasonably read as challenging the adequacy of IEPs that were created prior to April 2010 or asserting claims that the district failed to implement particular services designated on such IEPs (Parent Ex. A). With respect to the remainder of the impartial hearing officer's determination regarding compensatory education, the impartial hearing officer examined the parents' compensatory education claim for the portion of the 2009-10 school year that the April 2010 IEP was in effect (April 29, 2010 through June 30, 2010) and correctly noted that insofar as the district offered the student a FAPE, the parents were not entitled to such relief (IHO Decision at pp. 19-20). As discussed previously, the hearing record supports the conclusion that the district offered the student a FAPE through the April 2010 IEP, and accordingly, I will not disturb the impartial hearing officer's conclusion that the parents' request for compensatory education for a portion of the 2009-10 school year must fail.

### **Additional Relief**

Additionally, the district contends that the impartial hearing officer nevertheless improperly awarded relief related to the 2010-11 school year despite specifically finding that the district offered the student a FAPE via the April 2010 IEP. Absent a determination by the impartial hearing officer that there was a denial of a FAPE, no basis exists upon which to predicate the awarding of any relief (see 34 C.F.R. § 300.148[a]; Application of a Student with a Disability, Appeal No. 11-032, Application of the Dep't of Educ., Appeal No. 11-026; Application of the Dep't of Educ., Appeal No. 11-014, Application of a Student with a Disability, Appeal No. 08-078).

In this case, the hearing record demonstrates that the impartial hearing officer determined that the April 2010 IEP was not procedurally defective (IHO Decision at p.14), and that while the district did not demonstrate the appropriateness of the summer 2010 portion of the student's program, that failing did not render the IEP substantively deficient (*id.*). As noted above, the hearing record does not support the conclusion that the services as recommended on April 2010 IEP were inappropriately designed or that the district's implementation of the provisions of the IEP during summer 2010 contributed to a denial of a FAPE. Consequently, in the absence of any other basis, the impartial hearing officer's remedial directives awarding relief to the parents for related services, evaluations, and reimbursements must be annulled (*id.* at pp. 21-22). I note however, there is nothing that precludes directing the CSE to considering the parents' concerns regarding the student's transportation needs.<sup>21</sup>

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<sup>21</sup> Nothing in this decision shall preclude the parents from requesting that the district conduct an auditory integration evaluation.

## Conclusion

Having found that the district offered the student a FAPE, 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).<sup>22</sup>

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

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated June 15, 2011 is hereby annulled to the extent that the impartial hearing officer ordered the district to reconvene the CSE to provide home-based parent counseling and training, provide make-up services related to summer 2010, and to conduct an auditory integration evaluation.

**Dated:** Albany, New York  
October 3, 2011

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

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<sup>22</sup> Although the hearing record clearly shows that the parents' intention was to place the student at McCarton, it does not appear that this course of events ultimately transpired during the 2009-10 or 2010-11 school year.