



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 11-119

**Application of the [REDACTED]
[REDACTED] for review of a determination of a hearing
officer relating to the provision of educational services to a
student with a disability**

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Diane da Cunha, Esq., of counsel

Law Offices of Steven L. Goldstein, attorneys for respondents, Steven L. Goldstein, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Brooklyn Autism Center (BAC) for the 2010-11 school year. The parents' cross-appeal from the impartial hearing officer's determination which denied their request for reimbursement for the cost of ten hours per week of privately obtained after school applied behavior analysis (ABA) therapy. The appeal must be sustained in part. The cross-appeal must be sustained in part.

At the time of the impartial hearing, the student was attending a special education class at BAC for his kindergarten year (Tr. p. 800; Parent Ex. RR). BAC is a nonpublic school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and 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]; see Parent Ex. AA at p. 1).

Background

When the student was 2 1/2 years old, he received a diagnosis of pervasive developmental disorder-not otherwise specified (PDD-NOS) after exhibiting a speech-language delay as well as a lack of eye contact and imaginative play (Parent Ex. OO at p. 1). Additionally, at that time, the student did not exhibit stereotyped body movements but would line up objects (id.). Prior to turning three years old, he began to receive home-based ABA services, speech-language therapy, and occupational therapy (OT) through Early Intervention (id.). In September 2008, the student entered into a center-based preschool program (id.).

On November 12, 2009, the student's special education teacher at the center-based preschool program provided the Committee on Preschool Special Education (CPSE) an educational update/progress report of the student (Dist. Ex. 9). The report indicated that the student had attended a 10:1+2 special class since September 2008 (id.). The report indicated the student attended a preschool classroom that utilized ABA techniques within a play-based preschool setting and curriculum (id. at p. 1). The report further stated that the student continued to exhibit progress in social skills including playing simple turn-taking games with two to three peers with adult modeling and prompting (id.). The student demonstrated progress in play skills, including an expanding repertoire of appropriate play with a variety of toys (id.). The report indicated that the student became distracted at times but was easily redirected and that he was working on his grasp while writing (id.). The report noted that the student continued to demonstrate progress in his cognitive and academic skills including identification of colors, shapes, animals, numbers, and letters (id.). Moreover, the student followed one-step directives and two-step unrelated commands but needed prompts when distracted (id. at p. 3). Based on his progress in the preschool program, the report included a "rationale for least restrictive environment" (LRE) for the student that recommended he begin to attend a 12:1+3 special class to focus on his social and cognitive skills (id. at p. 4).

On November 20, 2009, the parents privately obtained a psychoeducational evaluation of the student as he transitioned from the CPSE to the Committee on Special Education (CSE) (Parent Ex. OO). The report indicated that the student had received a diagnosis of PDD-NOS (id. at p. 1). The report further indicated that the student received speech-language therapy and OT in school as well as 10 hours of home-based special education itinerant teacher (SEIT) services and three hours of speech-language therapy outside of school (id.). With respect to background information, the report indicated that the student exhibited age level academic strengths such as his ability to read, spell, and print words (id.). However, he continued to demonstrate significant delays in the areas of speech-language, social skills, and fine motor skills (id.).

The private psychologist administered several tests to the student including the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III), the Vineland Adaptive Behavior Scales-Second Edition (VABS-II), selected subtests of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH), and the Childhood Autism Rating Scale (CARS) (Parent Ex. OO at p. 2). With respect to the WPPSI-III, the student demonstrated average reasoning ability during visual activities with no language component and average word knowledge skills, but exhibited difficulties with tasks related to the processing of abstract oral

language (*id.* at pp. 3-4). Overall, the student exhibited varying abilities with respect to both the verbal and nonverbal reasoning tasks (*id.* at p. 4). However, the student achieved a general language composite of 103 (average range) which measured his basic expressive and receptive language development (*id.* at pp. 3-4).

With respect to the WJ-III, the student's performance on the letter-word identification and passage comprehension subtests both fell within the superior range (Parent Ex. OO at p. 5). The student identified words at the six year age level including "car" and "cat," identified all the letters of the alphabet, and read and understood phrases such as "red table" and "big house" (*id.*). Administration of the VABS-II yielded standard scores of 100 (adequate) in communication, 81 (moderately low) in daily living skills, 77 (moderately low) in socialization, 104 (adequate) in motor skills, and an adaptive behavior composite of 88 (adequate) (*id.* at p. 6). The VABS-II further showed that the student's social skills were a significant weakness relative to his other skills areas, and he exhibited difficulty interacting with peers on the playground and had not established a close friendship (*id.* at pp. 6, 8). Additionally, the private psychologist indicated that improvement in the student's social skills and attention may help to increase his overall level of adaptive behavior (*id.* at p. 6). With respect to the CARS results, the student was rated as exhibiting "moderately abnormal relationships" including avoiding eye contact and lack of initiation of social contact (*id.* at p. 9). The report reflected that the student demonstrated difficulties with nonverbal communication and exhibited a "mildly abnormal emotional response" including laughing and smiling based on scripting rather than responding to input from others (*id.*).

The private psychologist recommended a small, individualized, structured, multisensory classroom setting for students with PDD-NOS and use of differentiated instruction techniques (Parent Ex. OO at p. 12). It was recommended that the student be provided with verbal behavior instruction techniques, research-based instructional methods, and access to role models for behavior (*id.*). It was also recommended that the student receive a minimum of 10 hours of home-based ABA instruction to address his communication and social skills (*id.*).

On December 22, 2009, a district school psychologist conducted a classroom observation and teacher interview at the student's preschool as part of his referral for the "[autism spectrum disorders] ASD Nest program" (Dist. 8 at p. 1).¹ The student reportedly was progressing well in the area of academics and exhibited age level academic skills (*id.* at p. 2). The report also indicated that the student exhibited delays in reciprocal social behavior that moderately interfered with everyday social interactions (*id.* at p. 3). The student also demonstrated delays with respect to interpretation of social cues and social communication (*id.*). The report noted that the student's teacher indicated that he "almost always has difficulty relating to peers and has difficulty making friends" (*id.*).

On January 1, 2010, a speech-language pathologist provided a progress report of the student (Dist. Ex. 13). The report indicated that the student's receptive language skills were variable depending on his ability to maintain his attention and he required prompts and cues to engage in conversations with peers (*id.* at p. 1). The report further indicated that the student

¹ It appears that the ASD Nest program refers to an integrated co-teaching program for students on the autism spectrum (see Application of a Child with a Disability, Appeal No. 10-023).

typically communicated using single word utterances or two through four short word phrases and that his play skills continued to improve with modeling and prompting as needed (id. at p. 2). The report noted that the student's oral motor mechanism was intact, but he presented with decreased awareness of his body and oral motor peripheral mechanism (id. at p. 3). Moreover, the student's speech intelligibility was "fair" (id.). The speech-language pathologist recommended the continuation of speech-language therapy to address receptive, expressive, and pragmatic language skills (id.).

On January 5, 2010, the student's preschool special education teacher completed a "CSE Report" of the student (Dist. Ex. 14). The teacher indicated that the student demonstrated delays in the areas of cognition, fine motor, gross motor, speech-language skills, and social/emotional development (id. at p. 3). The teacher reported that the student demonstrated overall progress but continued to work on cooperative play skills, following a schedule, attention skills, as well as receptive, expressive, and pragmatic language (id. at pp. 1-3).

On February 20, 2010, the student's SEIT provided a progress report of the student (Parent Ex. NN). The SEIT reported that during preferred activities the student maintained good eye contact, but at other times avoided eye contact and needed redirection (id. at p. 1). The SEIT further reported that the student inconsistently responded to his name and engaged in self-stimulatory and off-task behavior and therefore required frequent redirection and prompting (id.). The SEIT indicated that the student requested appropriately and exhibited an extensive vocabulary; however, he tended to be impatient when he needed to follow directions, take turns, and wait (id.). Moreover, the student exhibited difficulty managing his emotions including exhibiting a tantrum by screaming, running away, and lying on the floor when his demands were not met or he felt frustrated (id.). The SEIT reported that the student lacked social skills and a basic interactive approach with peers (id. at p. 2). The SEIT's report indicated that the student demonstrated pragmatic language delays and used physical means of communication such as grabbing toys and pushing or hugging tightly (id.). The student required a teacher to shadow him, redirect, and facilitate interactions with peers (id.). However, he demonstrated "significant progress" in his academic skills including an ability to identify letter sounds, write many words, read simple picture books, and engage in rote counting to 100 (id.). The SEIT also indicated that the student exhibited "significant progress" in communication skills, including using a variety of phrases to request and make comments (id. at p. 3). The student was working on improving his writing (id.). The SEIT recommended that the student continue to receive home-based ABA services to address learning age appropriate skills (id.).

On February 27, 2010, a school psychologist completed an evaluation of the student in consideration of referring the student to the ASD nest program (Dist. Ex. 11). The school psychologist administered the Autism Diagnostic Observation Schedule (ADOS) to the student (id. at p. 1). She noted that testing revealed that the student used mostly single words and short phrases and that his eye contact was reduced, along with a reduction of overall social response and interaction (id. at pp. 1, 2). The school psychologist also noted that the student demonstrated delays with joint attention (id.). The school psychologist reported that based on the student's behavior during the assessment, he "met criteria for a diagnosis of Autism on this measure" (id. at p. 3).

On March 8, 2010, a district psychologist administered the Preschool Evaluation Scale-School Version (PES-SV) to assess the student's development (Dist. Ex. 10). The student achieved standard scores of 7 in large muscle skills, 7 in small muscle skills, 7 in cognitive thinking, 2 in expressive language, 2 in social skills, 0 in self-help skills, and an overall quotient of 70 (2nd percentile) (id. at pp. 1-2).

On March 26, 2010, the CSE convened for the student's review and to develop his individualized education program (IEP) for the 10-month 2010-11 school year (Parent Ex. CC). Meeting participants included the school psychologist who had conducted the March 8, 2010 PES-SV and who also acted as the district representative, the private psychologist who had conducted the November 2009 psychological evaluation, an additional parent member, and the parents (id. at p. 2). A special education teacher of the student participated in the meeting by telephone (id.). The CSE found the student eligible for special education programs and services as a student with a speech or language impairment and deferred to the district's central based support team (CBST) for recommendation of a State-approved nonpublic school (id. at p. 1). The CSE further recommended three 30-minute sessions of speech-language therapy per week in a group of three and two 30-minute sessions of OT per week in a group of two (id. at p. 22). The IEP indicated that the recommended program would start on September 8, 2010 and the next CSE meeting would take place on March 26, 2011 (id. at p. 2).

On April 6, 2010, the CPSE convened for the student's review to develop his IEP for April 7, 2010 through August 31, 2010 (Parent Ex. BB at pp. 3, 4). Meeting participants included a district representative, a district special education teacher, and the student's mother (id. at p. 4). The CPSE found the student eligible for special education programs and services as a preschool student with a disability (id. at p. 3). The CPSE recommended placement for the student in a 12:1+3 special class in a center-based program together with two 30-minute sessions of individual speech-language therapy per week, one 30-minute session of speech-language therapy per week in a group of two, one 30-minute session of individual OT per week, and one 30-minute session of OT per week in a group of three (id. at p. 33). In addition, the student was recommended to receive 10 60-minute 1:1 sessions of SEIT services per week and three 60-minute sessions of individual speech-language therapy per week (id. at p. 3). For summer 2010, the student was recommended to receive a 12:1+3 center-based program at a specific State-approved nonpublic school, as well as 10 60-minute 1:1 sessions of SEIT services at a specific site outside of the center-based program and three 60-minute sessions of individual speech-language therapy per week (id. at p. 3).

With regard to the process for placing the student in the nonpublic school in accordance with the March 2010 IEP, by letter dated May 28, 2010, the executive director of the Association of Metroarea Autistic Children (AMAC) indicated that the student had been accepted into an 8:1+2 special kindergarten class that would commence on September 7, 2010 (Dist. Ex. 2). The letter further indicated that the student would receive related services of two 30-minute sessions of individual speech-language therapy per week, one 30-minute session of speech-language therapy per week in a group of two, and two 30-minute sessions of individual OT per week, as mandated on his March 2010 IEP (id.).

On June 19, 2010, the student's preschool teachers and related service providers developed a third quarter CPSE progress report (Parent Ex. AA at p. 9). The report indicated

that the student continued to exhibit difficulties with attention and distractibility during group activities (id.). It further indicated that the student followed one to two-step directions, matched and sorted objects with one attribute, completed puzzles, understood letter-sound correspondence, understood some sight words, and continued to work on answering wh-questions (id.). The report noted that the student exhibited slow but steady progress with respect to his speech-language goals including responding to wh-questions with visual cues and expressing wants and needs with reminders to use his words (id.). He also demonstrated progress in the areas of self-help skills but continued to require instruction with dressing and eating skills (id.). The report indicated that the student required verbal and visual cues to maintain a mature quadripod grasp while writing, and he required assistance to manipulate the small buttons on his shirt (id.). With respect to gross motor skills, the report reflected that the student continued to work on body awareness (id. at p. 10). With respect to social/emotional functioning, the report indicated that the student sometimes would not follow instructions, threw himself on the floor, and scripted; all of which appeared to be attention-seeking behaviors (id.). The student continued to work on cooperative play skills including turn-taking and sharing (id.).

In an undated letter entitled "To Whom It May Concern," the student's ABA therapist stated that she had worked with the student after school three days per week since June 2010 (Parent Ex. AA at p. 3). The letter indicated that the student had acquired several skills but had not generalized these skills to a "natural environment" and did not possess observational or incidental learning skills to continue his development at an age appropriate rate (id.). The ABA therapist indicated that the student needed to continue with his home-based ABA program to ensure consistency with respect to the student's behavior plans across environments, maintain mastered skills, and develop skills in the areas of communication, play skills, and daily living skills (id.). Specifically, the ABA therapist indicated that the student needed to increase his receptive and expressive vocabulary, increase attention, improve conversational skills, decrease echolalia and scripting, learn to greet adults and peers independently, and acquire coping skills to address his emotions and lack of frustration tolerance (id.). The ABA therapist noted that learning social skills and coping strategies would assist the student to engage in social situations that were "extremely overwhelming to him, due to lack of language skills" (id.). He further noted that with respect to play skills, the student required instruction to play appropriately with peers and toys, to take turns, and wait for his turn (id.). In addition, the student needed instruction with respect to basic safety rules in the home and within the community (id. at p. 4). The report indicated that the student ran from caregivers when outside and in stores and that he also needed instruction in the areas of dressing, bathing, brushing teeth, and independent toileting (id.). The report also indicated that the student needed to increase his ability to maintain his attention and "learn how to learn" (id.). The ABA therapist recommended that the student continue to receive after school ABA therapy (id.).

In an undated letter entitled "To Whom It May Concern," the student's SEIT, who is also a Board Certified Behavior Analyst (BCBA), stated she had worked with the student two days per week since June 2010 (Parent Ex. AA at p. 5). The SEIT indicated that the student was often overwhelmed and frustrated in social situations due to his language delays (id.). The SEIT further indicated that the student's social skills needed to improve in the areas of greeting adults/peers, responding to his name, maintaining eye contact, attending when someone was speaking to him, answering questions during a conversation, maintaining a conversation, coping with emotions, waiting his turn, and frustration tolerance (id.). The SEIT also indicated the

student demonstrated significant delays in both play and daily living skills (id.). The SEIT reported that the student's skills needed to be addressed in the areas of turn taking, waiting for a turn, appropriate play with toys and peers, play skills, dressing, bathing, tooth brushing, and toileting skills (id.). The report indicated that the student engaged in frequent tantrum behaviors that often functioned to avoid work tasks and provide him attention (id.). The report further indicated that the student needed to develop attention skills which would assist him in acquiring new cognitive, language, social/emotional skills, and self-help skills (id.). The SEIT recommended that the student continue to receive home-based ABA services to maintain consistency of behavior plans across environments, maintain mastery of skills, and to assist the student to continue to acquire new skills (id.).

In a letter dated July 23, 2010 entitled "To Whom It May Concern," an ABA therapist indicated that based on her observations of the student, although he had learned several skills, he continued to require instruction in many basic skills areas (Parent Ex. AA at p. 6). Specifically, she indicated that the student required further instruction in the areas of attention, eye contact, responding to his name when called, conversation skills, expressive language skills, self-help skills, and dramatic play skills (id.). In addition, she observed that the student engaged in several behaviors including scripting, elopement, throwing himself to the floor, excessive laughing, grabbing items, and screaming; all of which negatively affected his ability learn (id.). The ABA therapist reported that the student also exhibited difficulties with generalization of skills across environments (id.). The ABA therapist recommended that the student receive 10 hours of home-based ABA instruction to address the student's "challenging behaviors," assist him in learning new skills "at a steady rate," learn how to communicate and express himself verbally, and promote generalization (id.). Additionally, she recommended that the home-based services be used "to teach [the student's] caregivers how to address his escape behaviors in public" and how to teach him self-help skills at home (id.).

In a letter dated July 23, 2010 entitled "To Whom It May Concern," the student's ABA therapist indicated that she had provided ABA services to the student since March 2010 (Parent Ex. AA at p. 7). The letter indicated the student needed to learn several skills in the areas of language, social skills, play skills, behavior, emotional functioning, and attention (id.). The ABA therapist recommended that the student continue to receive afterschool ABA services to maintain his mastery of skills, generalize learned skills, maintain consistency of behavior plans, learn age appropriate skills, and avoid skill regression (id.).

On July 28, 2010, the CSE reconvened to review the student's IEP for the 2010-11 school year (kindergarten) (Parent Ex. AA at pp. 12, 13). Meeting participants included a school psychologist (who also acted as district representative), a district special education teacher, a private ABA provider, an additional parent member, and the student's mother (id. at p. 13). The CSE found the student eligible for special education and related services as a student with autism (id. at p. 12). The CSE recommended placement for the student in the 8:1+2 special class at AMAC as well as related services consisting of two 30-minute sessions of individual speech-language therapy per week, one 30-minute session of speech-language therapy per week in a group of two, and two-30 minute sessions of individual OT per week (id. at pp. 12, 26). The IEP indicated a projected initiation date of September 7, 2010 through July 27, 2011 and noted that the duration of services was "not to exceed on year" (id. at p. 13).

In a Final Notice of Recommendation (FNR) also dated July 28, 2010, the district notified the parents that AMAC was the school to which the district assigned the student for the 2010-11 school year (Parent Ex. AA at p. 1). The FNR was returned to the district by the parent and reflected that the parent granted consent for the services that were recommended and it was signed by the student's mother on August 4, 2010. The FNR contained a handwritten notation dated July 28, 2010 stating that the parent agreed that AMAC was an appropriate placement for the student and she consented to placing him there; however, she believed that he also required additional home-based ABA services as was discussed at the July 2010 CSE meeting (id.). The hearing record shows that the student subsequently started attending AMAC in the fall 2010 (Tr. pp. 285, 484).

In a letter dated August 16, 2010, the parents notified the district that they believed that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. K at p. 1). Specifically, the parents stated their belief that in addition to the student's placement at AMAC, he needed to continue to receive home-based ABA services (id.). The parents also alleged that the district committed "procedural errors" in developing the IEP that resulted in a denial of the parents' right to meaningfully participate in the decision-making process (id. at pp. 1-2). Additionally, the parents contended that the district failed to develop a "substantively and sufficiently appropriate IEP" and offer a placement that was "sufficient and adequate and/or appropriate" to address all of the student's needs (id. at p. 2). The parents stated that as a result, they would be "supplementing" the student's placement at AMAC with home-based ABA services of eight to ten hours per week during the 2010-11 school year and that they would be seeking reimbursement for those services (id.). The parents stated that a "formal request for due process" would follow (id.).

On October 4, 2010, the student's home-based ABA therapist conducted a classroom observation of the student at AMAC at the request of the principal because the parents had requested a [behavioral intervention plan] (BIP) "to decrease his 'singing' behavior" (Dist. Ex. 4). The observation report indicated that the student often engaged in unintelligible vocalizations and self-directed behavior, including ignoring teacher requests and throwing himself on the floor (id. at p. 1). Specifically, when directed to complete his work, the student would often throw himself on the floor (id. at p. 2). After several attempts, the ABA therapist was able to engage the student in the activity by providing him with hand-over-hand assistance, at which time the student's unintelligible vocalizations ceased (id.). For a reward, the student began to play with blocks while engaging in song-like vocalizations (id. at p. 3). The report indicated that the student threw at least five blocks and attempted to throw additional blocks but the observer prevented this by taking them from the student before he could throw them (id.). The student then continued to play with the remainder of the blocks while engaging in singing/vocalizations, and when the student was done playing with the blocks, he knocked them off of the table, started walking away, and when he was asked to pick the up blocks, he threw himself to the floor (id.). The report noted that at first, the student required hand-over-hand assistance to pick up the first few blocks but then he picked up the blocks independently (id.). The observation report further noted that the student did not follow verbal directions independently but followed directions with prompts (id.). During the 30-minute observation, the student threw objects nine times and threw himself on the floor six times (id. at pp. 3-4). The report reflected that the student vocalized and sang during directed and play activities (id. at p. 4). The ABA provider recommended baseline

data be taken regarding the student throwing objects/self to the floor and that a discrete trial program be provided to the student (id.). It was also recommended that "planned ignoring" be used to address the student's vocalization/singing behavior (id. at p. 5).

On October 18, 2010, the student's ABA therapist conducted another observation of the student at AMAC (Dist. Ex. 5). The ABA therapist reported that she worked directly with the student for three hours that day to assess his skill level (id. at p. 1). She reported that the student consistently identified and labeled common objects, colors, shapes, animals, verbs/actions, and all the letters of the alphabet including upper and lower case letters (id.). She further noted that the student read and spelled several words but was inconsistently demonstrating these skills (id.). She indicated that the student used one to two words to express his needs including labeling pictures and objects, and that he often avoided eye contact, only making eye contact when engaged in maladaptive behavior such as grabbing for objects (id.). The ABA therapist recommended a discrete trial program to address the student's needs in the areas of academic skills, social skills, and language skills (id. at p. 2). Specifically, it was recommended that the ABA program address the student's abilities in the areas of eye contact, sitting still, following directions, answering social questions, manding/requesting using sentences, sound/letter correspondence, rote counting, and 1:1 correspondence (id.). It was also recommended that the student be provided instruction with respect to labeling objects, colors, shapes, numbers, letters as well as usage of verbs, prepositions, and pronouns (id.).

By letter dated October 20, 2010 to the CSE chairperson, the parents alleged that AMAC was not properly implementing the student's IEP and that the student's OT services were not being provided as mandated in his IEP (Parent Ex. G at pp. 1-2). The parents also reiterated their assertion that the student continued to need the privately obtained 10 hours per week of home-based ABA services and advised that they would visit AMAC during the first week of November 2010 "to confirm whether or not [the student's] IEP [was] being implemented," and if it was not, they would withdraw the student from AMAC and enroll him in "an appropriate private school" and would seek reimbursement from the district (id.).

On November 1, 2010, the student's summer home-based ABA therapist provided a "Regression Statement," which indicated that the student exhibited regression beginning on October 20, 2010, after attending AMAC for six weeks (Parent Ex. II). Specifically, she noted that the student's behaviors of elopement, throwing himself to the floor, and climbing had not only returned but had increased (id.). The ABA therapist recommended that the student attend a "highly-structured, high-quality ABA school" and after school ABA program consisting of discrete trial training, as the student was not yet a "natural environment learner" (id.). It was further recommended that the student be provided with a BIP and a functional behavioral assessment (FBA) (id.). Additionally, the therapist reported that the student needed to increase his safety and self-help skills and decrease inappropriate behavior (id.).

Amended Due Process Complaint Notice and Response

In an amended due process complaint notice dated November 5, 2010,² the parents asserted the student was denied a FAPE for the 2010-11 school year and that they had placed the

² The parents had previously filed a due process complaint notice dated September 14, 2010 and the district

student at BAC and would be seeking direct reimbursement for the cost of tuition for the 2010-11 school year (Parent Ex. A at pp. 1, 2). The parents also asserted that the student was denied up to 74 hours of ABA related services during the prior (2009-20) school year, and they would seek compensatory services for those missed hours (id. at pp. 2, 3).

The parents claimed that the July 2010 CSE was not properly constituted, the CSE failed to consider all of the evaluative data available to it, and the CSE's recommendations were predetermined (id. at pp. 6-9). Specifically, the parents asserted that the district representative lacked the requisite knowledge of the district's special education programs and resources, and could not commit the district's resources to the CSE's recommendations (id. at pp. 6-7). The parents also asserted that the district's special education teacher who participated in the CSE meeting would not have likely implemented the IEP and was therefore inappropriate (id. at pp. 6-7). The parents also asserted that they were denied meaningful participation in the development of the IEP because the CSE excluded the student's private ABA provider and the parents from deliberative discussions and other conversations concerning the student, and they were not provided with all of the documents to review that the district staff had reviewed, and that the CSE failed to properly consider all of the documentation it had before it (id. at p. 7). As a result, the parents also assert that the CSE predetermined the student's program and assigned school without any meaningful input from them (id. at p. 7). The parents further assert that the CSE failed to consider the evaluative information before it and the student's program was insufficient and not designed to allow the student to make meaningful progress (id. at p. 7).

The parents assert that the IEP should have included provisions of 10 hours of at home-based ABA services (id. at pp. 2, 4-5) as well as transitional support services (id. at p. 8). The parents also alleged that AMAC failed to implement the student's IEP which resulted in a denial of a FAPE to the student (id. at pp. 4-5, 8-9).

The parents also asserted that the student's placement at BAC and receipt of after school ABA therapy was appropriate and that equitable considerations favored the parents (id. at p. 11). The parents also requested transportation services to and from BAC, and that the district provide the student with 10 hours per week of ABA therapy outside of school as set forth in his April 6, 2010 IEP as the student's pendency (stay put) placement a final outcome from the impartial hearing (id. at p. 10).

The hearing record shows that on or about November 8, 2010, the student started attending BAC (Tr. pp. 71, 351-52, 553).

In an amended response to the parents' amended complaint dated November 18, 2010, the district asserted, among other things that "upon information and belief," the IEP contained appropriate goals for the student; the CSE members, including the parents, had an opportunity to

filed a response (Parent Exs. H; I). In a September 24, 2010 e-mail to the district, the parents asserted the district's response did not respond to "all of the allegations and issues raised" in the due process complaint notice (Parent Ex. J). The parents' amended due process complaint notice contained all of the allegations found in the original complaint, which was revised to add the parents assertions regarding failure to properly implement the student's IEP at AMAC, references to the student's placement at BAC, and the parent's request for funding at BAC (compare Parent Ex. A at pp. 3-12 with Parent Ex. H at pp. 2-10).

participate in the meeting; the CSE considered documents provided by the parents at the meeting; a transition plan was not required because the student was not yet 15 years old; and the student's "ABA special education teacher" participated in the meeting (Parent Ex. B at pp. 1, 4-5).

Impartial Hearing Officer Decisions

An impartial hearing convened on December 10, 2010, and concluded after five days of hearings on May 9, 2011 (Tr. pp. 1, 51, 255, 455, 667). The first day of the impartial hearing was limited to the issue of the student's pendency placement (Tr. pp. 3, 62). In an interim order dated February 3, 2011, the impartial hearing officer determined that the student's pendency placement was based upon his April 6, 2010 IEP (IHO Interim Decision at p. 4). Accordingly, she ordered that from September 14, 2010 until the matter was withdrawn or a final decision had been issued, the student was entitled to receive a total of 10 hours weekly of 1:1 "SEIT/ABA" therapy in 60-minute sessions outside of school pursuant to pendency (id. at p. 5).

In a final decision dated August 22, 2011, the impartial hearing officer determined that the IEP was "procedurally defective" and for that reason the district had failed to provide the student with a free FAPE for the 2010-11 school year (IHO Decision at pp. 21, 22-23). She also determined that AMAC was not appropriate for the student, finding, among other things, that the student "spent two months at AMAC with no programs in place at all" and that he "regressed substantially" during that time (id. at p. 23). Regarding the appropriateness of the parents' unilateral placement at BAC, the impartial hearing officer determined that while the program at BAC did not provide speech-language therapy and OT, the program was sufficiently individualized to address the student's needs (id. at pp. 24-25). However, the impartial hearing officer also determined that the parents had failed to prove that the student required the additional home-based ABA therapy (id. at p. 25). Further, the impartial hearing officer determined that the district was not required to maximize the educational benefits provided to the student by providing him with 10 hours of home-based ABA services (id. at pp. 25-26). Lastly, the impartial hearing officer determined that contrary to the district's contentions, the parents provided the requisite 10 day notice to the district that they were enrolling the student in a private school and would be seeking tuition reimbursement, and that the evidence demonstrated that the parents cooperated in the CSE process, and therefore, equitable considerations favored an award of tuition reimbursement (id. at pp. 25-27). Accordingly, she ordered the district to reimburse the parent for the student's tuition at BAC from November 8, 2010 through June 30, 2011 (id. at p. 27).³

Additionally, the impartial hearing officer found that she did not need to address the district's claims seeking to limit the parents to just those assertions made in their due process complaint notice (IHO Decision at p. 27). Regarding the parents' assertion that the district should not be permitted to assert various claims and defenses due to the insufficiency of the district's response to their due process complaint notice, the impartial hearing officer determined that the parents were not prejudiced given the circumstances in this case and therefore, she would not address that claim (id.).

³ The impartial hearing officer noted in her decision that "by agreement of the parties," the parents' request for compensatory services for the 2009-10 school year had been withdrawn (IHO Decision at p. 6 n. 3).

Appeal for State-Level Review

The district appeals the impartial hearing officer's determination that BAC was an appropriate placement for the student.⁴ Specifically, the district contends that the educational program at BAC was not appropriate for the student because, among other things,: (1) it did not provide speech-language therapy or OT, which the student's required; (2) it did not meet the student's social/emotional needs; (3) the 1:1 instruction was "overly confining" and did not "promote [the student's] independence;" and (4) there is no objective evidence that the student made progress in the program.

The parents submit an answer denying many of the claims raised in the petition. The parents also assert that the district waived any defenses regarding the parents' unilateral placement of the student at BAC and their request for at home ABA services because the district did not raise these issues in its response to the parents' due process complaint notice. The parents also assert that since the impartial hearing officer's determination that BAC was appropriate was based on witness credibility and the weight afforded to the documentary evidence, and the district has not appealed those determinations; therefore, it is precluded from appealing the determination that BAC was appropriate and the petition should be dismissed. The parents cross-appeal the impartial hearing officer's determination that they failed to prove that the student required additional at home ABA therapy.⁵

In an answer to the cross appeal, the district asserts that it was not required to raise all of its arguments in the response to the parents' due process complaint notice and that it properly appealed the impartial hearing officer's determination that BAC was appropriate because her determinations as to "credibility, value and weight" are not "'findings, conclusions and orders,'" which are required to be identified in a petition. The district asserts that the impartial hearing officer correctly determined that it was not required to "maximize the benefits provided to the student" by providing home-based ABA services and that such services were not appropriate.⁶

Discussion

Scope of Review

⁴ The district does not appeal the impartial hearing officer's determinations it did not offer the student a FAPE or that equitable considerations did not preclude an award of tuition reimbursement.

⁵ The parents assert as part of their "cross-appeal" that as the impartial hearing officer's interim order on pendency was not appealed by the district, the student continues to be entitled to 10 hours per week of ABA therapy outside of school "retroactive to commencement" of the impartial hearing and until the parents' claims are resolved. It was unnecessary to assert the student's continuing right to receive pendency as a cross-appeal since the right arises by operation of law.

⁶ The district contends that the parents' cross-appeal of the student's pendency entitlements is improper as the district did not appeal the impartial hearing officer's pendency order. It further asserts that it does not contest the student's right to pendency services "until the resolution of this proceeding." As the district did not appeal the impartial hearing officer's interim order on pendency and does not contest the student's entitlement under that order, I need not address this issue in my decision.

Initially, I note that the impartial hearing officer's determinations that the district failed to offer the student a FAPE for the 2010-11 school year and that equitable considerations did not preclude an award of tuition reimbursement have not been appealed, and therefore have become final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; IHO Decision at pp. 19, 21, 23, 26-27). The sole issues before me on appeal are the appropriateness of the parents' unilateral placement of the student at BAC and the home-based ABA services.

Applicable Standards – Unilateral Placement

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 Individuals with Disabilities Education Act (IDEA) (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; 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]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 [1982] and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger

v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 C.F.R. § 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

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]).

Preliminary Issue—Response to Due Process Complaint

The parents assert that the district waived any challenges to the parents' unilateral placement of the student at BAC and their request for at home ABA services because it did not raise these issues in its response to the parents' due process complaint notice. I find that this argument is unavailing (see R.B. v. Dep't of Educ., 2011 WL 4375694, at *5-*7 [S.D.N.Y. Sept. 16, 2011] [holding that while a response to a due process complaint required of the school district pursuant to 8 NYCRR 200.5[i][4] must contain the information required under state and federal regulations, it does not function as a waiver of unasserted defenses]). Therefore, I will address the arguments regarding the unilateral placement raised in the district's petition.⁷

⁷ The point in time to identify disputed issues to be resolved by the impartial hearing officer with regard to a

Appropriateness of BAC

As discussed above, the district asserts that BAC was an inappropriate placement for the student for the 2010-11 school year. The educational director at BAC testified that the school is an intensive 1:1 ABA program for students who have received a diagnosis of autism (Tr. p. 531).⁸ She further testified that within the school, there are seven "one-to-one teachers," a lead teacher, the educational director, and two classes composed of seven students total (Tr. p. 538). Moreover, she testified that the students receive 1:1 ABA instruction provided by the teachers within the classroom who rotate between students every 45 minutes and that the students' ages range from 6 through 13 years old (*id.*). The educational director developed the ABA program and BIPs for the students at the school, which were then modified to meet the individual needs of the students (Tr. pp. 535, 537, 549). The hearing record reflects that BAC employs neither a speech-language therapist nor an occupational therapist (Tr. pp. 631-32).

The hearing record shows that the student demonstrates difficulties with social skills, emotional functioning, fine motor skills, sensory processing, and behavior as well as receptive, expressive, and pragmatic language and has needs in the areas of cognition, academic skills, speech-language skills, fine motor skills, sensory regulation, behavior, and social/emotional functioning (Tr. pp. 271-79, 285, 390-91, 393-95, 808; Dist. Exs. 4-5; 8-9; 13; Parents Exs. MM; NN; OO; PP).

Speech-Language Therapy

The district asserts that BAC was inappropriate, in part because it did not provide speech-language therapy to the student for the 2010-11 school year. The educational director testified that 80 to 90 percent of the student's school day addressed the student's speech-language development (Tr. pp. 596-97, 631). She further testified that the student had exhibited progress in his language processing and articulation skills since attending BAC (Tr. pp. 596-97). Specifically, the educational director testified that within the 1:1 instructional ABA therapy sessions, BAC addressed the student needs related to articulation by implementing an ABA program entitled "imitating a vocal model" (Tr. pp. 575-77, 695-97). For example, the student exhibited difficulty with the "th" sound and the education director described how the ABA provider broke down the sound for the student and shaped the student's articulation of each sound (Tr. p. 576). In addition, the instructor modeled the sound and then the student would imitate the sound such as the "th" sound (Tr. p. 577). The educational director indicated that the instructor would systematically increase the introduction of consonant vowel combinations to the student as needed (Tr. p. 576). The imitating a vocal model ABA program was developed specifically for the student and that the student exhibited much progress in the area of articulation including his articulation of sounds (Tr. p. 577).

unilateral placement or equitable considerations is during a prehearing conference, among the purposes of which is to narrow the issues to be decided if possible and clarify the issues that will be resolved through the impartial hearing (see 8 NYCRR 200.5[j][3][iii], [xi]).

⁸ The hearing record described ABA therapy as an empirically supported methodology that implements principles of positive reinforcement to increase positive behavior and decrease inappropriate behavior (Tr. p. 533).

The student's 1:1 ABA instruction also addressed his needs in the area of maintaining eye contact during conversational speech (Tr. pp. 577-78). The hearing record shows that the BAC teachers implemented an eye contact program with the student, which incorporated positive reinforcement (Tr. p. 578). BAC also provided an ABA program related to the student exhibiting eye contact when his name was called (id.). The educational director testified that the student's ability to maintain eye contact had improved since attending BAC, including 80 percent accuracy in making eye contact in response to his name (Tr. pp. 577-79). The hearing record reflects that the BAC program also addressed the student's needs related to vocabulary, pronouns, prepositions, verbs, and object function (Tr. pp. 563, 566, 573-74, 596-98). In addition, BAC provided instruction regarding the student's expression of his wants and needs (Tr. pp. 563, 565-66, 598). The student's program also addressed mean length of utterance resulting in his ability to speak in sentences (Tr. pp. 563, 565-66, 597-98).

Accordingly, I find that based on the testimony of the educational director, the instruction provided at BAC appropriately addressed the student speech-language needs in the areas of articulation as well as receptive, expressive, and pragmatic language and the lack of speech-language therapy at the school did not, under the circumstances of this case, render BAC inappropriate.

Occupational Therapy

The district also argues that BAC was inappropriate for the student because it failed provide the student with OT. As further discussed below, I find that the student's needs related to fine motor, sensory regulation, and related behavioral needs were met in the program at BAC.⁹ The hearing record also shows that the student demonstrated difficulties with his grasp while writing, sensory processing, and interfering behaviors (Dist. Exs. 9 at p. 2; 11 at p. 3; Parent Ex. AA at p. 10).¹⁰ The educational director testified that the student's behaviors of elopement, throwing himself to the floor, and throwing objects were all addressed at BAC (Tr. pp. 583, 586). She further testified that BAC implemented a BIP as well as accommodations for the student to address his behaviors, which resulted in a "significant" decrease in those behaviors (Tr. pp. 585-88).

The educational director testified that to address the student's grasp while writing, BAC implemented the "handwriting without tears" program with a focus on his grasp (Tr. p. 579). She further indicated that with the use of worksheets together with tracing and modeling, the student's handwriting had improved while at BAC (Tr. p. 580). Moreover, she testified that the BAC teachers also addressed the student's delays in the area of fine motor skills during art projects and while the student was engaged with toys (Tr. p. 595).

⁹ Although the district asserts that the student's maladaptive behaviors worsened while at BAC, the hearing record indicates that the student exhibited similar behaviors while at AMAC at the beginning of his kindergarten year (Tr. p. 94).

¹⁰ Although evidence in the hearing record does not show a direct link between the student's interfering behaviors and deficits related to sensory integration needs, the evidence in this case shows that BAC was prepared to address such deficits for the student if necessary.

The hearing record shows that the student was provided with a sensory diet throughout the day at BAC, which was developed by the student's occupational therapist during his preschool years (Tr. pp. 562, 595-96). The sensory diet provided the student with sensory input that allowed the student to better maintain his attention and engage in learning (*id.*). I find that the sensory diet along with the BIP appropriately addressed the student's behaviors (Tr. pp. 583, 586). Additionally, I find that the student's 1:1 instruction addressed his fine motor needs.

Social Skills

Despite the above findings, for the following reasons, I find that the evidence does not show that the program at BAC was specially designed to meet the student's unique needs in the area of social skills.

The evidence in the hearing record reflects that the student's had significant socialization needs (Parent Ex. OO at p. 6). More specifically, as discussed above, the hearing record shows that the student demonstrated difficulties in social interactions with peers including a lack of cooperative play skills, decreased imaginative play skills, lack of initiation of play, decreased verbal interactions with peers, lack of social expression as well as difficulties with playing with toys, turn taking, and interpretation of social cues (Dist. Ex. 8 at p. 3; Parent Exs. NN at p. 2; OO at pp. 6, 8-9). In addition, the student needed to acquire coping skills to address his emotions and lack of frustration tolerance (Parent Ex. AA at p. 3).

The educational director testified that at BAC the student began to attend an after school peer socialization group in approximately March 2011 that was "open to the community" and consisted of weekly social visits with 10 year old nondisabled students (Tr. pp. 589, 591-92). She further testified that the student also had daily interactions with nondisabled eighth grade students from another school at lunch and during ABA sessions (Tr. pp. 589-90, 648). Aside from these two instances of working with significantly older students, the hearing record does not show that the student the BAC program was designed to address the student's deficits in his social emotional functioning with opportunities for social interaction and instruction alongside his peers. Testimony shows that the ABA instructor provided only 1:1 instruction to the student throughout the school day (*see* Tr. p. 538). Additionally, the student was not provided with social skills instruction or coping skills instruction and the student was not provided with ABA instruction in the area of social skills or coping skills (Tr. p. 629). Additionally, the educational director testified that the student did not have an ABA social skills program nor was data taken regarding the student's social skills (*id.*). The student's school day lacked any opportunities to learn age appropriate social skills through direct teacher instruction or exposure to same or similar aged peers during social interactive opportunities. I find that in light of the evaluative information in the hearing record, such services were necessary for his unilateral placement to be reasonably calculated to enable him to receive educational benefits with regard to one of his most significant areas of deficit. However, as more fully described below the student's home-based ABA services addressed the student's social skills to some degree and, therefore I will turn next to the parents' cross-appeal that the impartial hearing officer erred in her determination that the student did not require at home ABA services.

Home-Based ABA Services

With regard to the home-based ABA services, the student's SEITs provided progress reports indicating the student received 10 hours of home-based ABA/SEIT services per week to address the student's needs related to behavior, academics, self-help skills, communication skills, social skills, fine motor skills, and attention (Parent Exs. MM; NN at pp. 1-4). The student's SEIT addressed the student's social and communication skills in the home and community settings by providing the student with coping strategies, redirection, language modeling, verbalization, modeling, positive reinforcement, and a reward system (Parent Ex. NN at p. 2). The report indicated that the student exhibited progress in the areas of making requests, imitative behavior, play skills, and communication skills (Parent Ex. MM; NN at pp. 1-4). For example, the student answered at least three questions related to social situations as well as engaged in turn taking behavior and reciprocal greetings with minimal prompts (Parent Exs. MM; NN at p. 3). There is sufficient evidence to show that the home-based ABA services addressed, among other things, the student's needs related to social skills, and thus in part rectify the lack of evidence of instruction at BAC with regard to social skills. Thus, when I consider the totality of the circumstances, I find that the private services unilaterally obtained by the parents' as a whole were reasonably calculated to enable the student to receive educational benefit (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

Relief

The inquiry does not end there, because taken alone, I have found that BAC was not appropriate and, furthermore, I agree in large part with the sentiment that the impartial hearing officer's conclusion that parents obtained home-based ABA services for the student that the district would not be required to fund had BAC been appropriate as the parents contended. In this case although the impartial hearing officer found that the student would benefit from the home-based ABA services, she limited the relief granted to the parents.¹¹ The impartial hearing officer reasoned that the program at BAC was appropriate and could adequately address the student's needs but that the home-based ABA services represented maximization of services provided to the student, which is not required under the IDEA or, in other words, that the home-based ABA services provided substantially more than was necessary for the student to receive educational benefits. Consequently, the impartial hearing officer determined that the district was not required to fund such services even in the case in which it had denied the student a FAPE.¹² Although as stated above, the services obtained by the parents as a whole sufficiently addressed the student's needs, I agree with the impartial hearing officer to the extent that the student would not require home-based ABA services in addition to his program at BAC had BAC addressed his social skill needs.

¹¹ Although the parties and impartial hearing officer describe this to varying degrees as a second prong issue, it also may be characterized as equitable considerations or the process of fashioning relief. Regardless of how the parties or the impartial hearing officer described the issue, both BAC and the home-based ABA services have been properly appealed by the parties.

¹² Typically parties dispute in the first and second prongs of a Burlington/Carter analysis whether the public school IEP or the unilateral services obtained by a parent are appropriate, that is, whether they adequate enough to be described as reasonably calculated to enable the student to receive educational benefit. In this case whether home-based ABA services were sufficient or were designed to address the needs of the student does not appear to be the issue. Instead, the issue appears to be whether the parents, in obtaining services unilaterally, significantly exceeded the quality or quantity of services that the student required in order to receive educational benefits and whether the district should be held responsible for them.

Courts have repeatedly recognized the "broad discretion" that hearing officers and reviewing courts must employ under the IDEA when fashioning equitable relief, and as noted recently, courts have also "repeatedly rejected invitations to restrict the scope of remedial authority provided in Section 1415(i)(2)(C)(iii)" (see Mr. and Mrs. A v. New York City Dept. of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see also Forest Grove v. T.A., 129 S.Ct. 2484 [2009]). While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow they may take advantage of deficiencies in the district's offered placement to obtain maximization of their child's potential at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148). As one circuit court recently explained, "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs)" (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]; see Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 301 [5th Cir. 2009] [explaining that "a finding that a particular private placement is appropriate under IDEA does not mean that all treatments received there are *per se* [reimbursable]; rather, reimbursement is permitted only for treatments that are related services as defined by the IDEA]).

I agree with the impartial hearing officer that the evidence in the hearing record does not establish that the student required the 10 hours of home-based ABA services that the parents unilaterally obtained for the student (IHO Decision at pp. 25-26). As mentioned above, the home-based ABA services were designed to address behavior, academics, self-help skills fine motor skills, and attentional needs, all of which were already sufficiently addressed at BAC, and I find that the only reason the home-based services are required is because they also address social skills needs that BAC should have addressed. The evidence shows that the student's ABA therapists indicated that the student required a home-based ABA program to ensure consistency with respect to the student's behavior plans across environments, maintain mastered skills as well as to develop skills in the areas of communication, play skills, and daily living skills (Parent Ex. AA at p. 3-7). However, the BAC educational director testified that the home-based ABA program was necessary for the student "to maximize his day with learning and engaging in appropriate behaviors" (Tr. p. 609). School districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 [2d Cir.2003]; Walczak, 142 F.3d at 132). The hearing record further shows that the home-based ABA services assisted the student with the generalization of skills and increasing his ability to learn new concepts (Tr. pp. 497-99). Although the student may receive greater benefit from the receipt of home-based ABA services, I find that the hearing record supports the impartial hearing officer's conclusion that the home-based ABA services were not necessary for the student to receive educational benefits (see IHO Decision at p. 26). While I can understand that the parents may find all of these services highly desirable, it does not follow that the district must be made responsible for all of them. The IDEA 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]).

Accordingly, I find that the hearing record lacked evidence that the student required 10 hours of home-based ABA instruction in order to receive educational benefits. The hearing record further reflects that the student's significant needs in the areas of speech-language skills and social skills as well as his needs in fine motor, sensory processing, behavior, academics, and cognition could be appropriately addressed during the school day through an appropriate educational program without the need for home-based services. Therefore, the relief should reflect that the parent acquired sufficient appropriate services when all of the services are viewed in totality, but that the district is only required to pay for expenses to address the student's needs that it would have borne in the first instance had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; C.B., 635 F.3d at 1160). Accordingly, I will sustain the district's appeal in part and modify the relief granted by the impartial hearing officer and reduce the reimbursement for tuition at BAC by 25% due to the lack of evidence that it addressed the student's deficits with regard to social skills, and sustain the parents' appeal in part by granting relief in the form of 5 hours per week to reflect that a portion of the home-based ABA services addressed student's social skills deficits but they were otherwise in excess of what the student required.

Conclusion

Having found that the unilateral placement of the student at BAC and the private home based educational services obtained by the parents were appropriate for the student to the extent indicated, and that further equitable considerations are not at issue, the necessary inquiry is at an end (Mrs. 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. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated August 22, 2011 that granted full tuition reimbursement for BAC and denied reimbursement for the student's home-based ABA services for the 2010-11 school year are annulled; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for 75% of the costs of tuition at BAC for the 2010-11 school year upon the parents' submission of proof of payment; and

IS FURTHER ORDERED that the district shall reimburse the parents for five hours per week of home-based ABA services for the 2010-11 school year upon the parents' submission of proof of payment.

Dated: Albany, New York
December 9, 2011


JUSTYN P. BATES
STATE REVIEW OFFICER