The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 11-127

Application of the [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 respondent, Tracy Siligmueller, 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 McCarton School (McCarton) for the 2010-11 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending McCarton (Tr. pp. 358, 433).[1] McCarton is a private 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 (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Background

The student's educational history is set forth in detail in Application of a Student with a Disability, Appeal No. 09-141. The parties' familiarity with the student's educational history and prior due process proceedings is assumed and will not be repeated here in detail. Briefly, as a young child, the student received diagnoses of an autistic disorder and Landau-Kleffner

[1] Although the student also received home based services through McCarton, the parents indicated that they were not seeking reimbursement for the services (Tr. pp. 498-99).

Syndrome (Parent Exs. A-1 at p. 3 ; A-3 at p. 3). Through the Committee on Preschool Special Education (CPSE), the student attended an 8:1+1 special class at an approved preschool; however he struggled to keep up despite the addition of applied behavior analysis (ABA) services at school and home (Tr. pp. 487-88). Subsequently, at age four, the student transitioned to a home based program that included 40 hours per week of ABA services, speech-language therapy, and occupational therapy (OT) (Tr. p. 488). In fall 2002, the student began attending McCarton and has remained at McCarton since that time (Tr. pp. 488, 552).

According to McCarton documents, during the 2009-10 school year, the school provided the student with an interdisciplinary instructional model with a 1:1 staff to student ratio (Parent Ex. D-17 at p. 1; see Dist. Ex. 4 at p. 2). The student received 40 hours per week of individualized education in a classroom of five peers (Parent Ex. D-17 at p. 1). The student also received daily related services of one hour of speech-language therapy and 45 minutes of OT (id.).[2] In addition, McCarton developed goals and objectives for the student for the 2009-10 school year (Dist. Ex. 12).

In January 2010, McCarton staff prepared educational and OT progress reports for the student (Dist. Ex. 10; Parent Ex. D-17).[3] The educational progress report, signed by a "teacher" and educational supervisor, indicated that the student required highly individualized instruction based on the principles of ABA in order to acquire and maintain skills (Parent Ex. D-17 at p. 1).[4] According to the report, the student's then current educational programming was characterized by fast-paced instruction, frequent repetition, visual support, predictable routine, a dense schedule of reinforcement, physical guidance, intensive generalization training of acquired skills, and a comprehensive behavior management program (id.). The report stated that new instructors were systematically introduced to the student in order to control and manage his aggressions toward them and that when the student was working with new instructors, a 2:1 staff to student ratio was necessary in order to implement the student's behavior plan and protective holds when he became aggressive (id.).

With respect to communication and social skills, the progress report stated that the student continued to demonstrate marked delays in both expressive and receptive language and that the student's speech was often unintelligible due to reduced volume and fast pace (Parent Ex. D-17 at p. 1). The progress report noted that the student often required physical prompts to pace himself and reminders to increase his volume (id.). According to the progress report, when given visual aids and/or verbal prompts the student used five to seven-word utterances to request desired items or activities (id.). If the student was averse to a specific task he would express his dislike by whining or crying (id.). The progress report noted that in instances where a specific

---

[2] Due to a staffing shortage, the student's OT was reduced from five sessions to four sessions per week for part of the 2009-10 school year (Dist. Ex. 10 at p. 1).

[3] Parent exhibit D-17 was submitted into evidence as an incomplete document, with the agreement of both parties (Tr. pp. 250-51). Four pages of the seven page document were admitted into evidence with the understanding that if the additional pages were later discovered they could be submitted at that time (Tr. p. 250). No additional pages were submitted.

[4] The hearing record indicates that the teacher was certified in general education in the state of Pennsylvania (Dist. Ex. 3 at p. 2). The educational supervisor was a board certified behavior analyst (BCBA) (Parent Ex. D-17 at p. 7).

verbal interaction was rehearsed the student responded well to minimal prompting such as a slight gesture (id.). It further noted that the student had learned to make appropriate comments and give directions in the context of learned routines or familiar situations and activities (id. at p. 2). However, the progress report indicated that the student continued to work on making various comments in different contexts (id.).

According to the progress report, during the current evaluation period the student responded well to learned group directives without requiring additional prompts from his 1:1 instructor (Parent Ex. D-17 at p. 2). The progress report noted that the student often answered questions spontaneously during group reading and cooking activities (id.). In addition, when visual aids, materials, and demonstrations were used the student was able to successfully participate in these activities (id.). The progress report indicated that the student responded immediately and with a good degree of accuracy to questions directly pertaining to a task at hand in a group setting (id.). The progress report noted that although reading and cooking group activities were highly motivating for the student, he could be unsuccessful if in close proximity to staff members "target[ed]" by him for acts of aggression (id.). The progress report reflected that when the student exhibited aggression toward staff members, removal from the group was necessary (id.). It further indicated that the student continued to have difficulty and challenging behaviors in the context of group exercises (id.).

As detailed in the progress report, the student mastered following 3-step directions that had been explicitly taught to him, but made limited progress in following general directions using prepositions (Parent Ex. D-17 at p. 2). The student continued to work on attending to simple known directives and initiating movement toward completion of the directive without requiring additional prompts (id.). The progress report noted that the student's performance was variable due to his distractibility and reliance on prompts (id.). In areas where the student received regular practice he more fluently responded and engaged with others (id.). According to the progress report, the student interacted with peers during structured activities; with prompting, gave the other student a turn; and often took his turn independently (id.). The progress report indicated that during phases of low impulsive or aggressive behavior, the student could be paired during leisure, snack, or lunch activities with one other student for 15 minutes without exhibiting "severe" behavior characterized as challenging (id.). The progress report noted that systematic fading of 1:1 support continued to be a goal (id.).

Turning to the student's behavior, the progress report indicated that due to his limited spontaneous communication skills the student exhibited challenging behaviors such as aggression, dropping to the floor, and yelling/crying (Parent Ex. D-17 at p. 3). The progress report noted that the student's aggression was often preceded by non-purposeful body movements (id. at p. 2).

According to the progress report, the student's safety awareness was limited and he did not visually attend to signals consistently (Parent Ex. D-17 at p. 6). In order to address the student's goal of self-navigation, he participated in trips to the grocery store to purchase ingredients for lunch or snack preparation (id. at p. 3). The progress report indicated that during the evaluation period the student demonstrated good initiation and navigational ability in the grocery store (id.). The student was able to locate five familiar food items with some prompting and the progress report noted that routinely and systematically checking off a list was a powerful

motivator for the student (id.). The student required assistance and prompting to follow the steps involved in a shopping trip (id.).

The progress report indicated that during the evaluation period the student had engaged in new hobbies such as playing computer games and making a cookbook; however, noted that the student's favorite leisure activities were physical activities such as basketball and bowling (Parent Ex. D-17 at p. 3). The student required visual support as well as subtle prompting from the instructor to initiate leisure activities (id.).

The progress report reflected that the student shopped weekly for his own lunch items and with assistance was able to follow a written list to obtain the necessary ingredients and utensils for making his lunch (Parent Ex. D-17 at p. 3). The progress report indicated that the student did not initiate lunch preparation when the teacher instructed and often waited for additional prompting (id.). The progress report noted that teaching and prompting procedures had focused on decreasing the student's prompt dependence while increasing initiation (id.).

According to the progress report, the student participated in several prevocational activities during the evaluation period, which included completion of supply inventories by filling out a checklist and delivering supplies to the classrooms (Parent Ex. D-17 at p. 3).

In summary, the progress report indicated that the student had shown gradual improvement in some areas while his behavior and academic performance continued to be inconsistent (Parent Ex. D-17 at p. 4). More specifically, the report showed that the student progressed in reading, writing, spelling, and vocabulary, but that he struggled with mathematical concepts including time and money (id.). The report indicated that the student's performance was highly variable and often related to his ability to focus, and also cited inattentiveness, language delays, and behavioral challenges as interfering with the student's learning, socialization, and community integration (id.). According to the progress note, the student's prompt dependence and distractibility severely interfered with his ability to complete simple tasks, as did mock or actual attempts at aggression (id.). The progress report stated that the student continued to require highly individualized 1:1 instruction by trained professionals in order to obtain meaningful progress and that detailed data collection was required in order to evaluate the student's progress and make necessary modifications to meet his annual goals (id.).

In addition to the educational progress report, in January 2010 the student's occupational therapists at McCarton conducted an evaluation as part of a semi annual review of the student's progress and as an assessment of the student's continued need for OT services in the areas of fine motor, gross motor, and sensory processing skills (Dist. Ex. 10 at p. 1). To assess the student's functioning in fine manual control, manual coordination, body coordination, and strength and agility, the occupational therapists administered the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2) in a nonstandardized manner and also engaged in clinical observation of the student (id.).[5] According to the occupational therapists, the student attained

[5] The occupational therapists reported that the evaluation was administered in a nonstandardized manner due to the high degree of complex verbal directions required to understand each task (Dist. Ex. 10 at p. 1). They also reported that visual demonstration, encouragement, and sensory breaks were used to facilitate compliance in attempting each targeted skill (id.). They noted that the reported test scores were adapted and did not directly reflect a comparison of the student with his peers taking the exam according to standardized directions (id.).

the following standard scores (and percentile ranks) on the BOT-2: fine manual control 21 (<1st percentile), manual coordination 29 (2nd percentile), body coordination 27 (1st percentile), and strength and agility 27 (1st percentile) (id. at p. 2). The therapists cited low tone, low arousal level, poor body awareness, difficulty following verbal directions, and poor adaptive behaviors, as well as deficits in motor planning, as contributing to the student's low scores on the BOT-2 (id. at p. 1). They noted that the student had little to no ability to perform fine motor tasks or tasks requiring bilateral coordination (id.). Compared with the results of testing conducted in July 2009, the occupational therapists reported that the student demonstrated progress with regard to balance and strength and maintained the same score regarding fine motor precision, fine motor integration, upper limb coordination, and running speed and agility (id. at p. 3). They noted that the student scored a two-month regression in manual dexterity (id.).

With respect to the student's 2009-10 OT goals, the therapists reported that the student had met a fine motor objective related to translating pennies from the palm of his hand to his thumb and index finger and an activities of daily living (ADL) skill related to orienting himself to walk to familiar locations in the building with moderate prompts (Dist. Exs. 10 at pp. 4, 5; 11 at p. 1). The student made no progress on objectives related to verbally requesting activities that provided vestibular and proprioceptive input or identifying coins and their value (Dist. Exs. 10 at pp. 3, 5; 11 at p. 1). For the remainder of the goals, the therapists noted that the student had made little progress or progress, but that the goal was not yet met (Dist. Ex. 11). The occupational therapists recommended that the student continue to receive OT five times per week (Dist. Ex. 10 at p. 5).

In preparation for the student's annual review, on March 17, 2010 a school psychologist for the district conducted an observation of the student at McCarton (Dist. Ex. 8; see Tr. p. 130). The observation lasted for approximately one hour and fifteen minutes during which time the student participated in a reading group, snack time, and speech-language therapy (Dist. Ex. 8). The psychologist reported that the student's reading group consisted of four students seated at a table, with one instructor leading the group, while the other adults sat behind the students and took data (id. at p. 1). The psychologist stated that the student was able to correctly read a list of 8-9 sight words correctly, point to the title of the story, turn the page independently in response to a group directive, and sit quietly while another student read (id.). She noted that the student did not correctly find the illustrator when asked to do so, and at other times required prompting to turn the page (id.). The psychologist reported that when tapped by the adult behind him to indicate he should read the student did so (id.). She noted that the student required assistance to answer a question posed to him and that when asked to point to a certain character, the student pointed to the wrong one (id.). The psychologist observed that the adult sitting behind the student took data on his ability to read words correctly and his on task behavior (id.). The adult provided the student with tokens and in several instances helped the student focus by pointing to a specific location in the book (id. at p. 1-2).

With respect to snack, the psychologist described the student's interaction with peers, which generally consisted of the student being prompted verbally or visually to ask questions of other students or responding to questions posed to him by peers (Dist. Ex. 8 at p. 2). The psychologist reported that following snack the student went outside with another student to participate in a speech-language dyad (id.). The dyad consisted of the two students with a speech-language therapist and another adult who helped to support the session by refocusing the

other student (id.). At the direction of the speech-language therapist, the student engaged in a ball game with the other student in which they each asked if the other "was ready" and then threw the ball (id.). According to the psychologist, after the ball game the student was instructed by the speech-language therapist to "'pick something to do'" (id.). In response, the student walked to where the games were kept and stood still (id. at p. 3). Despite being prompted a second time the student still did not choose anything (id.). The psychologist reported that for the next activity the student was seated at a desk with the other student and instructed to prepare sandwiches with plastic food (id.). She indicated that during this activity the student was able to accurately point to named foods (id.). The psychologist noted that as a final activity the student practiced turn taking as part of a board game (id.).

To conduct the student's annual review and develop an individualized education program (IEP) for the 2010-11 school year, the Committee on Special Education (CSE) met on two days in April and May 2010 for a total of approximately five hours (Tr. p. 503; Parent Ex. B-1 at p. 1). The first meeting took place on April 30, 2010 and was attended by the district representative who was also the school psychologist, a special education teacher for the district, the student's father, and an additional parent member (Parent Ex. B-1 at p. 2). The head teacher and program director from McCarton, along with the student's speech-language pathologist and occupational therapist from the school participated in the meeting by telephone (id.). When the CSE reconvened on May 10, 2010, the same district representative and special education teacher were in attendance, along with the student's father, and a different additional parent member (id. at p. 1). The head teacher from McCarton participated in the meeting by telephone (id.). According to the school psychologist, in developing the students' 2010-11 IEP, the CSE considered the January 2010 OT progress report and IEP goal report, the student's 2009-10 McCarton IEP, a speech-language therapy report, the classroom observation of the student, and McCarton's behavior intervention plan (Tr. pp. 198-99).

For the 2010-11 school year, the CSE recommended that the student be found eligible for special education programs and related services as a student with autism and that he be placed in a 6:1+1 special class in a specialized school with a 1:1 behavior management paraprofessional (Parent Ex. B-1 at pp. 1, 27). The CSE further recommended that the student receive weekly related services of four 60-minute sessions of individual speech-language therapy, one 60-minute session of speech-language therapy in a dyad, and five 45-minute sessions of individual OT (id. at p. 27). To address the student's management needs, the CSE recommended numerous environmental modifications and human/material resources (id. at pp. 5-7). The CSE indicated that the student's behavior seriously interfered with instruction and that he required additional adult supervision, as well as a behavior intervention plan (id. at p. 6). The proposed May 10, 2010 IEP included a behavior intervention plan which targeted the student's crying/whining, falling to the floor, and aggression (id. at pp. 28-30). The IEP also included annual goals and short-term objectives related to word recognition and decoding, reading comprehension, written expression, math skills, receptive language skills, expressive language skills, speech pragmatics and social communication, prevocational skills, fine motor skills, play skills, motor planning, bilateral coordination, strength and endurance, independence in ADLs, and classroom functioning (id. at pp. 8-24).

Minutes from the CSE meetings indicated that the student's father believed that the McCarton reports reflected the student needs (Dist. Ex. 4 at p. 2). With respect to the parent's

concerns, the meeting minutes indicated that the student had made slow steady progress but still presented with behavioral issues including impulsive behavior and irregular behavior toward teachers, which was variable (id. at p. 2). According to the meeting minutes, the student's father believed that the student required 1:1 instruction (id.). The meeting minutes indicated that at McCarton the student participated in group instruction in the form of daily morning meeting, snack, and lunch groups; twice weekly reading groups; a once weekly cooking group; and a sports group that met four times per week (id.). The minutes noted that the student's participation in a math group was unsuccessful because math was very difficult for him (id.). According to the meeting minutes, the student was held in a "'wrap position'" generally in response to aggressive contacts with another person (id.).[6]

Following the CSE meeting held on May 10, 2010, the student's father provided signed consent for a 12-month school year and agreed to defer implementation of the student's IEP until July 1, 2010 (Dist. Exs. 5; 6). On both forms he indicated that he did not agree with the district's 6:1+1 program recommendation (id.).

On or around June 15, 2010, the district notified the parents of the school to which the student was assigned for the 2010-11 school year (Dist. Ex. 7). The student's father visited the assigned school on June 24, 2010 (Tr. pp. 507-08; see Parent Ex. C-2).

Due Process Complaint Notice

In a due process complaint notice dated March 28, 2011, the student's parent requested, among other things, reimbursement for tuition at McCarton for the 2010-11 school year (IHO Ex. I at pp. 1, 5). The parent attached to the due process complaint notice the March 18, 2011 and December 23, 2010 letters to the district referenced above (id. at pp. 3, 5). The parent asserted that the district's proposed placement was not appropriate for the student, specifically alleging that the teacher to student ratio was not sufficient to meet the student's needs and that the curriculum was appropriate only for students who were functioning at a "far higher" level than the student (id. at p. 5). The parent also asserted that the student's placement at McCarton was appropriate and indicated that they had enrolled the student in the private school (id.). They requested a prompt hearing in order to obtain tuition reimbursement and if necessary the cost of related behavioral therapies and legal fees (id.).

Impartial Hearing Officer Decision

An impartial hearing convened on May 6, 2011 and concluded on July 15, 2011, after four days of proceedings (Tr. pp. 1-622). In a decision dated August 30, 2011, the impartial hearing officer found that the district did not meet its burden of proving that it offered the student a free appropriate public education (FAPE) for the 2010-11 school year (IHO Decision at p. 4). The impartial hearing officer specifically found that as result of an autism spectrum disorder and Landau-Kleffner Syndrome, the student had "particularly intense special education needs and behavioral issues" (id.). Finding the testimony of the parents' witnesses credible and not rebutted, the impartial hearing officer concluded that although the student was able to work on maintaining skills in a group, he required 1:1 instruction to acquire new skills (id.). The

[6] The use of the "wrap" technique has been discontinued and is not at issue in this hearing (Tr. pp. 603-12).

impartial hearing officer found that the student would not receive educational benefit or learn new skills in a 6:1+1 setting, even with the support of a behavior management paraprofessional (id.). The impartial hearing officer further found that although a behavior management paraprofessional could help control the student's behavioral issues, the paraprofessional could not provide the 1:1 instruction that the student needed in order to make educational progress (id.). The impartial hearing officer next found that the district's assigned school was not appropriate because the student would not have been grouped for instructional purposes with students with similar needs and abilities and that the student would not have benefitted from instruction in the assigned class, noting testimony of a district witness that the other students in the assigned class were at higher functional levels (id.). The impartial hearing officer concluded that the district did not prove that it offered the student a FAPE for the 2010-11 school year, based upon a finding that the district did not establish that the student would have been able to make meaningful educational progress in the CSE's recommended 6:1+1 program and placement (id. at p. 5).

The impartial hearing officer next found that the parents met their burden of proving that McCarton was an appropriate placement for the student for the 2010-11 school year (IHO Decision at pp. 5-7). In support of her finding, the impartial hearing officer indicated that McCarton provided the student with 1:1 instruction that targeted the student's specific educational and behavioral needs; implemented a positive behavioral support plan designed to address the student's specific behavioral issues; and modified/adapted the plan as new maladaptive and interfering behaviors emerged (id. at p. 5). In addition, the impartial hearing officer found that testimony from McCarton staff was credible and convincing and that the student's progress reports and related documents reflected that the McCarton program was addressing the student's specific education and behavioral needs and that the student was making progress (id.). The impartial hearing officer further found that the McCarton program was not too restrictive, that the student would not benefit from mainstreaming opportunities with general education students, and that the student required the 1:1 instruction that he received at McCarton (id. at pp. 5-6). Regarding the "wrap" procedure, the impartial hearing officer noted that it was used only once during the 2010-11 school year during the summer and was discontinued as part of the student's behavior plan; and that the "wrap" procedure was not an aversive behavioral intervention (id. at p. 6). Regarding the parents' decision to supplement the McCarton program with home-based services, the impartial hearing officer found that such did not negate or call into question the propriety and sufficiency of the McCarton placement (id. at pp. 6-7). As to equitable considerations, the impartial hearing officer found that the parents cooperated with the CSE, and did not interfere or hinder the CSE (id. at p. 7). In addition, the impartial hearing officer noted that the student's father visited the proposed placement, provided the district with notice of their rejection of the 6:1+1 program recommendation, and provided the CSE with appropriate and timely notice of their rejection of the assigned school (id. at p. 7).

As a remedy, the impartial hearing officer directed the district to reimburse the parents for the costs of the student's tuition at McCarton for the 2010-11 school year (IHO Decision at p. 8).

Appeal for State-Level Review

The district appeals, as serting that the impartial hearing officer's finding that the district failed to offer the student a FAPE should be vacated. The district specifically asserts that the recommended 6:1+1 special class, with a 1:1 behavior management paraprofessional and related services was appropriate and was designed to enable the student to receive educational benefits. Regarding the parents' assertion that the student could only learn new material with 1:1 instruction, the district asserts that the district paraprofessional could provide instruction similar to the 1:1 instruction provided at McCarton if instructed to do so by the special education teacher. In addition, the district asserts that any complaints regarding the assigned school, including functional grouping, were speculative and should not be considered because the student did not attend the placement, but moreover, that the assigned school and classroom were appropriate. In addition, the district asserts that equitable considerations preclude tuition reimbursement because the parents did not give the district the required notice of the unilateral placement. The district asserts that although the parent testified that he informed the CSE that the placement was not appropriate for the student and that they would reenroll the student at McCarton, that there was no documentary evidence in support of this contention.

In their answer, the parents admit some allegations and deny some allegations, and assert that the August 30, 2011 impartial hearing officer decision should be upheld. The parents attach additional evidence to the answer for consideration on appeal. In particular, the parents' assertions include that the student cannot receive educational benefits in a 6:1+1 classroom setting; that the curriculum in the assigned school is too advanced for the student and because there is reason to believe that the assigned school could not provide the OT that the student required because there is only one occupational therapist for more than 60 special education students. The parents also assert that McCarton is an appropriate placement for the student; and that the equities favor tuition reimbursement. In addition, the parents assert that the district made a false representation on appeal by asserting for the first time that the student's parents did not provide the required notice of their specific complaints regarding the district's recommendation or their intention to enroll the student in a public school. Moreover, the parents assert that by failing to raise the notice issue in any form before the impartial hearing officer, that the district waived the claim on appeal.

In a reply, the district objects to consideration of the additional evidence submitted by the parents on appeal. [7] The district further asserts that the district's claim that the parents did not provide notice to the district of the parents' unilateral placement was not waived by the district's failure to raise the issue of the parents' timely notice at the impartial hearing.

---

[7] Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In reviewing the documentary evidence submitted by the parents, I note that it was available at the time of the impartial hearing and could have been offered into evidence and further that the documentary evidence is also not necessary to render a decision, and therefore, it will not be considered.

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], 30 0.116[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 NYCR R 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 W L 2736027, at *6 [S.D.N.Y. Jul y 3, 2008]), establishes annual goa ls re lated to those ne eds (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for th e use of appropriate s pecial e ducation s ervices (34 C.F.R. § 300.320[a][4]; 8 NY CRR 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 N o. 04-046; Application of a Child with a Dis ability, 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 inad equate or inappropria te, th e serv ices s elected by the paren ts were appropriate, and equitable consid erations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlingt on v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congr ess intended retroactive reimbursement to parents by school officials as an available rem edy 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 f irst 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 reim bursement for a unilateral pla cement ha s the burden of proof regarding th e appropriateness of such placem ent (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

Scope of Review

Initially, I will determine the issues that may be appropriately considered on appeal from the August 30, 2011 i mpartial hearing officer decisi on. State regulations provide, in pertinent part, that "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decis ion, identifying the find ings, conclusions and orders to which exceptions are taken, and shall briefly indicat e what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). A review of the district's verified petition and the impartial hearing officer's decis ion indicates that the im partial hearing officer's determination that the student was denied a F APE based upon findings that the recomm ended 6:1+1 placem ent was

inappropriate; that the student could only learn new material with 1:1 instruction; and that the assigned class was inappropriate because the student would not have been grouped with students with similar functional ability are challenged by the district on appeal.

State regulations further provide that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer (8 NYCRR 279.4[b]). Although the parents assert in their answer reasons, in addition to those delineated in the impartial hearing officer's August 30, 2011 decision, to support their claim that the student was denied a FAPE, a review of the parents' verified answer indicates that the parents did not cross-appeal from the impartial hearing officer's August 30, 2011 decision (see Answer). Raising additional issues in a respondent's answer without cross-appeal is not authorized by State Regulations and, in effect, deprives the petitioner of the opportunity to file responsive papers on the merits because State Regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). In essence, a party who fails to obtain a favorable ruling with respect to an issue submitted to an impartial hearing officer is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal.[8] Accordingly, regarding the first prong of the Burlington/Carter test, the only issues to be considered on appeal in this case concern whether the impartial hearing officer erred in finding that the student was denied a FAPE based upon findings that the 6:1+1 placement was inappropriate; that the student could only learn new material with 1:1 instruction; and that the assigned class was inappropriate because the student would not have been grouped with students with similar functional ability.

April/May 2010 IEP

Recommended 6:1+1 Special Class Placement

I will now consider whether the student's IEP substantively provided the student with a FAPE. The impartial hearing officer found that although the student was able to work on maintaining skills in a group, he required 1:1 instruction to acquire new skills and that the student would not receive educational benefits or learn new skills in a 6:1+1 setting, even with the support of a behavior management paraprofessional (IHO Decision at p. 4). The district asserts that the impartial hearing officer erred because the CSE's recommended placement of the student in a 6:1+1 special class with a 1:1 behavior management paraprofessional and related services was designed to confer educational benefits. Upon review of the hearing record, I find that the district offered the student a FAPE for the 2010-11 school year.

According to State regulations, a 6:1+1 special class placement is designed to address 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]). Upon review of the student's needs, I find that the 6:1+1 special class placement recommended in the

[8] An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly to the extent the parents have not cross-appealed any rulings adverse to them or the impartial hearing officer's decision not to address certain claims, those issues have now become final and binding.

April/May 2010 IEP with a 1:1 behavior management paraprofessional was an appropriate educational setting for the student.

Initially, review of the April/May 2010 IEP reflects that the CSE accurately described the student's academic, social, and behavioral needs, and provided program accommodations and strategies to address his identified needs. Additionally, review of the April/May 2010 IEP reveals that the student's annual goals were consistent with the student's identified needs. The hearing record reflects that the April/May CSEs considered information about the student provided by McCarton staff who had been working with him, and that specifically, the present levels of performance and annual goals were developed based on information provided at the CSE meetings by the McCarton program director, as well as student's head teacher and therapists, and also included information found in the private school reports (Tr. pp. 137-138, 141, 144-45, 170, 172, 174, 175-76). The student's father reported that the meeting was "thorough" and resulted in "quite a detailed IEP" (Tr. pp. 503-504). In addition, the school psychologist indicated that the IEP goals were created at the CSE meetings and everyone agreed with them (Tr. pp. 177-80).

To address the student's academic, attending, behavioral, and social/emotional needs, the CSE recommended that the student be placed in a 6:1+1 special class in a specialized school with a 1:1 behavior management paraprofessional, despite disagreement from both the parent and the McCarton staff (Tr. pp. 194-95; Parent Ex. B-1; see Dist. Ex. 4). As detailed above, the CSE recommended numerous environmental modifications and human/material resources to address the student's management needs (Parent Ex. B-1 at pp. 5, 6). The IEP included academic goals related to improving the student's word recognition and decoding skills, reading comprehension, written expression, and math skills (id. at pp. 8-11). The IEP also included goals targeting the student's prevocational skills, play skills, and ADL skills (id. at pp. 17, 19, 22). To address the student's speech-language needs, the CSE recommended that the student receive individual speech-language therapy for four 60-minute sessions per week and speech-language therapy in a dyad for one 60-minute session per week (id. at p. 27). The IEP included speech-language goals related to improving the student's receptive and expressive language skills, as well as speech pragmatics and social communication skills (id. at pp. 12-16). To address the student's fine motor and sensory processing deficits, the CSE recommended that the student receive individual OT for five 45-minute sessions per week (id. at p. 27). The IEP included goals related to improving the student's fine motor skills, motor planning, bilateral coordination, and muscle strength and endurance (id. at pp. 18, 20). The CSE also recommended that the student receive adapted physical education and developed a corresponding goal related to increasing the student's strength (id. at pp. 7, 23). To address the student's interfering behaviors, the CSE developed a behavioral intervention plan (BIP) that detailed the student's interfering behaviors including crying/whining; falling to the floor; aggression toward teachers in the form of hitting, grabbing, hair pulling, pinching and kicking; and variable attention (id. at pp. 28-30; see Tr. pp. 169-70). The behavior plan was developed with the help of the student's head teacher at McCarton and included components of the plan being employed by the private school (Tr. pp.170-71). Additionally, the IEP included a goal related to improving the student's functional behavior within the classroom (Parent Ex. B-1 at p. 24).

Although the hearing record shows that during the 2009-10 school year McCarton provided the student with an "interdisciplinary instructional model with a 1:1 staff to student

ratio" and the McCarton staff opined that the student continued to require highly individualized 1:1 instruction by trained professionals in order to achieve meaningful progress (Parent Ex. D-17 at pp. 1, 4), I find that the hearing record supports a finding that the student worked well in a group setting, and that the student would have been able to receive educational benefit and learn new skills in a 6:1+1 setting, with the support of a behavior management paraprofessional.

Initially, I note the student's father's testimony that the parents wanted a 1:1 setting for the student because his teachers and therapists said it was necessary, and that, based upon staff and their own observations, the student only learned new material when it was taught by a qualified teacher, which meant someone who knew ABA (Tr. p. 531; see Tr. p. 497). In addition, I note testimony by the student's head teacher at McCarton for the 2001-11 school year that the student would have a "very difficult time" in a class of six students, one teacher, and a paraprofessional and that he required "a one-to-one person with him" (Tr. p. 453; see Tr. pp. 432-33). I also note testimony by the Director of McCarton's upper school that in order to learn new material the student needed to be taught in a 1:1 setting and that the person teaching the student should have training in "behavior analytic intervention" and ideally at least have a bachelor's degree in education or a related field, the availability of ongoing training plus a good sense of data collection and management (Tr. pp. 363, 376). [9] Nevertheless, a review of the entire hearing record supports a finding that the district offered the student a FAPE for the 2010-11 school year.

According to the school psychologist, district staff believed that the student worked well in a group setting, that the student did not require 1:1 given his ability to function, and that a 1:1 setting was too restrictive (Tr. p. 195). Moreover, the district's school psychologist opined that a 1:1 ratio meant one student with a certified special education teacher and that under this definition McCarton did not actually provide 1:1 instruction (Tr. p. 246). She noted that although the adults in the McCarton classroom were referred to as teachers, there was only one certified teacher in the classroom, the rest of the adults were not certified teachers, and they appeared to function in a similar manner as the district's paraprofessionals (Tr. p. 149). The teacher of the assigned class testified that she provided the students in her class with 1:1 instruction (Tr. p. 318). She estimated that each student received 15-20 minutes of 1:1 instruction from her, but indicated that the amount of 1:1 instruction varied depending on each student's needs (Tr. pp. 338-39).

In addition, the district's school psychologist testified that the behavior management paraprofessional recommended for the student for the 2010-11 school year would assist in dealing with the student's behaviors (Tr. pp. 147, 183-84). She further explained that the behavior management paraprofessional would assist in providing positive reinforcement, redirection, and prompting "similar to what the adults in his room currently would be doing" (Tr. p. 147). Referencing the reading group she observed in March 2010, the school psychologist

[9] The director opined that in a 6:1+1 class with a behavior paraprofessional, the student would initially get distracted and then get bored, which would lead to acting out behavior (Tr. p. 377). He further opined that the student's acquisition of new skills would drop "precipitously" and that it would be detrimental to the student's current academic progress (id.). He indicated that he could not see a behavior management paraprofessional as being beneficial to the student because the issue was not about the consequences of behavior, rather about keeping the student engaged and employing proactive strategies (id.).

noted that when the student was listening to the head teacher reading and asking questions, other "teachers" were seated behind the student prompting him and indicating where he should look (Tr. pp. 147-48; see Dist. Ex. 8). She explained that the recommended behavior management paraprofessional would function in the same way (Tr. p. 148). The school psychologist indicated that the behavior management paraprofessional would also take guidance from the special education teacher with respect to addressing the student's behaviors (id.).

Minutes from the student's CSE meeting indicated that during the 2009-10 school year, he participated in various groups throughout the week for reading, cooking, sports, morning meeting, snack, and lunch activities (Dist. Ex. 4 at p. 2). The minutes also noted that the student's participation in a math group did not "work out," as math was very difficult for the student (id.). The May 2010 IEP reflected that, according to his teacher, the student could sit appropriately in a group for 30-minute intervals and that the student generally liked groups, especially if it involved cooking or reading (Tr. pp. 145-46; Parent Ex. B-1 at p. 6). The student also reportedly responded well to learned group directives without requiring additional verbal prompts (Parent Ex. B-1 at p. 6). The school psychologist testified that a 6:1+1 setting could address the student's needs because the recommended class would include a special education teacher directing instruction supported by a classroom paraprofessional and the individual paraprofessional assigned to the student (Tr. p. 192). She opined that the recommended class was similar in terms of support to the student's then current class with a bit less distraction; noting that for the most part the students in the class would be working on the same project, rather than a number of adults simultaneously teaching different students who are on different types of program (Tr. pp. 192-93; see Tr. pp. 465-67). The school psychologist also reported that the student engaged well with other students and functioned well in a group and that the 6:1+1 would support the student's learning in a group (Tr. p. 192).

In consideration of the foregoing, I find that the evidence in the hearing record does not support the impartial hearing officer's determination that the district's recommendation of a 6:1+1 special class was inadequate to address the student's needs. I further find that the hearing record supports a finding that the April/May 2010 CSEs recognized the student's "highly intensive management needs," such that he required "a high degree of individualized attention and intervention" as contemplated by the State regulations governing recommendations for 6:1+1 special class placements (see 8 NYCRR 200.6 [h][4][ii][a]), and that the IEP recommending placement of the student in a 6:1+1 special class with a 1:1 behavior management paraprofessional and related services was reasonably calculated to enable the student to receive educational benefits and therefore, offered the student a FAPE (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Assigned Classroom

Functional Grouping

I will now consider the impartial hearing officer's finding that the student was denied a FAPE based upon the determination that the student would not have been grouped with students having similar functional ability (see IHO Decision at pp. 4-5). State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak,

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

In this case, a meaningful analysis of the parents' claim with regard to functional grouping would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008] aff'd 2009 WL 3326627 [2d Cir. Oct. 16, 2009]). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320). With regard to the implementation of a student's IEP, a denial of FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (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]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parents rejected the IEP and enrolled the student at McCarton prior to the time that the district became obligated to implement the student's IEP. Thus, the district was not required to establish that the student had been grouped appropriately upon the implementation of his IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 6:1+1 special class at the assigned district school provided the student with suitable grouping for instructional purposes and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn v. Baker Sch. Dist., 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]).

According to the hearing record, at the time of the May 2010 CSE meeting, the student was thirteen years old and functioning at a first grade level for reading and writing and a pre-kindergarten to kindergarten level for math (Parent Ex. B-1 at p. 5). The teacher of the assigned 6:1+1 special class testified that on the first day of school she had six students in her class ranging in age from 11-12 years old and that all of the students had been diagnosed with autism (Tr. pp. 266-67). According to the teacher, two of the students in the class read at approximately a fourth grade level, "a couple" of students read at a third grade level, and one student "used pictures" but did not read (Tr. p. 268). The teacher testified that the older students wrote "very nicely" and the other students also wrote (Tr. p. 269). She estimated the students' writing skills to be between the fourth and fifth grade levels (id.). The teacher of the assigned class reported that the students in her class were working on a third grade math curriculum and "doing well at it" (id.). She indicated that the class did not use a specific curriculum for reading or writing but that reading and writing instruction centered around themes (Tr. pp. 270-71).

The teacher of the assigned class testified that she had read the student's IEP and that a lot of the reading, sight word, and math goals on the student's IEP were "very, very similar" to the goals of the students in her class (Tr. pp. 274, 293). She indicated that she provided the students with differentiated instruction and therefore could accommodate students who were either a little higher or a little lower functioning on the autism spectrum (Tr. p. 275; see Tr. pp. 285-86, 287, 294, 295-96, 311, 339).

In response to questioning, the teacher opined that the student, whose word identification and decoding skills were at a first grade level, was appropriate for her classroom, as the students in the class were at all different reading levels and one student was functioning below the first grade level (Tr. pp. 283-84). In addition, there was one student whose decoding skills fell between the first and second grade levels and the remaining students were functioning closer to a

third grade level (Tr. p. 285).[10] The teacher indicated that for a differentiated lesson she would use the same materials, but break it down so students could understand (Tr. pp. 285-86). For reading comprehension, the teacher reported that one student fell below the first grade level, one student at approximately the second grade level, and the remaining students functioned at approximately the third grade level (Tr. pp. 286-87). As noted above, the hearing record shows that the student's reading comprehension skills were at an early first grade level (Parent Ex. B-1 at p. 5). With respect to writing, the teacher of the assigned class indicated that there was one other student at an early to mid-first grade level and "the other two" students were more toward a third grade level (Tr. p. 287).[11] With respect to math, the teacher testified that there was another student at a pre-kindergarten to kindergarten level (id.). The teacher of the assigned class reported that all of the students in her class received speech-language therapy and OT, although not all at the same frequency of in the same ratio (Tr. pp. 299-300; 308-10). Accordingly, upon review of the hearing record, I find that the evidence shows that the district was capable of implementing the student's IEP with suitable grouping for instructional purposes in the 6:1+1 special class at the assigned district school.

Conclusion

Based on the foregoing, I find that the May 10, 2010 IEP, and the recommended 6:1+1 placement with a behavior management paraprofessional was designed to address the student's needs, that the recommended special education programs and related services were reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having determined that the district offered the student a FAPE, it is not necessary for me to consider the appropriateness of the program that the parents obtained for the student, or whether the equities support their claim for tuition reimbursement (see MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). I have also considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated August 30, 2011 which determined that the district failed to offer the student a FAPE for the 2010-11 school year and awarded the parents reimbursement for the student's tuition at the McCarton School is hereby annulled.

Dated: **Albany, New York**
December 21, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER

[10] The teacher's initial assessment of the students' reading skills suggested that they ranged from a pre-kindergarten to a fourth grade level (Tr. p. 268).

[11] The teacher initially testified that at least some of the students were functioning between the fourth and fifth grade levels for writing (Tr. p. 269).