



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-167

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

[REDACTED]

### **Appearances:**

Asher, Gaughran LLP, attorneys for petitioners, Julie Gaughran, Esq., of counsel

Shaw, Perelson, May and Lambert, LLP, attorneys for respondent, Lisa A. Rusk, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Carmel Academy<sup>1</sup> (Carmel) for the 2010-11 and 2011-12 school years. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for the 2010-11 school year. The appeal must be dismissed. The cross-appeal must be sustained.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a

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<sup>1</sup> At the time the student was initially enrolled at Carmel, the school's name was the Westchester Fairfield Hebrew Academy (Parent Ex. E). The school's name was subsequently changed to the Carmel Academy (Tr. p. 620).

school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

The student first received a diagnosis of a pervasive developmental disorder-not otherwise specified (PDD-NOS) at the age of three years and subsequently received additional diagnoses of an autism spectrum disorder and an attention deficit hyperactivity disorder-

combined subtype, for which he has received medication (Tr. p. 579; Dist. Exs. 12 at p. 1; 14; 16; 17 at pp. 2-3; 22 at p. 1; Parent Ex. D at pp. 4, 5, 6, 7, 34).<sup>2</sup> The hearing record reflects that the student was evaluated through the Committee on Preschool Special Education (CPSE) and deemed eligible for special education services as a preschool student with a disability at the age of three years and received speech-language, occupational, and vision therapies, individual special education itinerant teacher services (SEIT), and he participated in a social skills group (Tr. pp. 556, 559-61; Parent Ex. D at p. 4). The student also received private individual social skills support at that time (Dist. Ex. 17 at pp. 1-2; Parent Ex. D at p. 4). During kindergarten and through third grade, the student was deemed eligible for special education programs and services through the Committee on Special Education (CSE) as a student with autism, attended district integrated co-teaching (ICT) classrooms and received varied combinations of related services each year, including speech-language therapy, OT consult services, and teacher assistant<sup>3</sup> support, and his parents received parent training and counseling services (see Tr. pp. 81, 588; Dist. Exs. 2 at p. 1; 7 at p. 1; 9 at p. 1; 10 at p. 1; 11 at p. 1; Parent Ex. D at pp. 5, 7).<sup>4</sup> The student also received private speech-language therapy and counseling at some point during this time (Dist. Exs. 12 at p. 2; 22 at p. 2).

The student is described as having demonstrated low average to superior cognitive ability at various times of testing and demonstrated deficits in the areas of academic performance, language skills including pragmatic language, social/emotional development, and attending skills (Tr. pp. 183-84; Dist. Exs. 3 at pp. 3-5; 10; 17; Parent Ex. D at pp. 13-34).<sup>5</sup> The hearing record reflects that the student experienced increased behavioral challenges in third grade resulting from heightened anxiety, attentional variability and perseverative thinking (Tr. pp. 451, 587-88; Dist. Ex. 4 at p. 7; 7 at p. 1). During third grade the student was able to sustain focus for only five to ten minutes, was unable to complete class work without direct teacher support and appeared to have academic abilities that he did not apply in the classroom (Dist. Exs. 1 at p. 2; 3 at pp. 5-7; 4 at pp. 5, 7; 7 at pp. 1-2; see Dist. Exs. 25; 26; 27 at p. 1). He exhibited disruptive negative attention seeking behaviors that resulted in a significant amount of time off task and subsequently, poor task completion (Tr. p. 603; Dist. Ex. 3 at p. 6; 6 at pp. 1-2; 7 at p. 1).

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<sup>2</sup> The hearing record reflects that in 2007 the student was tested for pediatric autoimmune neuropsychiatric disorders associated with streptococcus (PANDAS) due to elevated levels of the strep antibody and the subsequent development of behaviors (i.e. separation anxiety, obsessive thoughts and compulsive behaviors, etc.) and was treated with antibiotics (Dist. Ex. 5 at p. 2; Parent Ex. D at pp. 5-6). However, there was no definitive diagnosis of PANDAS (Dist. Ex. 5 at p. 2).

<sup>3</sup> The parties and IHO use the words assistant and aide interchangeably throughout the hearing record. As no one is disputing the correct term, and in order to reduce confusion, I will use the word assistant through this decision.

<sup>4</sup> A district psychological re-evaluation report dated January 2008, indicated that during the 2007-08 school year when the student was in first grade he received among other things, consultant teacher special education services as opposed to attending an integrated co-teaching classroom (Dist. Ex. 10 at p. 1).

<sup>5</sup> The student obtained a Full Scale IQ of 84 in the low average range on a spring 2010 implementation of the WISC-IV; however the evaluator noted in her report that the score should be interpreted with caution as it was comprised of discrepant scores across four domains and may be an underestimate of the student's true potential as he was inattentive, distracted and disregulated throughout the course of testing (Parent Ex. D at p. 13). The evaluator further noted that the low average score represented a decline from previous test results (*id.*).

On February 23, 2010, a subcommittee of the CSE convened at the request of the parent (Dist. Ex. 3 at p. 6; Parent Ex. C at p. 11). At this meeting, the CSE subcommittee reviewed a functional behavior assessment (FBA) of the student which reflected data taken during January 2010 related to the duration of his off task behavior, and also reviewed anecdotal records regarding the student's disruptive behaviors (Tr. pp. 50-51, 373; Dist. Exs. 3 at p. 6; 6). These behaviors had recently become more serious in nature, prohibited the student from producing class work, impacted the student's adaptive functioning and also affected the learning of other students in the class (Dist. Exs. 3 at p. 6; 6 at p. 1). The subcommittee agreed that the student required a behavior intervention plan (BIP), and discussed strategies for use in the classroom, including the use of conversations with the student about appropriate classroom behavior, modified seating, a classroom office space, complex tasks broken into steps, social stories, and having the student step out of the class to a specific location when he required a break, in order to regroup and talk about his behavior (Dist. Ex. 3 at p. 7). The February 23, 2010 IEP reflected that the school psychologist and "building team" would develop the student's BIP based on the outcome of the subcommittee and present it to the parents (*id.*); *see* Tr. p. 50). The parents were in agreement with the recommendation of a BIP (Dist. Ex. 3 at p. 7). The hearing record also reflects that the CSE determined that the student required additional support in the classroom and that the CSE chairperson indicated that additional support would be identified (Tr. pp. 408-14).<sup>6</sup>

On March 5, 2010 the parents met to review the student's BIP with the student's regular education and special education teachers, his speech therapist and the consulting psychologist who wrote the student's BIP (Tr. pp. 740-41; Dist. Ex. 7 at p. 1; *see* Parent Ex. C at pp. 17-19, 21).<sup>7</sup> The hearing record reflects that at the suggestion of the director of special education at the time, the district staff determined that only certain components of the BIP should be implemented at that time (Tr. pp. 52, 379-80, 458-59). Additionally, the parents were informed during the March 5th meeting that the additional support of a 1:1 assistant, which they believed had been recommended by the CSE chairperson at the February 23, 2010 CSE meeting, would not be provided (*see* Tr. pp. 738-741).

After the meeting, in an email to the CSE chairperson dated March 5, 2010, the parents informed the district that they were concerned that the district was "unable to provide a qualified staff member to implement the behavioral plan" that was developed for their son, noting that they believed that the need for this staff member was "unanimously agreed upon" as essential to the success of the behavioral plan at the February 23, 2010 CSE subcommittee meeting (Parent Ex. C at p. 22). The email indicated that the parents were willing and able to find qualified staffing if the district was unable to do so, that the district was failing to meet their son's needs, and that the issue needed to be addressed post haste (*id.*).<sup>8</sup>

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<sup>6</sup> The hearing record reflects that the person who chaired the February 23, 2010 CSE meeting was involved only temporarily as he was filling in for the regular CSE chairperson who was absent (Tr. pp. 1316-17, 1323, 1328).

<sup>7</sup> The hearing record reflects that the meeting was initially scheduled for March 1, 2010 but was rescheduled due to weather for March 5, 2010 (Parent Ex. C at pp. 17-19, 21).

<sup>8</sup> The parents' March 5, 2010 email was also sent to the director of special education, the consulting psychologist, the student's third grade special education and regular education teachers, his speech therapist, and the assistant principal at the student's elementary school (Tr. pp. 182, 247, 449, 594).

The district's special education director responded to the parents shortly thereafter and indicated that he was reviewing the situation with the CSE chairperson and with the staff at the student's school (Parent Ex. C at p. 22). He indicated that there did not appear to be a record of a CSE recommendation for an assistant from the February 23, 2010 CSE meeting or at any other time, however, he would check further and visit the school on the following Monday (*id.*). According to the special education director, he had not been told that the school could not implement a plan needed by the student and stated that "we will ensure that happens" (*id.*).

In an email to the student's mother dated March 6, 2010 the special education director again indicated that they would "figure this out and make things work" and that he would speak to her the following Monday (*id.* at p. 25). The director of special education emailed the parent again on March 8, 2010 indicating that he would be out of the office that day but had written to the consulting psychologist and the student's team to better understand the circumstances and that he may not be able to get back to her until the following afternoon (*id.* at p. 30).

The student underwent a private psychoeducational evaluation over four days beginning on April 23, 2010 and ending on May 14, 2010 (Parent Ex. D). The student's mother completed an application to Carmel for the student for the 2010-11 school year on April 27, 2010 and on May 12, 2010 she signed a contract enrolling the student at the school for the 2010-11 school year (Dist. Ex. 47; Parent Ex. E).

A subcommittee of the CSE met on June 15, 2010 for an annual review of the student and to develop his IEP for the 2010-11 school year (Tr. p. 626; Parent Ex. F at p. 1). However, the hearing record reflects that the private evaluation report commenced on April 23, 2010 was not presented to the CSE because it was not completed (*see* Tr. pp. 625-26; Parent Ex. C at p. 39).

The resulting IEP was similar to the student's previous February 23, 2010 IEP in that for fourth grade, the CSE recommended an integrated co-teaching class to support the student in math, writing, reading, organizational skills, social skills, and to provide additional behavioral supports; parent counseling and training; group speech-language therapy once per week both in the classroom and in the therapy room; and continued the student's positive reinforcement plan (*compare* Dist. Ex. 3 at pp. 1-2 *with* Parent Ex. F at pp. 2, 3). However, although the June 15, 2010 IEP also reflected new information including that the teaching assistant would help with the implementation of the student's BIP, the collection of data required to assess the effectiveness of the BIP, that the teaching assistant would support the student's participation in and completion of class activities, monitor his social interactions and safety on the playground, and support the student during art, library and recess, the IEP continued to recommend a shared teaching assistant (6:1) in the classroom setting (Parent Ex. F at pp. 2, 3). Additionally, the IEP included new program modifications related to the student's need for refocusing and his potential need for a quiet work area to complete tasks, the modulation of his internal thinking, his need for larger tasks broken into smaller pieces, the use of checklists, opportunity for verbal rehearsal of directions, and the use of social stories surrounding the social and classroom situations that the student had difficulty with (*id.* at pp. 3-4). In addition to provision of monthly team meetings which were also carried over from the previous IEP, the June 15, 2010 CSE recommended behavioral intervention consultation for the student's teacher twice per month (*id.* at p. 4). The

hearing record reflects that the district sent a copy of the student's June 15, 2010 IEP to the parent on June 30, 2010 (id. at p. 1).

The parent notified the CSE chairperson via email on August 16, 2010 that she was placing the student outside the district for the 2010-11 school year (see Tr. pp. 84, 122-23; see also Dist. Ex. 33). The CSE chairperson responded to the parent's notice with a letter dated August 18, 2010 informing the parent that she was requesting that the CSE reconvene with the parents to consider their concerns and recommend any changes to the student's IEP that may be needed to ensure he received an appropriate program (Dist. Ex. 32). Also on August 18, 2010 the district sent the parents a corrected 2010-11 IEP; although issued in August 2010 this IEP bears a date of June 15, 2010 (Dist. Ex. 4 at p. 1). The attached cover letter indicated that a clerical error had been made with regard to the student's teaching assistant support and that the teaching assistant time, ratios and durations discussed at the previous CSE meeting were now correctly reflected in the student's June 15, 2010 IEP (id.). Specifically, the IEP as revised recommended the student receive 1:1 teaching assistant support for two and a half hours five days per week and 2:1 teaching assistant support for two and a half hours five days per week in the classroom setting (id. at p. 3).<sup>9</sup> In an email to the CSE chairperson dated August 30, 2010 the parent indicated that she had returned from vacation on August 27, 2010 and received the CSE chairperson's letter of August 18, 2010 and that she and her husband did not believe it would be practical or productive to reconvene the CSE and discuss the concerns that the parents had previously detailed in earlier meetings (Dist. Ex. 33). The letter also reiterated that the parents had recently notified the district that they were enrolling the student in Carmel Academy for the 2010-11 school year (id.). The CSE chairperson responded by email the next day stating that it was her understanding that all of the parents' concerns had been addressed at the June 15, 2010 CSE meeting but that the CSE would remain available to discuss any concerns the parents may have should they want to meet in the future (id.). The hearing record reflects that no such meeting was held and that the student attended Carmel Academy for the 2010-11 school (see Parent Exs. K; L).

The following year, in preparation for the student's upcoming annual CSE meeting on April 7, 2011 the district school psychologist conducted a triennial psychological reevaluation of the student (see Tr. pp. 181-83; Dist. Ex. 18). On April 20, 2011 a district special education teacher also conducted an educational reevaluation of the student for the upcoming meeting (Tr. p. 184; Dist. Ex. 19).

The CSE subsequently convened on May 25, 2011 to develop the student's IEP for fifth grade for the 2011-12 school year (Dist. Ex. 5). The resultant IEP recommended the student receive direct consultant teacher services of ten 40-minute sessions in a four-day cycle, a full time 1:1 teaching assistant (six hours per day), group speech-language therapy, counseling services, and further recommended individual parent counseling and training for the student's parents (id. at p. 1). The IEP reflected that an FBA and a BIP were developed for the student and that the BIP would continue to be implemented for the student (id. at p. 3).

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<sup>9</sup> Testimony by the student's mother indicated that she received the corrected version of the student's 2010-11 IEP (see Tr. pp. 643-44).

The hearing record reflects that the student continued to attend Carmel for fifth grade during the 2011-12 school year because, although they wanted the student to return to the district at some point, the parents believed the transition to the district middle school would be traumatizing for the student as he was still academically and socially vulnerable (Tr. pp. 650-52).

On June 27, 2011 the parents filed a due process complaint notice for the student's program for the 2010-11 and the 2011-12 school years (IHO Ex. 1).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated June 27, 2011, the parents notified the district that they were rejecting the proposed 2011-12 IEP, were retaining their son at Carmel for the 2011-12 school year, were requesting an impartial hearing regarding both the 2010-11 and 2011-12 school years, and that they would be seeking tuition reimbursement for Carmel for both the 2010-11 and 2011-12 school years (IHO Ex. 1).<sup>10</sup> With respect to the 2010-11 school year, the parents asserted that procedurally, the district CSE personnel ignored the student's then district teachers', therapists', and psychologist's admonitions that the current level of staff support was insufficient to ensure that the student's needs could be met and that he required 1:1 teacher assistant support throughout the day (id. at pp. 4-5). The parents asserted that substantively, the June 2010 IEP was flawed as it provided for a 6:1 teaching assistant rather than the 1:1 teaching assistant that was agreed to at the CSE meeting (id. at p. 5). The parents also assert that the recommended integrated co-teaching (ICT) placement was inappropriate given the nature and severity of the student's behavioral issues (id.).

With respect to the 2011-12 school year, the parents asserted that procedurally, the May 2011 CSE denied them meaningful opportunity to participate in the IEP creation process (IHO Ex. I at p. 8). Specifically, the parents asserted that when they tried to find out the student to teacher ratio for the recommended consultant teacher, they were advised that the district was not required to provide such information on IEPs (id.). The parents asserted that the May 2011 IEP was substantively inappropriate because the student, who had well documented attention deficits, was placed in a general education classroom with up to 25 students (id.). They contended that "with or without a consultant teacher who is simultaneously responsible for a number of other special needs students" the student would have been presented with a "barrage of distractions", and would find attending and learning difficult (id.). The parents also assert that the student would have become highly anxious and overwhelmed and would have had difficulty transitioning from one classroom to another in the large middle school (id.). In the due process complaint, the parents also outlined how Carmel was an appropriate nonpublic placement, including its class sizes, teacher qualifications, the related services it provides and the progress the student had made (id. at pp. 5-7, 9). For a remedy, the parents proposed that the IHO find that the district failed to offer the student a FAPE for the 2010-11 and 2011-12 school years and order reimbursement for the cost of tuition at Carmel for those years (id. at p. 9).

In its July 7, 2011 response to the parents' due process complaint, the district asserted that for the 2010-11 school year, the district increased supports and services to the student and that

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<sup>10</sup> The parents noted that by letter dated August 16, 2010, they had rejected the student's IEP for the 2010-11 school year and placed the district on notice of the student's unilateral placement (IHO Ex. 1 at ¶ 15).

during the prior school year [with fewer supports and services] the student was able to complete grade level work (IHO Ex. 6 at p. 2). The district further asserted that for the 2011-12 school year the student would be assigned a consultant teacher during his core classes, and that the student ratio was recommended to be 1:1 for the teaching assistant (id.). The district also asserted that the CSE recommended adding counseling to the student's plan (id.). Finally, the district asserted that it offered the student a FAPE in the least restrictive environment (LRE) for both years, that Carmel did not meet the student's special education needs in the LRE, and that the equities do not favor an award of tuition reimbursement (id.).

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened on September 9, 2011 and after a total of nine hearing days, concluded on March 9, 2012 (Tr. pp. 1, 21, 286, 495, 726, 840, 920, 1144, 1374). In a decision dated July 26, 2012, the IHO determined that for the 2010-11 school year (a) the district failed to offer the student a FAPE; (b) Carmel was not an appropriate unilateral placement, and (c) if Carmel had been appropriate, the parents were only entitled to 50% reimbursement for the cost of the student's tuition (IHO Decision at pp. 12, 15, 16). With respect to the 2011-12 school year, the IHO determined that (a) the district offered the student a FAPE; (b) Carmel was not an appropriate unilateral placement; and (c) if overturned on Prong II, and Carmel is later determined to be an appropriate placement, equitable considerations do not favor an award of tuition reimbursement (id. at pp. 12, 13, 15, 16).

The IHO first noted that the IEP that was entered into evidence as District Exhibit 4 included a cover letter dated August 18, 2010 and was the "corrected" copy of the IEP developed at the June 15, 2010 CSE meeting (IHO Decision at p. 7). The IHO also noted that the original IEP, entered into evidence as Parent Exhibit F, was mailed to the parents on June 30, 2010 (id.).<sup>11</sup> The IHO found the lag between the date the parents received the original IEP and when they received the corrected IEP to be of particular significance, as the behavior plan and its update placed into evidence could never be fully implemented without a full time assistant or assistant being assigned to the student (id.). The IHO further noted that the corrected IEP was sent to the parents after their notice of withdrawal, and he opined that the notice may have been the reason for the district's review of the original IEP sent to the parents (id. at p. 8).

With respect to the 2010-11 school year, the IHO found that the district could not properly implement the behavior plan fully, as the student to teaching assistant ratio had not changed from 6:1 to 1:1, as agreed upon during the February 2010 meeting (IHO Decision at p. 8). The IHO also found that the nature of the student's behaviors were a direct manifestation of his disability, and needed to be addressed in a meaningful way as they directly and demonstrably affected his ability to benefit from his educational program (id. at p. 13). The IHO also noted that it should have been apparent to all concerned that the student required the services of a 1:1 teaching assistant (id. at p. 8). The IHO determined that for both of the student's 2009-10 and 2010-11 school years, despite the district's careful attention to developing an FBA and BIP<sup>12</sup> based on the FBA, the district never put into effect the plan that was developed (id. at p. 13).

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<sup>11</sup> Again both IEPs are confusingly dated June 15, 2010 (Dist. Ex. 4; Parent Ex. F).

<sup>12</sup> The IHO also refers to the BIP as the behavior modification plan and behavioral plan (IHO Decision at p. 13).

The IHO also noted that the student's resistance to his education was in part, emotional in nature (id.). The IHO noted that the student's behavior clearly impacted his ability to benefit from his educational program and any direct causal relationship from either the student's autism or his emotional difficulties was the fault of the district for not fully addressing the issues presented in the 2010-11 IEP after the results of the unsuccessful 2009-10 school year program (id. at pp. 13-14).

With respect to the student's fifth grade school year, the IHO determined that the student's FBA and BIP that were not fully implemented during the 2010-11 school year were fully addressed in the 2011-12 IEP (IHO Decision at p. 14). The IHO also found that the updated evaluations performed for the 2011-12 IEP demonstrated that the student had the intellectual capacity to gain benefit from the program proposed for fifth grade with the BIP fully implemented as anticipated in the IEP, and that the district had finally put into place the necessary personnel to effectuate the plan (id.).

With respect to the appropriateness of Carmel, the IHO first noted that although his decision was focused on the 2010-11 school year, the findings were appropriate and applicable to both the 2010-11 and 2011-12 school years, should his Prong I findings be determined incorrect (IHO Decision at p. 15). In finding that Carmel was not an appropriate placement for both years, the IHO first emphasized that while the teaching staff had special education credentials and appeared to be qualified to teach a special education program, the first half of the school day, long believed to be an important part of the school day, was reserved for Jewish studies (id. at pp. 15, 16). Based on this, the IHO determined that only one half of the parents' tuition costs could be reimbursed [if they were to have prevailed on Prong II] (id. at p. 15). With respect to the program at Carmel, the IHO found that the student's report card provided no objective basis to judge the grades provided, and therefore no method for objective comparison with the student's prior work within the district (id.). The IHO also determined that statements that the student is happier or less oppositional at Carmel [than at the public school] lack the sufficiency to meet the requirements of proving the appropriateness of the private school (id.). The IHO noted that the parents provided neither standardized test results nor an objective method of comparing the student's work at the district and Carmel (including examples of the student's work product), in order to determine whether educational progress was made at Carmel (id. at pp. 15-16). The IHO also determined that the anecdotal evidence the behavior approach implemented at Carmel had better results than the BIP improperly implemented at the district during the 2010-11 school year (id. at p. 16). The IHO also determined that while he was told that most of the program at Carmel was applicable to all students and that it was individualized for the student here, the hearing record did not demonstrate how it was individualized [to meet the student's unique needs] (id.). Finally, the IHO rejected the parents' fear that the student would be stigmatized by having a 1:1 teaching assistant at the district's middle school, as the student essentially had the same support while at Carmel (id. at pp. 9, 16-17).

With respect to equitable considerations in relation to the parents' claims with the 2010-11 school year, the IHO determined that although the parents had applied for acceptance at Carmel in April 2010, they did so only after the district failed to provide for the 1:1 assistant teacher that had been promised during the February 2010 meeting (IHO Decision at p. 8). The IHO also determined that the parents' failure to provide the district with a longer period of

advance notice of their unilateral placement was justified by the "tortured road" they had to travel with respect to the implementation of the student's BIP during the 2009-10 and 2010-11 school years (*id.* at p. 16). With respect to the 2011-12 school year however, the IHO found that the district had finally addressed the student's needs, and the parents' fear of the student being stigmatized by reason of having a 1:1 teaching assistant was not equitable reasoning for the unilateral placement (*id.* at pp. 16-17).

It is from these decisions and findings of fact that both parties have appealed.

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

In their petition, the parents first assert that the IHO correctly found that the district failed to offer the student a FAPE for the 2010-11 school year. The parents also assert that the IHO erred in how he interpreted facts within the hearing record concerning the appropriateness of Carmel for both the 2010-11 and 2011-12 school years. The parents do not appeal the IHO's decision that the district offered the student a FAPE for the 2011-12 school year - instead, their petition focuses on the assertion that the IHO misinterpreted facts concerning Carmel and his determination that it was not an appropriate placement for the 2011-12 school year. The parents do however, provide a blanket statement in the petition that "errors regarding the applicable legal standards are addressed in the memorandum of law" (Pet. ¶ 71).

With regard to the 2011-12 IEP, the parents assert in their petition that the hearing record does not support a finding that the student could function within a large classroom setting at the district's middle school, and the IHO misread the hearing record, asserting that the district's assignment of a 1:1 teaching assistant would only further exasperate the students anxiety. With regard to the appropriateness of Carmel for the 2011-12 school year, the parents assert in their accompanying memorandum of law that the IHO utilized an improper legal standard in determining that Carmel was inappropriate for the student, and that moreover, the IHO's determination turned on erroneous, extra-legal and discriminatory considerations. With regard to equitable considerations for the 2011-12 school year, the parents assert within their accompanying memorandum of law that the IHO utilized an improper legal standard, applying the substantive Prong I Burlington/Carter analysis instead of an equities based standard and by imposing an improper legal standard with respect to the 10-day notice provision as it pertains to equitable considerations.

In its answer, the district cross-appeals the IHO's determination that it failed to offer the student a FAPE for the 2010-11 school year and that it was impossible for the district to have fully implemented the BIP with the contemplated personnel assigned to the student. The district also cross-appeals the IHO's finding that equitable considerations favored an award of tuition reimbursement for the 2010-11 school year, asserting that, among other things, the parents failed to share a private evaluation with the CSE, they signed the placement contract with Carmel prior to the CSE meeting, they failed to notify the CSE about the contract, and they rejected the district's offer to reconvene a CSE to address their concerns with the original June 2010-11 IEP.

The parents answered the district's cross-appeal, asserting and reiterating that the IHO properly found a denial of FAPE and awarding tuition reimbursement for the 2010-11 school year.

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [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; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO'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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; 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 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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 includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay

expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Scope of Review**

A review of the parent's petition reveals that the IHO's adverse finding that the district offered the student a FAPE for the 2011-12 school year was not raised therein, and as such this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see J.F. v New York City Dept. of Educ., 2012 WL 5984915, at \*6 [SDNY Nov. 27, 2012]). To the extent that the parent may have attempted to raise additional errors solely in the memorandum of law, it has long been held that a memorandum of law is not a substitute for a petition for review, which is expected to set forth the petitioner's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8[a][3], [b]; Application of a Student with a Disability, Appeal No. 12-113; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-121; Application of a Child with a Disability, Appeal No. 07-112). Finally, I note that while the parents note their dissatisfaction with how the IHO interpreted the hearing record, a blanket statement in a petition stating that "errors regarding the applicable legal standards are addressed in the memorandum of law" is insufficient and only serves to circumvent the pleading requirements (see T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at \*14-\*15 [S.D.N.Y. Sept. 16, 2013] [holding that "catch-all allegations" in a due process complaint notice are insufficient to bring an issue within the scope of an impartial hearing]; N.K. v New York City Dep't of Educ., 2013 WL 4436528, at \*6 [S.D.N.Y. Aug. 13, 2013] [rejecting the claims in an amended due process complaint pursuant to a unilateral reservation of rights where permission of the school district or the IHO was absent]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at \* 5 [E.D.N.Y. Jan 6, 2012] [rejecting the proposition that a general reservation of rights in a due process complaint notice preserves additional procedural arguments later in the proceeding]; see also 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]).

As to the next preliminary matter, I note that the IHO failed to make a determination as to which was the operative IEP for the 2010-11 school year for the purpose of determining whether the district offered the student a FAPE. Regulations require that at the beginning of each school

year a school district must have an IEP in effect for each child with a disability within its jurisdiction (34 CFR300.323[a]; 8 NYCRR 200.4[e][1][ii]) The IDEA also provides that reimbursement for private tuition can be reduced or denied if parents do not provide districts with at least 10 business days notice of their decision to remove the student from the public school (34 CFR 300.148[d][1][ii]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]; L.K. v. Dep't of Educ., 2011 WL 127063 at \*12 [E.D.N.Y., 2011]; R.B. v. Dep't. of Educ., 713 F.Supp.2d 235, 248 [S.D.N.Y 2010]). As noted above, after the parents notified the district of their concerns with the original June IEP and their subsequent notice of unilateral placement of the student at Carmel starting in September, the district in fact sent a corrected IEP to the parents, which was received by the parents prior to the start of the school year. This corrected IEP is the document that should have been analyzed because it preceded the student's unilateral placement at Carmel and the purpose of the unilateral placement notice provision is to encourage, not discourage, districts to make corrections to IEPs in this type of circumstance (McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at \* 8 [S.D.N.Y. Jan. 22, 2013] [holding that a corrected IEP, not an earlier version of an IEP, was the operative IEP to be analyzed when the parent was aware of the corrections]). Therefore, I find that the IHO erred when he made his FAPE findings based on the prior inoperative IEP (Parent Ex. F), and not the corrected IEP (Dist. Ex. 4) (L.K., 2011 WL 127063 at \*12 [E.D.N.Y., 2011]; R.B., 713 F.Supp.2d at 248). Therefore, issues involving the question of FAPE in the instant appeal before me will be determined using the corrected June 2010 IEP (Dist. Ex. 4).

## **B. 2010-11 School Year IEP**

The crux of the parties' contentions with respect to the 2010-11 IEP is whether the student would have been provided with adequate staffing to support his classroom participation and to implement his BIP. The parties do not contest the adequacy of the statements of the student's present levels of academic performance in the IEPs, nor do they contest the identified deficits, goals and short-term objectives, or whether the student's educational placement was in the LRE – rather, the parties are in essence arguing over the adequacy of the teacher assistant support provided for in the student's IEP. The IHO found that the student would not have been provided with adequate support to fully implement the student's BIP "into the 4<sup>th</sup> Grade" (IHO Decision at p. 8). For the following reasons, I disagree and find that the hearing record reflects that for the 2010-11 school year, the IEP, as revised in August 2010, provided the student with adequate staffing to support the student's classroom participation and to implement his BIP.

The hearing record shows that the student has deficits in the areas of academic performance, language skills including pragmatic language, social/emotional development, and attending skills (Tr. pp. 183-84; Dist. Exs. 3 at pp. 3-5; 10; 17; Parent Ex. D at pp. 13-34). A review of the IEP reveals that it addressed the student's pragmatic language needs with speech-language services of one 30-minute group (of 5) session per week in the classroom setting and one 30-minute group (of 5) session per week in the therapy room (Dist. Ex. 4 at p. 2). To address the student's needs in math, writing, and reading, the IEP provided the student with integrated co-teaching services two hours per day in a 6:1 ratio, as well as 1:1 teaching assistant

support for two and a half hours, five days per week and 2:1 teaching assistant support for two and a half hours, five days per week (id. at pp. 2, 3). Furthermore, and as directly related to the parties' concerns regarding the level of support offered to the student, I note that the student's organizational, social, and behavioral needs were also addressed on the IEP by his inclusion in the ICT classroom and the provision of the teaching assistant in various ratios (id.).

Testimony by the district CSE chairperson explained the increase in teacher assistant support provided in the IEP, stating that the student had received teacher assistant support for two hours per day in a 6:1 ratio during third grade, but that for fourth grade the student would receive five hours of teacher assistant support per day (Tr. pp. 136-39). This support was to be provided in a 1:1 ratio for two and a half hours per day and in a 2:1 ratio for an additional two and a half hours per day (Tr. pp. 137-38). The CSE chairperson's testimony indicated that the 1:1 teacher assistant support would be provided during the time when the special education teacher was not in the classroom to ensure that the student would have the opportunity for 1:1 adult support and that during the time when the special education teacher was in the classroom, the student would receive 2:1 teacher assistant support (shared at times with one other student), as well as the support of the special education teacher (Tr. p. 84).

After reviewing the hearing record, I do not find it unreasonable for the teacher assistant to address the potential needs of two students when the special education teacher is also available to assist either of these students as part of her 6:1 integrated co-teaching responsibilities. Furthermore, a review of the student's BIP reveals that the plan was intended to be implemented by the student's classroom teacher, special education teacher, and his speech therapist, in addition to designated support staff (the student's designated teacher assistant) (Dist. Ex. 7 at p. 5; see also Dist. Ex. 4 at p. 3). Therefore, responsibility for providing support to the student would be sufficiently shared among multiple qualified staff. Testimony by the district behavior consultant who wrote the student's BIP indicated that while she believed the student's third grade IEP (2009-10) did not provide enough support to implement the BIP, she did believe that the increased teacher assistant time reflected in the IEP provided sufficient support to implement the BIP (Tr. pp. 374, 459-61). I note that a review of the BIP reveals that it was very detailed, thorough, and consistent with the information reflected in the FBA regarding off-task and disruptive behaviors that interfered with the student's ability to complete tasks (target behaviors) and with regard to the function of these behaviors (compare Dist. Ex. 7 at pp. 1-2 with Dist. Ex. 6 at pp. 1-2). I note also that the behavior consultant would have been knowledgeable with regard to how much teacher assistant support was required to implement the plan that she had written for the student. The special education co-teacher in the class that the student would have attended also testified that the BIP could have been implemented with the personnel specified on the IEP (Tr. p. 312).

The IEP also provided support to address the student's off task and disruptive behaviors via new strategies which addressed the student's management needs including the provision of a study carrel or other quiet work area in order to assist the student in maintaining focus on assigned tasks; a structured plan to assist the student's modulation of internal thinking (such as jotting ideas on an index card); multi-step tasks and lengthy assignments broken into smaller parts and presented in a series of three to four item checklists; opportunity to verbally rehearse with an adult or peer prior to following through with directions presented to him; the use of

social stories surrounding the social and classroom situations in which the student experienced consistent difficulty as well as access to these stories and the opportunity to revisit the ideas presented in them in order to preview or review acceptable behaviors across the targeted social situations (Dist. Ex. 4 at pp. 3-4). The IEP also reflected the addition of behavioral intervention consultation services twice per month for one hour for the student's teacher as a support for school personnel on behalf of the student, which included monitoring of the data collected, assessing the impact of the FBA, and working with teachers and the student to ensure that effective and consistent positive interventions are developed and implemented (*id.* at p. 4).

In conclusion, based on the above, I find that the IEP provided adequate support to the student to implement the BIP and was reasonably calculated to enable the student to receive educational benefit (Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]).

### **C. 2011-12 IEP**

Even though the parents have not properly appealed the IHO's now final and binding determination that the district offered the student a FAPE for the 2011-12 school year by failing to include it in their petition for review, assuming for the sake of argument that it had been properly appealed, for the following reasons their claims that the district failed offered the student a FAPE would nevertheless fail. The crux of the parties' contentions with respect to the 2011-12 school year again flow around the adequacy of the teacher assistant support recommended in the May 2011 IEP rather than the statements of the student's present levels of academic performance, nor do they contest the accuracy or appropriateness of the identified deficits, goals and short-term objectives, or whether the student's educational placement was in the LRE (see Parent Mem. of Law at pp. 5-9).

The IEP indicated that the student demonstrated deficits in mathematics, reading, and writing skills (Dist. Ex. 5 at pp. 2-3, 7, 8). To address the student's academic needs the May 2011 IEP recommended the student be placed in a general education classroom with consultant teacher services of ten 40-minute sessions in a four-day cycle in the core academic areas (*id.* at pp. 1, 3). Testimony by the special education teacher who would have provided the consultant teacher services to the student in fifth grade had he attended the district, indicated that she would have provided direct services in the student's writing and math classes each of which met for an 80 minute block every other day, and his reading class which met for a 40 minute block every other day and often more frequently (*id.*; Tr. pp. 503, 504-05). She also indicated that at times she would substitute a math or writing class and go into a science or social studies class if she felt a particular reading assignment would best be delivered in a small group or if she anticipated that students would need additional support (Tr. p. 505).

The consultant teacher also testified that she was responsible for educating the team as to the needs of the students that she worked with, providing direct instruction to her students both by supporting classroom instruction and by providing small group instruction, and that she also provided emotional support where necessary, all of which, I note, are supports consistent with needs reflected in the student's IEP (Tr. p. 504; see Dist. Ex. 5 at pp. 7, 8).

With regard to the 80-minute instructional blocks, the consultant teacher testified that the blocks are typically broken down into various activities (Tr. pp. 511-12). For example, she indicated that when students come in to class there is a small, "do now" activity waiting for them, after which they then write down their homework assignment and get themselves settled in (*id.*). She indicated that most classes then move into a fairly brief teacher-led lesson, after which students transition to either an independent activity or a group activity with the teacher interjecting or providing some additional instruction or clarification throughout the period (Tr. p. 512). At the end of the block period the class is brought together to recap what had been covered that day (*id.*). The consultant teacher's testimony indicated that there were natural breaks when instruction transitioned from teacher led instruction to student work and that the teachers provide additional breaks if the work is lengthy or tedious (Tr. pp. 512-13). As such, the evidence demonstrates that the instructional format utilized during the blocks would accommodate the student's variability in attention skills and related needs that were reflected in the IEP (*see* Dist. Ex. 5 at p. 7; *see also* Dist. Ex. 7 at pp. 1, 2, 4, 5).

To further address the student's attention issues and impulsivity which the May 25, 2011 IEP indicated continued to impact his overall functioning, the CSE recommended full time 1:1 teacher assistant support (Dist. Ex. 5 at pp. 1, 2, 3). The hearing record reflects that the teacher assistant would provide both academic and behavioral support to the student. Testimony by the consultant teacher indicated that in the student's case, the teacher assistant would provide support to help him stay on task and complete work and at the same time provide structures and supports so that he can work more independently and the BIP reflected that the teacher assistant would assist with the implementation of the student's BIP, the goal of which was to develop greater independence in task completion and to lower the frequency of his disruptive behavior (Tr. p. 506; Dist. Exs. 5 at p. 3; 7 at pp. 1-5).

A review of the student's BIP reveals that it provided for a high level of support to the student in that it included many specific and detailed strategies which were designed to enhance his ability to successfully complete class work. For example, the BIP provided for provision of a checklist of the classroom routines; assignments broken down into manageable steps and modified with respect to volume and length; monitoring of task completion and redirection provided as needed with support gradually faded to establish check-in points (e.g., the student will solve the next two problems and teacher assistant will be back to see how he did); access to a quiet work space in the classroom when the student is having particular difficulty getting started with an assignment or is engaging in a high level of off task behavior; and the use of graphic organizers and visual organization charts to minimize the student's efforts in organizing his work (Dist. Ex. 7 at pp. 4-5). The BIP also provided for positive reinforcement using a baseball theme which designated a "hit" for successfully completed assignments and for which the student earned a token (*id.* at p. 5).<sup>13</sup> A set number of tokens earned each day would be used toward reward at home provided by the student's parents (*id.*).

The BIP also provided the student with a high level of behavioral support as it contained detailed strategies designed to reduce disruptive behaviors including, among other things, a set of behavioral expectations related to designated periods of instruction and transition times, which were to be previewed in advance and posted next to the student's work space; instruction and

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<sup>13</sup> The BIP employed a baseball theme since the student had shown an interest in baseball (Dist. Ex. 7 at p. 2).

work periods divided into manageable segments (5-10 minutes); provision of breaks following two consecutive periods of positive behavior; and seating at the back of the classroom to minimize the student's access to "an audience" (Dist. Ex. 7 at pp. 2-3). Additionally, the BIP provided feedback to the student at frequent intervals via a "score card" system which would be used to tally how often he met the behavioral expectations (*id.* at p. 2). For each period of continuous positive behavior the student would earn a token which would be used to earn access to preferred activities such as playing a math game with a peer, working with a partner, or reading a favorite comic (*id.*). Following each occurrence of disruptive behavior or not adhering to the stated expectations, a "strike" would be given: after the first occurrence of behavior a nonverbal prompt would be given to the student to read the expectations card; after the second occurrence of behavior the student would be given a verbal prompt regarding the expectations card and a warning that if he continues he will have to leave the class to complete his work; and after the third occurrence the student would be escorted to an alternate location to work (*id.* at p. 3). The student would return to the classroom after demonstrating two consecutive periods of positive behavior while completing a task or assignment (*id.*).

The BIP also included strategies to teach the student replacement behaviors including social stories which targeted topics such as appropriate classroom behaviors, why learning is important, taking responsibility and how to make friends laugh; a decision tree to use when the student is confronted with situations involving his peers as he sometimes reported that his behavior was due to others daring him to engage in inappropriate conduct; and a cognitive restructuring form which was designed to revisit an incident, take a closer look at the situation to better understand what happened, and figure out what the student might do differently the next time (Dist. Ex. 7 at pp. 5-7).

As noted above, the BIP was to be implemented by the student's regular education teacher, his special education teacher, and his speech therapist as well as the student's designated 1:1 teacher assistant (Dist. Ex. 7 at p. 5). Testimony by the consultant teacher indicated that the student's BIP could have been implemented in the district middle school setting given the supports that were recommended (Tr. p. 508). I note also that the IEP reflects that behavior plans and supports had worked well with this student (Dist. Ex. 5 at p. 8).

The IEP also identified the student's organizational skills as a deficit (Dist. Ex. 5 at pp. 7, 8). The IEP also addressed the student's management needs with strategies consistent with the student's BIP, noting that he responds to structure, clear routines and expectations; requires visual supports to follow multi-step directions, arrival and dismissal routines, and should be provided with visuals along with auditorily presented information throughout the school day; is internally distracted, has difficulty attending for extended periods of time, and requires breaks to increase his ability to focus on instruction and extend his comprehension of lessons presented; requires prompting to continue to perform a task; is not easily able to accept praise or criticism and needs to feel heard in a nonjudgmental way; and notes that the student requires the support of a BIP and that data will be collected regularly to monitor the effectiveness of the plan and assess when and if changes are needed (Dist. Ex. 5 at pp. 8-9).

With regard to the student's speech-language needs the IEP provided for two 30-minute small group (of 5) sessions per week to address his difficulties with social exchanges including

perseveration on topics, off topic remarks, perspective taking, and understanding the implications of his frequent and/or abrupt topic changes (Dist. Ex. 5 at pp. 1, 7). Counseling services of one 30-minute session per week in a small group (of 5) were also recommended to address the student's anxiety related to social/emotional, behavioral, and academic deficits (id.). Additionally, the IEP provided supports for school personnel on behalf of the student via speech-language consultation of two 15-minute periods per week wherein the student would be observed in unstructured settings at various times and/or the speech-language therapist would consult with various teachers to gather information regarding the generalization of the student's social skills; one 30-minute team meeting per quarter; and one 30-minute counseling consultation per month (id. at pp. 14-15).

Although the parents contended that a 1:1 assistant would be stigmatizing and would not enable the student to focus in the large class setting, the hearing record does not support this contention. The fifth grade IEP reflected that the teacher assistant would serve as a facilitator rather than an enabler in order to increase the student's ability to function independently (Dist. Ex. 5 at p. 3). Consistent with this, testimony by the consultant teacher indicated that in the middle school setting, the teacher assistant's role is to provide structure and support such as prompting, so that the student can work more independently (Tr. p. 506). Her testimony indicated that rather than having a teacher assistant "on top of" a student all day long, they look at a student's day closely and provide support where they think it is necessary, but fade back support when it is not necessary and where the student can be independent (Tr. p. 507; see also Tr. pp. 532-34). She further indicated that she believed it took a lot of negotiation, evaluation, and trial to see where students can be successful independently, while at the same time making sure that support is there if they need it and that adjustments in the level of support need to be made throughout the year (Tr. p. 507; see also Tr. pp. 530-34). The consultant teacher described how she had created visuals in a checklist form for a student to use as a guide to go from the bus to his locker that prompted the student on where to go and what to do, in a situation where a student had insufficient skills to get down the hall unassisted but where the student was embarrassed by the teacher assistant (Tr. pp. 534-35). She also testified that part of her function is to support teacher assistants and help them best work with the students to which they are assigned (Tr. p. 504).

To address the possibility that a student may have difficulty with large numbers of students and a noisy environment in the hallways, the consultant teacher testified that they are able to stagger arrival and departure times so that a student could leave the classroom a minute or two before the hallways become busy or wait a minute or two so the hallways could clear out (Tr. p. 549). She also indicated that for students who would find entering the building in a large crowd overwhelming, they have other entrances that students can use (Tr. p. 550).

Lastly, although the parent contended that there was nothing in the hearing record to show that the student could function in a large class, I note that the director of the student's private school testified that during both fourth and fifth grade, the student spent most of his day in the PALS special education classroom, (Providing Alternative Learning Strategies), however, he participated in the Core or non-special education program for science and social studies in a co-teaching model (see Tr. pp. 926-29, 971-72, 991-92). The director indicated that for fifth grade the student was also integrated into the Core co-teaching class for "specials" including

technology, physical education, art, lunch, and playground (Tr. p. 992). The director further testified that the Core program has approximately 16 to 18 students in a class and that the PALS class typically contained 10 students although it contained 13 students for the fifth grade year (Tr. pp. 932, 1008-09). As such, the combined co-teaching class included approximately 26 to 28 students. However, the director also testified that the combined Core and PALS classes contained just 20 to 21 students (Tr. p. 1012). I note that even at the lower number, this class size is not significantly smaller than the 22 to 23 students, which according to the consultant teacher, was the number of students in the co-teaching class that the student would have been in at the district (Tr. p. 518). Furthermore, the hearing record reflects that the student made progress in a co-teaching class of similar size at the private school during fourth and fifth grade, without the high level of support of a 1:2 and a 2:1 teacher assistant (see Tr. pp. 967, 973, 74, 977, 979, 982, 990, 991; Parent Exs. K at pp. 8-9; L at pp. 2, 3, 5, 6, 8; M at pp. 2,7).

Based on the above, even if the issue had been properly raised, the evidence would nevertheless favor the district in that the program offered in the student's May 25, 2011 IEP provided adequate support and was reasonably calculated to enable the student to receive educational benefit (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

## **VII. Conclusion**

Having determined that the district offered the student a FAPE for the 2010-11 school year and that challenges to the IHO's determination regarding the 2011-12 school year are not properly before me, it is not necessary to consider either the appropriateness of Carmel Academy or whether equitable considerations favor an award of tuition reimbursement (see M.C., 226 F.3d at 66; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13, aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]).

I have considered the parties' remaining contentions and find that I need not address them.

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

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

**IT IS ORDERED** that the IHO's decision dated July 26, 2012 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2010-11 school year.

**Dated:**            **Albany, New York**  
                         **September 19, 2014**

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