The University of the State of New York

The State Education Department
State Review Officer
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No. 11-068

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 New York City Department of Education

Appearances:
Thivierge & Rothberg, PC, attorneys for petitioners, Christina D. Thivierge, Esq., of counsel

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

DECISION

Petitioners (the parents) appeal in part from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Brooklyn Autism Center Academy (BAC) for the 2010-11 school year, denied full reimbursement for the costs of the student's home-based applied behavior analysis (ABA) services, and did not address the parents' claims for reimbursement for other home-based related services. Respondent (the district) cross-appeals from the portion of the impartial hearing officer's decision that awarded the parents reimbursement for home-based ABA instruction and supervision. The appeal must be sustained in part. The cross-appeal must be sustained.

Background

At the time of the impartial hearing, the student was attending BAC, which he has attended since February 2008 (Tr. pp. 150, 295, 758; Dist. Ex. 7 at p. 1; Parent Exs. N; P). The Commissioner of Education has not approved BAC as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student was also receiving home-based ABA services and ABA supervision, parent training services, private speech-language therapy, private occupational therapy (OT) services, and an after school social skills program at BAC two hours per week (Tr. pp. 361, 611, 672, 717, 741, 743). The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student has received diagnoses of autism and apraxia (Tr. pp. 382, 709-10).[1] The hearing record reflects that the student presents with "significant deficits in social-emotional, receptive and expressive language, behavior management, self-help and conversational and communication skills" (Dist. Ex. 12 at p. 1; see also Tr. pp. 711-12).[2] Specifically, the student displays difficulties with basic personal care skills, including aspects of toileting, showering and washing himself, and tying his shoes (Tr. p. 245). In addition, the hearing record reflects that the student has struggled with negotiating personal space, and has displayed stereotypical movements and vocalizations associated with autism (Tr. pp. 476-77). The hearing record indicates that the student uses a vocal output device to augment his ability to communicate (Dist. Ex. 4 at p. 3). In addition, the hearing record indicates that the student exhibits self-aggression and aggression toward others; behaviors characterized as hitting, grabbing, biting, eye closing, and elopement (Tr. pp. 215-16, 464).

On July 1, 2008, a district social worker interviewed the student's mother, reviewed the student's individualized education program (IEP) dated August 2007, and prepared a social history update report as a result of a referral of the student for a reevaluation requested by the student's mother (Dist. Ex. 7). The social history update report indicated that the student was ten years old at the time of the interview; that the August 2007 IEP recommended that the student receive educational programs and related services as a student with autism and that he receive 12-month programming with placement in a special class (6:1+1) in a special school with related services of daily individual OT sessions for 30 minutes and daily individual speech-language therapy sessions for 60 minutes; and that he participate in alternate assessment (id. at p. 1). The social history update report also indicated that the student attended BAC and was in a class with five other students who each had their own paraprofessional, and one special education teacher (id.). The report indicated that BAC did not provide any related services and therefore, the student received his recommended related services after school (id.). The social history update report also indicated, among other things, that the student was recommended for 15 hours of home-based ABA; that the student's mother expressed an interest in an augmentative communication device; that an application for an assistive technology evaluation was given to the student's mother for the student's occupational therapist to complete and return to the Committee on Special Education (CSE); and that the parent transported the student to and from BAC (id. at p. 2).

A district bilingual school psychologist conducted a psychoeducational evaluation of the student on May 4, 2009 (Dist. Ex. 6). The psychoeducational evaluation report indicated that the student, who was then 11.3 years of age, had been referred for reevaluation to determine continued appropriate program and school placement for him (id. at p. 1). The school psychologist observed the student and stated that he was "almost nonverbal" through most of the observation and "repetitively made low guttural vocalizations that did not have a communicative intent" but had a

[1] The hearing record defines "apraxia" as a motor planning problem that affected the student's ability to produce speech sounds (Tr. pp. 515-16).

[2] I note that the hearing record contains multiple duplicative exhibits. For purposes of this decision, only District exhibits are cited in instances where both a Parent and District exhibit were identical. I remind the impartial hearing officer that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

"ritualized sensory quality" to them (id.).[3] The school psychologist also noted that the student's eye contact with both his mother and the psychologist was "fleeting and not used to engage either person" (id.). The school psychologist further noted that the student "engaged in self-stimulating behaviors such as rocking, body clenching, and starting intently," especially while watching a movie (id.).

The psychoeducational evaluation report indicated that due to the student's cognitive/social/emotional functioning, a formal assessment of the student's present academic performance could not be administered at that time (Dist. Ex. 6 at p. 1). Instead, the evaluator informally assessed the student's adaptive behavior performance of day-to-day activities necessary to take care of oneself and get along with others through an interview with the student's mother, using the Vineland–II Survey Interview Form of the Vineland Adaptive Behavior Scale, Second Edition (VABS) (id. at p. 2). The results of this informal assessment revealed scores within the "Low" range for the student's communication, daily living skills, and socialization; a score within the "Moderately Low" range for motor skills; and an adaptive behavior composite score was in the "Low" range (id. at pp. 2-3).

On November 19, 2009, a district social worker conducted a classroom observation of the student in his classroom at BAC as part of his annual review (Dist. Ex. 9). The resulting classroom observation report indicated that the student made transitions; he responded to prompts to attend and to verbalize; and that he was cooperative and earned rewards (id.).

On April 13, 2010, when the student was 12.2 years old, the school psychologist who had administered the Vineland-II Survey Interview Form of the VABS in May 2009 conducted an interview with the educational director of BAC using the Vineland-II Parent/Caregiver Rating Report of the VABS (Dist. Ex. 8 at pp. 1, 4). The results indicated scores in the "Low" range for communication, daily living skills, socialization, motor skills, and for his adaptive behavior composite score (id. at pp. 2-6). Review of the Vineland-II Parent/Caregiver Rating Report of the VABS reflected that the student's scores ranged from -2 to >-4 standard deviations below the mean when compared to his chronological peers (id. at p. 3).

The hearing record includes an April 29, 2010 speech-language, communication progress report signed by both of the student's speech-language providers (Dist. Ex. 10 at pp. 2-4). The progress report indicated that speech-language therapy focused on the student's articulation, receptive and expressive language goals, and improving his "functional communication across all modalities," as well as the student's ability to follow along with therapy routine, attend to tasks for increased periods of time, take turns, and initiate communication exchanges (id. at p. 2). The report noted that the therapists addressed the student's articulation through PROMPT (PROMPTs for Restructuring Oral Muscular Targets), a methodology whereby the "hands are placed in various positions on or around the face to cue the muscles and articulators (lips, tongue, jaw, teeth, cheeks) for placement and production of the targeted sounds or words;" intervention to which the student was reported to be receptive (id.). The student's speech-language pathologists who provided speech-language therapy to the student at home recommended that individual speech-language therapy be continued five times per week for 60 minutes (preferably by a PROMPT trained

[3] The school psychologist indicated that according to the student's mother, the student was "good at making his needs known" and would speak "up to [three] word sentences" (Dist. Ex. 6 at p. 1).

clinician for at least some of the sessions); that therapy should address functional goals included in the report as well as other goals established by the speech-language pathologist in order to continue to improve the student's functional communication across environments; and that the use of the student's augmentative communication device (Dynavox),[4] visuals and/or communication boards be continued to improve functional communication skills such as initiation, requesting, and commenting (id. at p. 4). The report further recommended that the student's two speech-language pathologists keep in frequent contact via email and direct observation of sessions to ensure consistency of treatment and goal implementation (id.). The speech-language, communication report contained a description of the student's speech-language present performance and learning characteristics, as well as speech-language goals that the May 21, 2010 CSE included in the student's IEP (compare Dist. Ex. 4 at pp. 4-5, 14, 16, with Dist. Ex. 10 at pp. 5-7).

A May 13, 2010 OT update report written by the student's occupational therapist when the student was 12 years old indicated that the student received individual OT one time per week for 60 minutes at a sensory gym (Dist. Ex. 10 at p. 1). The OT update report noted that the student's OT treatment focused on sensory regulation, task oriented performance, graphomotor skills, and visual-motor integration (id.). The report revealed that the student demonstrated improved self-regulation and task behavior; that he required less redirection and assistance for familiar tasks; and that he was better able to attend to and participate in novel activities (id.). The OT update report also noted that the student required timed "breaks" of one to two minutes, wherein he engaged in sensory activities of his choice (e.g. jumping, swinging, crawling under body pillows) between tasks to stay calm and focused (id.). It was also reported that at times the student was better able to communicate his need for a break, and that he was better able to complete fine motor/graphomotor tasks (id.). The student's occupational therapist recommended that the student receive individual OT sessions five times per week for 30 minutes per session (id.).

The hearing record includes an undated BAC "treatment summary," which contained proposed goals and objectives for the student (Dist. Ex. 13).[5] Among other things, the summary stated that the student had made gains since he began receiving 1:1 ABA instruction from BAC (id. at p. 1). It also stated that the student had made progress "across several domains," particularly in reduction of self-stimulatory behavior, aggression toward himself and others, and expressive language (id.). The report noted that progress was also achieved in attending, imitation, receptive language, self-care, typing, prevocational skills, reading, and math (id.). The summary also included instructional, personal, and social strategies; materials; and evaluations (id. at p. 4). The treatment summary also stated that the student required a "1:1 structured teaching setting utilizing the principles of [ABA] for him to continue acquisition of skills" in the areas of receptive and expressive language, imitation, self-care, socialization, play, math, handwriting, reading, leisure skills, prevocational skills, and behavior management (id. at p. 1).

In May 2010, BAC also prepared a progress report with respect to the student (Dist. Ex. 11). The report contained information relating to the student's current ABA programs in the areas of handwriting, receptive language, expressive language, mathematics, domestic, fine motor, self-

[4] A "Dynavox" is the type of vocal output device the student uses to augment his expressive communication (Tr. p. 523).

[5] The report is undated but bears a facsimile date of May 17, 2010 (Dist. Ex. 13 at p. 1).

care, reading, pre-academic and pre-vocational skills (id. at pp. 1-7). The report also contained summaries of data relative to the implementation of the student's behavior program as it related to his tongue-curling, non-contextual vocalizations, and eye closing behaviors (id. at pp. 7-8). A copy of the student's behavior program was attached to the progress report (id. at pp. 9-11).

The student's home-based ABA supervisor prepared a progress report in May 2010 (Dist. Ex. 12). The report stated that the student was receiving 12 hours of 1:1 ABA in the home per week (id. at p. 1). It further stated that the student had made "meaningful progress" in the past year, but that he continued "to present significant deficits in social-emotional, receptive and expressive language, behavior management, self-help, and conversational and communication skills" (id.). It further indicated that the student's home program focused "primarily on generalizing school-learned skills" at BAC, self-help skills and facilitating independence, "as well as addressing some deficits that undermine progress in other areas" (id.). The report advised that the student's aggressive behavior toward others and himself had "greatly decreased" (id.). It further reported that the student's aggressive behaviors, as well as self-injurious and self-stimulatory behaviors had been addressed in a behavior plan (id.). The report provided individual summaries with respect to the student's progress in attending, community safety skills, expressive language skills, receptive language skills, social/emotional skills, and self-help and independence skills (id. at pp. 2-4). The ABA supervisor recommended in the report that it was "crucial" that the student's learning environment be composed of experienced ABA teachers implementing consistent methodology, programming to facilitate more independent functioning, and parent training so that structure and learning opportunities could be maintained outside of formal therapy sessions (id.). The supervisor further recommended that the student receive "a minimum of 15-20 hours of ABA per week" and three hours of home supervision, and that such services be provided on a 12 month basis (id.). The supervisor further noted that an increase in inappropriate behaviors was observed with decreases of services due to such things as illness, vacation, and instructor turnover (id.).

The parents signed an enrollment contract for the student to attend BAC for the 2010-11 12-month school year, on May 17 and May 18, 2010, respectively (Parent Ex. Q at pp. 1, 3). A representative of BAC executed the contract on behalf of that school on May 19, 2010 (id. at p. 3).

The CSE met on May 21, 2010 for the student's annual review and to develop an IEP for the 2010-11 school year (Dist. Ex. 4). Attendees included a district psychologist, who also acted as the district representative;[6] a district social worker;[7] a district special education teacher; the student's mother, an additional parent member; and by telephone, the student's lead teacher from BAC and BAC's educational director (Dist. Ex. 4 at p. 2). The May 2010 CSE recommended that the student attend a 12-month program in a 6:1+1 special class in a specialized school (id. at pp. 1, 17). The CSE recommended individual OT five times per week for 30 minutes, and individual speech-language therapy sessions five times per week for 60-minutes (id. at pp. 6, 19). Recommended classroom academic accommodations and modifications included a multisensory

[6] The district school psychologist who participated in the May 2010 CSE meeting had conducted the May 2009 psychoeducational evaluation of the student (Dist. Ex. 6 at pp. 1-3) and had administered the Parent/Caregiver Rating Form of the VABS to the educational director from BAC in April 2010 (Dist. Ex. 8 at pp. 1-6).

[7] The district social worker who participated in the May 2010 CSE meeting conducted the November 2009 classroom observation of the student at BAC (Dist. Ex. 9).

approach when presenting directions, explanations and instructional content; daily review of previously introduced information and concepts; use of concrete examples and experiences when presenting new information; shortened assignments; and frequent breaks, repetition, rewording and paraphrasing of directions and questions (id. at p. 3). With respect to the student's social/emotional performance, the May 2010 IEP noted that the student's behavior seriously interfered with instruction and recommended that the student be provided with a full-time 1:1 behavior management paraprofessional (id. at pp. 6, 19). The May 2010 CSE also developed a behavioral intervention plan (BIP) to address the student's self-aggression, aggression toward others, and elopement from teachers (id. at p. 20). The May 2010 IEP also noted that the student's health/physical management needs warranted recommendation for assistive technology (Dynavox), OT, and adapted physical education (id. at pp. 1, 7-8). Because of his global delays, the student was recommended to participate in the State alternate assessment (id. at p. 19). The May 2010 IEP also provided that the student would be assessed through teacher observation, a portfolio, and student participation (id.). The May 2010 IEP recommended annual goals and short-term objectives relating to the student's reading skills, self-care skills, the ability to comprehend and follow directions, domestic skills, the ability to identify and label objects, self-regulation and task performance, speech-language skills, and graphomotor and keyboarding skills (id. at pp. 11-14, 16).

With respect to the student's placement, the May 2010 CSE discussed the student's specific constellation of needs, considered options other than the 6:1+1 special class placement in a specialized school for the student, and determined that the student continued to require the support and structure of a small classroom setting that would address his global delays and provide all the services and the additional supports to meet his needs (Dist. Ex. 4 at pp. 3-8, 18). The hearing record reflects that the student's mother and teachers from BAC participated in the CSE meeting, and that their input helped the CSE develop the student's May 2010 IEP (Tr. pp. 208, 321-22, 749-53; see Dist. Ex. 4 at p. 2).

In a letter to the parent dated June 11, 2010, the district summarized the May 2010 CSE's recommendations and identified the school to which the district assigned the student (Dist. Ex. 5).

By letter to the district dated June 14, 2010, the parent indicated that she had not yet received a specific placement recommendation for the student (Parent Ex. O). The parent further advised the district that she was "available to view any placement recommendation," but that "at this time, subject to any appropriate program and placement," the parents would continue the student's placement at BAC, and also continue to provide him with 25 hours per week of 1:1 ABA therapy, five hours per week of ABA consultation, five hours per week of individual speech-language therapy, two hours per week of individual OT, and transportation to and from these services (id.). The parent also advised the district that she would be seeking reimbursement from the district for the tuition, costs, and expenses of the student's programming (id.).

The student's mother visited the assigned school on June 24, 2010 with a private consultant (Tr. pp. 425, 489, 740; Parent Ex. K at pp. 1, 2). By letter to the district dated June 25, 2010, the parent acknowledged receipt of the district's June 11, 2010 letter and rejected the assigned school, indicating that based on what she observed during her visit, the school could not offer the student "the degree of intensive 1:1 instruction" that the student needed (Parent Ex. P at p. 1). The parent further stated her belief that the assigned placement "lack[ed] a cohesive educational program"

and did not "appear to provide its students with behavior intervention plans," which she believed was essential for the student (id.). The parent stated that she was "available to review any other placement recommendations," but "subject to any appropriate program and placement," she would be continuing the student's placement at BAC and providing him with the services that she had outlined in her earlier June 14, 2010 letter (id.). The parent stated that she would be seeking reimbursement from the district of the tuition, costs, and expenses of the student's programming (id.).

Due Process Complaint Notice and Response

By due process complaint notice dated July 2, 2010, the parents asserted that "based on procedural and substantive violations," the district had failed to offer the student a free appropriate public education (FAPE) for the 12-month 2010-11 school year (Dist. Ex. 1 at pp. 1-2). With respect to the May 2011 IEP, the parents alleged among other things, that: (1) the district predetermined the student's recommended 6:1+1 special class placement; (2) the district failed to discuss the student's present levels of performance at the CSE meeting; (3) the district failed to describe the student's OT needs and too broadly described the student's health/physical management needs; (4) the academic management needs listed in the IEP were inadequate and the district should have recommended ABA programming; (5) the district failed to appropriately review or develop the student's annual goals or short-term objectives during the CSE meeting; (6) the majority of the annual goals and short-term objectives were inappropriate to meet the student's needs and were "too sparse, vague, and ambiguous" for the student's progress to be measured; (7) the district inadequately indicated methods of measurement in the IEP; (8) the district failed to recommend parent training and counseling; (9) the district failed to conduct a functional behavioral assessment (FBA) before developing the student's BIP; (10) the BIP was inappropriate; and (11) the IEP did not recommend that the student be evaluated or provided with any assistive technology services (id. at pp. 3-5). The parents also asserted that the May 2010 IEP was inadequate in that the district "failed to offer an appropriate placement and program" for the 2010-11 school year (id. at p. 3). With respect to the student's placement at the assigned school, the parents asserted that the student's mother visited the assigned school and determined the placement to be inappropriate (id.).

The parents also asserted that their placement of the student at BAC and provision of home-based services constituted an appropriate program and services for the student (Dist Ex. 1 at p. 5). Further, the parents asserted that there were no equitable considerations that would bar the relief being sought (id.). With respect to relief, the parents sought an order that the district "pay the tuition, cost and other expenses" related to the student's attendance at BAC, and that the district also "provide and pay for" 25 hours per week of 1:1 ABA therapy, two hours per week of ABA supervision, five hours per week of ABA consultation, five hours per week of individual speech-language therapy, two hours per week of individual OT, and transportation (id.). The parents

further stated that "to the extent that they incur[red] costs and expenses" providing the student with the requested program, they sought reimbursement for such costs and expenses (id.).[8]

On or about July 12, 2010, the district responded to the parents' due process complaint notice (Dist. Ex. 2). The district contended, among other things, that the assigned school was reasonably calculated to enable the student to obtain meaningful educational benefits, that a discussion of the student's needs occurred at the CSE meeting, and that the annual goals and short-term objectives were discussed, as was the program recommendation (id. at pp. 3-4).

Impartial Hearing Officer Decision

The impartial hearing began on August 2, 2010 and concluded on April 1, 2011, after five days of proceedings. In a decision dated May 13, 2011, the impartial hearing officer found that the district offered the student a FAPE (IHO Decision at pp. 15-16).[9] The impartial hearing officer concluded that the procedural violations asserted by the parents, if any, were minimal and did not affect the parents' right to participate in the development of the IEP or result in an adverse educational impact upon the student (id. at p. 14). The impartial hearing officer also determined that both the parents and the CSE participants they invited provided substantial input into the goals in the student's IEP (id. at p. 15). The impartial hearing officer found that the program offered by the district "easily qualif[ied] as appropriate" in light of the student's deficits and progress (id. at pp. 15-16).

With regard to BAC, the impartial hearing officer also determined, among other things, that it was "too diversified to be functional" for the student and that it did not address the student's needs, particularly with respect to language related needs, and that the parent was required to seek other providers for the needed related services (IHO Decision at p. 16). According to the impartial hearing officer, the parents "presented a cogent case" for home-based services, but he determined that the student did not require more than ten hours of at-home ABA services per week (id. at p. 17). For relief, the impartial hearing officer directed that the district reimburse the parents for ten hours of home-based ABA instruction per week and three hours of supervision, and denied all other relief (id. at pp. 17-18).

Appeal for State-Level Review

The parents appeal from the impartial hearing officer's finding that the district offered the student a FAPE and his denial of tuition reimbursement for the student's attendance at BAC.

[8] The parents' due process complaint notice also sought the continuation of the student's pendency placement based on a prior impartial hearing officer decision dated July 13, 2009 (Dist. Ex. 1 at p. 2). The parents' alleged that the student's pendency included placement at BAC, 15 hours per week of ABA, two hours per week of "ABA supervision/consultation," five hours per week of speech-language therapy, three hours per week of OT, transportation for the student to and from BAC (Dist. Ex. 1 at p. 2).

[9] In an interim order on pendency dated August 4, 2010, the impartial hearing officer noted that at the August 2, 2010 hearing date the parties reached an agreement regarding the student's pendency placement and what services would continue to be provided to the student pending the outcome of the impartial hearing (Tr. pp. 4-7; Interim IHO Decision at p. 2). In particular, the parties agreed that the district would pay the tuition for the student's placement at BAC, 15 hours per week of "ABA tutoring," two hours per week of ABA supervision, five hours per week of speech-language therapy, transportation services to and from BAC (Interim IHO Decision at p. 2).

According to the parents, the impartial hearing officer erred in his determinations regarding the alleged procedural violations by the CSE, the parents' participation at the CSE meeting, the development of the goals, and that the district offered the student a FAPE. The parents dispute the impartial hearing officer's finding that BAC did not seem to substantially or directly provide for the student's language needs and assert that school staff targeted the student's receptive, expressive, and pragmatic language skills. Among other things, the parents also assert that BAC has adopted an appropriate behavior program and that as a result, the student has made gains across a number of skill areas. The parents further assert that the student's program at BAC and in the home setting was appropriate and that his placement at BAC as supplemented by his home-based programming was specially designed to meet the student's unique needs. Additionally the parents appeal the impartial hearing officer's reduction of their request for an award of home-based ABA services. According to the parents, the impartial hearing officer also erred in failing to award speech-language therapy and OT to the student. The parents finally assert that equitable considerations support their request for reimbursement. For relief, the parents request reimbursement for the cost of tuition at BAC; 16.5 hours of home-based ABA therapy; three hours per week of "ABA supervision/parent training;" 60 minutes of individual speech-language therapy, three times per week; and 60 minutes of individual OT, two times per week.

The district submitted an answer and cross-appeal, in which it contends that the impartial hearing officer correctly determined that the district offered the student a FAPE and that the district's recommended program would have sufficiently addressed the student's needs. The district also asserts that the impartial hearing officer correctly, although unnecessarily, determined that BAC was not an appropriate placement for the student. In addition to the reasons set forth by the impartial hearing officer (i.e. lack of speech-language therapy and OT services), the district asserts, among other things, that there is little contact or coordination between BAC and the student's home-based service providers. The district also contends that the impartial hearing officer erred in his determination that the student needed home-based services, especially since he had found that the district had offered the student a FAPE. According to the district, the impartial hearing officer erred in awarding the parents reimbursement for the student's home-based ABA services because they provided for generalization in the home environment and they focused on self-care, daily living, and leisure skills. The district further contends that the equitable considerations did not favor the parents.

The district subsequently notified the Office of State Review of the decision in New York City Dep't of Educ. v. V.S., 2011 WL 3273922 (E.D.N.Y. July 29, 2011), which was rendered after the petition was filed in this appeal.

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, 550 U.S. at 525-26; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR

200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

Discussion

Scope of Review

As a preliminary matter, the parents assert two new issues on appeal that they did not assert in their due process complaint notice before the impartial hearing officer—that the district failed to offer the student extended day services as part of its recommendations (i.e. home-based or other out-of-school programming) and that the district failed to timely provide the parents with copies of certain evaluations.[10] It is well settled that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). The parents' July 2010 due process complaint notice cannot be reasonably read to assert the two claims described above (see Dist. Ex. 1). Additionally, while the hearing record contains some evidence relevant to these issues, the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include these issues. Further, the hearing record does not reflect that the parents submitted, or that the impartial hearing officer authorized,

[10] State regulations provide that "[e]ach party shall have the right to prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five business days before the hearing" (8 NYCRR 200.5[j][3][xii]; see 34 CFR 300.512[a][2],[3]). It does not appear that this issue was raised before the impartial hearing officer.

an amendment to the parents' July 2010 due process complaint notice to include these issues. Therefore, these contentions, which are raised for the first time on appeal, are outside the scope of my review and therefore, I will not consider them (see M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 11-010; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).

May 2010 CSE Meeting

I now turn to the merits of the parties' dispute and first address their contentions regarding the May 2010 CSE meeting.

Predetermination and Parental Participation

I will first address the parents' contention that the district "predetermined" the student's program without the input of the parents and the student's teachers, and failed to discuss matters with the parent. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 C.F.R. § 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). The consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K, 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 C.F.R. § 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see M.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

In this case, the school psychologist testified that the district's recommended program and educational services for the student were determined during the May 2010 CSE meeting (Tr. pp.

321-22). The school psychologist also indicated that those present at the May 2010 CSE participated for the entire meeting, and that all participants including the parent and personnel from BAC had opportunity to provide input regarding the student (Tr. p. 18). I note that the lead teacher from BAC testified consistently with the psychologist, describing that she was affirmatively asked for her input regarding the student's program (Tr. pp. 321-22). The school psychologist also testified that prior to the May 2010 CSE meeting, she discussed the student's evaluations with the district social worker and the district special education teacher, and that they spoke numerous times with the student's teacher at BAC and the educational director of that school (Tr. pp. 17, 37).

The school psychologist also indicated that all of the annual goals and short-term objectives were discussed at the CSE meeting and that neither the parent nor personnel from BAC objected to any of the annual goals or objectives (Tr. p. 33). The hearing record supports the conclusion that some, although perhaps not all of the annual goals were discussed during the CSE meeting, but at no time does it appear that the parent was in any way precluded from raising concerns or offering input at the meeting (see Tr. pp. 33, 168, 191, 726). I note that the hearing record reflects, and the parties do not dispute, that the May 2010 CSE also considered, but rejected an alternative program recommendation for the student (Dist. Ex. 4 at p. 18; Tr. pp. 33-34, 37). The school psychologist indicated that CSE attendees from BAC did not voice any objection at the May 2010 CSE meeting to the recommended placement (Tr. p. 41), and there is no indication that the student's mother attempted to voice her objections to the recommended placement. Accordingly, I find that the May 2010 CSE meeting was conducted in a manner that allowed the parent the opportunity to participate and that the district did not engage in impermissible predetermination (see T.P., 554 F.3d at 253).

May 2010 IEP

Annual Goals and Short-Term Objectives

I now turn to the parents' contention that the annual goals in the May 2010 IEP were inadequate. An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee, and when periodic reports on the progress the student is making toward annual goals will be provided to the student's parents (8 NYCRR 200.4[d][2][iii][b], [c]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3][i], [ii]).

In this case, the parents correctly assert that five annual goals related to the student's academic needs are impermissibly vague and not measurable. However, the May 2010 IEP included 16 specific and measurable short-term objectives corresponding to the academic goals, that clarified them and thereby moderated any negative effect this may have had (Dist. Ex. 4 at pp.

11-12).[11] Nor does the hearing record support the parents' assertion that because the May 2010 IEP included "only" five academic-related annual goals, the annual goals therefore were inadequate, as neither the IDEA nor State regulations dictate that a student's IEP contain a requisite minimum number of goals to address any particular area of identified need.[12] Additionally, while the student's annual goals to be addressed by OT are also vague and not measurable when viewed in isolation, each annual goal included a corresponding short-term objective that clarified the specific conditions and criteria by which the student's progress would be measured, thereby rendering the annual goals objective and measurable when reviewed together with the corresponding short-term objectives (Dist. Ex. 4 at p. 13; see Tr. pp. 31-32).[13] As a consequence, I find that the structure and content of the short-term objectives in this instance remedied any deficiencies in the student's academic and OT annual goals and that the student was not denied a FAPE as a result of the inadequacy in the annual goals (see Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S., 454 F. Supp. 2d at 146, 147; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096).

Additionally, the May 2010 IEP included two annual goals prepared by and submitted to the CSE by the student's private occupational therapist that addressed the student's needs related to improving graphomotor and keyboarding skills, and improving self-regulation and task performance (Dist. Ex. 4 at p. 13;). Furthermore, the speech-language annual goals contained in the IEP were objective and measurable (id. at pp. 14, 16). The speech-language annual goals included in the May 2010 IEP were the same goals included in the April 2010 speech-language report and reflected the recommendations of the home-based speech-language therapy providers that worked with the student (compare Parent Ex. M at pp. 5-6, with Dist. Ex. 4 at pp. 14, 16). [14]

Moreover, the hearing record does not support the parents' assertion that the May 2010 IEP did not include any annual goals related to the student's communication needs. The student's IEP included annual goals indicating that the student would improve his ability to comprehend and follow instructions and directions and that he would identify and label objects (Dist. Ex 4 at pp. 9, 10). In addition, as indicated above, the May 2010 IEP included annual goals relating to articulation, increasing the length of the student's spoken phrases in order to increase his ability to request his needs and wants and to comment on various objects and events in his environment,

[11] I note that one of the short-term objectives relating to the annual goal of identifying and labeling objects references a different student's name (Dist. Ex. 4 at p. 12). However, the hearing record reflects that this objective would have been appropriate for the student (Tr. p. 309; Dist. Ex. 4 at p. 3).

[12] To the extent the parents argue that the student had mastered skills in the short-term objectives, the evidence shows that this occurred during the 2010-11 school year subsequent to the date of the May 2010 CSE meeting when the IEP was developed (Tr. pp. 196-99).

[13] The hearing record reflects that an additional page of OT goals was erroneously included in the student's May 2010 IEP; that these OT goals were for another student and were not for the student that is the subject of this appeal (Tr. pp. 50-51; Dist. Ex. 4 at p. 15).

[14] The hearing record reflects that the annual goals and short-term objectives included in the May 2010 IEP were either based upon information included in documentation provided by BAC, and/or were the same as the annual goals and short-term objectives recommended by the student's home-based related service providers.

responding to wh-questions using verbal responses and/or through use of an augmentative communication device, and using an augmentative communication device to sequence a three icon statement (id. at pp. 14, 16).

Finally, I note that the March 2010 IEP identified the evaluative procedures and schedules to be used to measure progress toward meeting the annual goals, and indicated when reports on the student's progress would be provided to the parents (Dist. Ex. 4 at pp. 9-14, 16).

Based on the foregoing, a careful review of the hearing record shows that the annual goals and short-term objectives in the student's May 2010 IEP targeted appropriate areas of need and contained sufficient specificity by which to guide instruction. Therefore, I find that the parents' claim that the student was denied a FAPE due to inadequate annual goals and short-term objectives in the May 2010 IEP must fail under the circumstances in this case.

Parent Counseling and Training

I now turn to the parents' contention with respect to parent counseling and training. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 C.F.R. § 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of FAPE where a school provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. March 25, 2010]), or where the district was not unwilling to provide such services at a later date (see M.M., 583 F. Supp. 2d at 509 [S.D.N.Y. 2008]; but c.f., P.K. v. New York City Dep't of Educ., 2011 WL 3625088, at *9 [E.D.N.Y. Mar. 2011]; adopted at 2011 WL 3625317 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *21 [E.D.N.Y. Jan. 21, 2011] adopted at 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]).[15]

Although parent counseling and training was not noted on the May 2010 IEP, testimony by the assistant principal of the assigned school indicated that group parent counseling and training was available at the school as well as at the district office (Tr. pp. 136, 142; see Dist. Ex. 4). In addition, testimony by the special education teacher from the assigned school reflected opportunity for parents, teachers, and related service providers to work closely on a student's specific need, such as implementing an augmentative communication device (Tr. pp. 115-16). Furthermore, the

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

special education teacher indicated that she communicated daily with parents through a communication book that traveled to and from school with each student and that she provided parents with her telephone number to foster daily communication (Tr. p. 81). Both the student's home ABA supervisor and the parent testified that the ABA supervisor was providing the parents with parent training sessions (Tr. pp. 666-67, 720; see Tr. p. 422; Dist. Ex. 12 at p. 4). Based upon the circumstances of this case, I find that the district's failure to provide parent training and counseling on the May 2010 IEP did not comport with regulations (see 34 C.F.R. 300.34[c][8]; 8 NYCRR 200.4[d][2][v][b][5], 200.13[d]). However, given the parent training and counseling services the parents had previously received through the home program, and that parent training and counseling would have been available at the assigned school, I conclude that under the circumstances of this case, the district's failure to incorporate parent training and counseling into the May 2010 IEP did not result in a denial of a FAPE (see M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509).

6:1+1 Special Class Placement

I now consider the parents' contention that the recommended 6:1+1 special class placement was inappropriate. For the reasons discussed below, that portion of the impartial hearing officer's decision which determined that a 6:1+1 special class placement was appropriate to meet the student's needs is supported by the hearing record.

The district's school psychologist testified that a 6:1+1 special class with a full-time paraprofessional would have been appropriate for the student because he had autism, was "almost non-verbal," and the recommended 6:1+1 special class placement supported students similar to the student (Tr. p. 19). She testified that the recommended educational setting also offered opportunities for socialization and that this would provide the student with a "highly structured supportive environment" (Tr. pp. 19, 20). The May 2010 IEP indicated that the student would benefit from a placement that was a "small highly structured program" that would address his global delays and provide the student with the services and additional supports to meet his identified needs (Dist. Ex. 4 at p. 18).

With respect to the student's academic performance and learning characteristics, the May 2010 IEP noted that according to the student's teachers, he had made progress "across several domains," "most noticeably" in the reduction of self-stimulatory behavior, aggression toward himself and others, and in expressive language; and that progress had also been made in the areas of attending, imitation, receptive language, self-care, typing, prevocational skills, reading, and math (Dist. Ex. 4 at p. 6). The May 2010 IEP also reflected that based on teacher estimate, the student's math and reading skills were at a prekindergarten level (id. at p. 3; see Tr. pp. 22, 53). The May 2010 IEP also indicated that the student was learning how to use his Dynavox (Dist. Ex. 4 at p. 3). With respect to the student's speech-language deficits, the May 2010 IEP reflected that the student presented with apraxia of speech, which resulted in a "severe impairment" of his articulation skills and expressive and receptive language skills (id. at p. 4). The student's speech intelligibility was described as "fair" in known contexts and "poor" in unknown contexts (id.). Because of the student's apraxia, his speech production was inconsistent (id.). However, the May 2010 IEP also indicated that the student had made "adequate progress" toward his speech and language goals (id.). With respect to the student's social/emotional performance, the May 2010 IEP characterized the student's socialization skills as in the "low range" and indicated that his

interpersonal, play, and social coping skills had not developed age appropriately (id. at p. 6). The May 2010 IEP also indicated that the student engaged in self-stimulating behaviors and that he sometimes engaged in self-aggression and in aggression toward others (id.). The May 2010 IEP further reflected that the student needed assistance with self-regulation, task performance, and graphomotor skills and that he could benefit from sensory input, which increased his ability to remain calm and alert for learning (Dist. Ex. 4 at pp. 8, 13; see Dist. Ex. 10).

According to State regulations, a 6:1+1 special class placement is designed to address the needs of students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). In light of the student's aforementioned cognitive, academic, and speech-language needs, I find that the 6:1+1 special class placement recommended in the May 2010 IEP was an appropriate educational setting for the student. I also note that the May 2010 IEP identified academic management needs, including use of a multisensory approach when presenting directions, explanations, and instructional content; daily review of previously introduced information and concepts; use of concrete examples and experiences when presenting new information; shortened assignments and frequent breaks; and repetition, rewording, and paraphrasing of directions and questions designed to facilitate the student's learning (Dist. Ex. 4 at p. 3). The recommended 6:1+1 special class placement was also augmented by related services targeting the student's sensory regulation, graphomotor skills, and speech-language needs. Specifically, the May 2010 IEP recommended that the student's speech-language therapy sessions address his delays in language processing and communication skills, and that a token system and tangible reinforcers could be employed (id. at pp. 4, 19). The recommendations in the IEP also addressed the student's speech-language needs by providing the student with assistive technology in the form of a Dynavox (id. at p. 7). With regard to the student's motor needs, the May 2010 IEP provided the student with the related services of OT as well as adapted physical education (id. at pp. 1, 19). To address the student's social/emotional needs, the May 2010 IEP provided additional support in the form of a 1:1 behavior management paraprofessional (id. at p. 6).

In view of the forgoing evidence, I find that the district identified an appropriate special class placement for the student in his May 2010 IEP from the continuum of special education services (8 NYCRR 200.6). However, for the reasons discussed below, I find that the district did not show that it adequately addressed the student's significant behavioral needs in a manner that was reasonably calculated to enable the student to receive educational benefits in the 6:1+1 special class.

Special Factors in an IEP and Interfering Behaviors

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Board of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; Tarlowe, 2008 WL 2736027, at *8; W.S, 454 F. Supp. 2d at 149-50; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with

a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380 ; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id.).[16] State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call

[16] While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or Pre-school Committee on Special Education (CPSE) "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[17] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, the May 2010 IEP notes the student's interfering behaviors and states that the student "engages in self stimulating behaviors such as tongue curling, non contextual vocalizations, and eye closing" and that "[h]e sometimes engages in self aggression and aggression towards others" (Dist. Ex. 4 at p. 6). Although the hearing record contains the one-page BIP that was developed for the student (Dist. 4 at p. 20), the May 2010 IEP does not indicate that a BIP was to be used to address the student's interfering behaviors.

In this instance, the school district did not conduct an FBA. The school psychologist testified that the March 2010 CSE did not conduct an FBA regarding the student because it was "privy" to the information contained in an FBA conducted by BAC; that she had informally seen the student in his classroom; that she drafted a BIP for the student primarily based on the BAC

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

teacher's report and on information from the FBA from BAC; and that she was aware of and had BAC behavior intervention reports (Tr. pp. 25, 45-46, 57). The school psychologist did not identify the specific behavior intervention reports to which she made reference. I note that the April 13, 2010 progress report includes a description of the student's behavior program related to aggression, self-aggression, tongue curling, non-contextual vocalizations, eye closing, and elopement (see Dist. Ex. 11 at pp. 9-11). The hearing record has conflicting evidence regarding the development of the BIP. The school psychologist also indicated that the BIP was discussed with everyone at the CSE and that the collective opinion was that it appropriately met the student's needs (Tr. p. 26). Contrary to the psychologist's testimony, the educational director of BAC testified that the CSE had a copy of the student's BIP from BAC but the BIP was not discussed in detail (Tr. p. 169).

Review of the BIP developed by the school psychologist bore limited relation to the student's self-aggression and aggression toward others, behaviors characterized as hitting, grabbing, and biting, non-contextual vocalizations, tongue curling, and eye closing (Tr. pp. 45-46, 464).[18] The BIP included the following description the student's problem behaviors: hitting both sides of his head with open palms or closed fists and/or biting himself on the arm, hand, or shoulder, aggression towards others by hitting, biting, kicking, or grabbing another person, and by running away from teachers (Dist. Ex. 4 at p. 20). However, the BIP did not include either a global or specific hypothesis as to why the problem behaviors occurred. In addition, although the BIP contained a list of strategies (e.g., time out, differential reinforcement of incompatible behaviors, behavior shaping by for example, systematically lengthening exposure to problematic situations, and extinction) to be tried to address the student's interfering behaviors, the BIP did not include a baseline measure of the problem behaviors across activities, settings, people and times of day that could be used to evaluate intervention effectiveness (id.). Also, the BIP lacked specificity regarding implementation of the listed strategies for altering events to prevent the occurrence of the behavior, teaching individual alternative and adaptive behaviors to the student, and providing consequences for the targeted inappropriate behaviors and alternative acceptable alternative behaviors (id.). Furthermore, the BIP lacked a schedule to measure the effectiveness of the interventions (id.). The forgoing evidence shows that the BIP did not comply with State regulations relating to its content.

Under the circumstances of this case, despite the CSE's recommendation for a 1:1 behavior paraprofessional, I cannot conclude that the student was offered a FAPE. The failure to identify the BIP in the student's IEP in this instance was not remedied by the BIP included in the hearing record. The special education teacher from the proposed public school indicated she would "further develop strategies" included in the student's IEP, however, there were none and her statement that " a crisis paraprofessional knows exactly how to deal with a child in crisis" was not sufficient (Tr. p. 86). Moreover, the teacher could not explain why the student displayed the behaviors targeted in the BIP or how the strategies on the IEP would be implemented (Tr. p. 94-95). As discussed above, in light of this student's history of significant behavioral needs and the

[18] The BIP was dated both December 10, 2009 and May 21, 2010 (Dist. Ex. 4 at p. 20). The school psychologist did not explain the dates on the document.

importance of measures to address these deficits I find that, contrary to the impartial hearing officer's conclusion the district failed to offer the student a FAPE.

The Parents' Unilateral Placement and Home-Based Program

In this case, the parents assert that the impartial hearing officer erred in declining to award them reimbursement for the student's tuition costs at BAC, reducing the total number of hours of home-based ABA services awarded, and failing to address their claims for reimbursement for the related services of speech-language therapy and OT that they privately provided to the student during the 2010-11 school year. Before I address the appropriateness of the parents' unilateral program, initially, I note that pursuant to the district's obligation to provide the student's pendency placement and the conclusion of the 2010-11 school year, as discussed below, the appropriateness of BAC has been rendered moot.[19]

Mootness

I must note that in this case the parents have already received all of the tuition at BAC by virtue of pendency and the 2010-11 school year at issue has expired, which raises the question of whether a portion of the instant appeal has been rendered moot by the passage of time. Although the district acknowledged the student's pendency placement for the 2010-11 school year as BAC and the parents' claim for tuition reimbursement has already been paid by the district (see IHO Interim Decision at p. 2; Answer ¶¶ 44-46), the district asserts in its answer that the instant appeal is not moot because it still has a legally cognizable interest in an adjudication on the merits of the parents' appeal because a "decision in [the district's] favor" would change the student's "home-based pendency services on a going-forward basis" and relieve the district of "any future obligation to fund those services as the pendency placement during future proceedings" (Answer ¶ 44; citing Pawling Cent. Sch. Dist. v. N.Y.S. Educ. Dep't, 3 A.D.3d 821, 823-24 [3rd Dept. 2004]). However, upon careful consideration of the evidence in the hearing record, I find that regardless of the merits of a decision concerning whether the parents' placement of the student at BAC was appropriate for the 2010-11 school year, no further meaningful relief may be granted to the parents in relation to their request for tuition reimbursement at BAC because they have received all of that portion of the relief sought pursuant to pendency, and thus, that portion of the parents' appeal has been rendered moot. In addition, careful consideration of the District Court's recent decision rendered in New York City Dept. of Educ. v. V.S., 2011 WL 3273922 (E.D.N.Y. July 29, 2011), as discussed further below, does not compel a different result.

As other State Review Officers have long held in administrative reviews of impartial hearing officer decisions, the dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50

[19] Although the parents argue that the impartial hearing officer erred in not addressing their claim for reimbursement for private speech-language therapy services, I note that the impartial hearing officer's interim decision also awarded five hours per week of speech-language therapy and, therefore the parents are entitled to reimbursement for these services through the date of this decision.

N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

However, an exception provides that a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). First, it must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). Second, controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714-15; Application of a Child with a Disability, Appeal No. 07-139). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

In this case, there is no longer any live controversy relating to the appropriateness of the parents' placement of the student at BAC and their request for tuition reimbursement at that school for the 2010-11 school year. Here, even if a determination on the merits demonstrated that BAC was inappropriate for the 2010-11 school year, in this instance, it would have no actual effect on the parties because the 2010-11 school year expired on June 30, 2011, and the student remained entitled to his pendency placement at BAC funded by the district through the conclusion of the administrative due process. Accordingly, the parents' claims that the impartial hearing officer erred in finding BAC inappropriate for the 2010-11 school year need not be further addressed here. A State Review Officer is not required to make a determination that is academic or will have no actual impact upon the parties (Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; Application

of a Child with a Disability, Appeal No. 07-077; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-086; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64).

With regard to the District Court's decision in V.S. (2011 WL 3273922), the court held that in Application of the Dep't of Educ., Appeal No. 10-041, the State Review Officer correctly determined that the parents' request for funding for the school year that was the subject of that appeal was no longer at issue where the student was educated at public expense at a private school chosen by the parents for the duration of the school year pursuant to a pendency order (V.S., 2011 WL 3273922, at *9). Noting that a decision in favor of the district in that matter would not affect its obligation to pay the costs of the student's private school tuition, the Court nevertheless determined that the district sought redress regarding the collateral issue of the student's ongoing pendency placement for future proceedings and that had a decision been rendered by a State Review Officer on the merits, it would have affected the student's placement (id.). After careful consideration and for several reasons described below, I respectfully decline to adopt the reasoning as set forth in V.S.[20]

First, the sole reason that the District Court held that Application of the Dep't of Educ., Appeal No. 10-041, was not moot was because the parties required resolution of the merits of their dispute to establish the student's pendency placement in future proceedings (V.S., 2011 WL 3273922, at *10);[21] however, this rationale regarding future pendency may be read so broadly as to apply to virtually any and all Individuals with Disabilities Education Act (IDEA) proceedings involving the educational placement or services to be provided to a student, and other courts in New York have not adopted this broad approach (see Bd. of Educ. v. O'Shea, 353 F.Supp.2d 449, 457 [S.D.N.Y. 2005] [determining the matter was moot and declining to resolve the merits of the parties' dispute when the pendency provision provided an independent basis for doing so]; see also Murphy v. Arlington Cent. School Dist. Bd. of Educ., 297 F.3d 195 [2d Cir. 2002] [ruling that the pendency provision formed a basis for awarding relief without addressing the merits of the parties' dispute]; Bd. of Educ. v. Schutz, 290 F.3d 476, 484 [2d Cir. 2002] [rejecting the district's argument that a dispute must be resolved on the merits rather than on the basis of the pendency provision]; Patskin, 583 F. Supp. 2d at 428-29 [holding that the matter was moot where the school year at issue had passed, and stating that the relevant controversy was whether the IEP that the student was provided with was an appropriate placement and that there was no reasonable expectation that the student would be subjected to that particular IEP again]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 273, 278-80 [E.D.N.Y. Aug. 25, 2010] [dismissing the case as moot and

[20] Although State Review Officers endeavor to adhere as closely as possible to the legal guidance provided by the courts, in rare instances, where conflicting authorities regarding statutory interpretation are present, such authority may not be binding upon a State Review Officer (see Application of the Bd. of Educ., Appeal No. 05-074 [holding that a student need not have previously received special education services from a public agency to be eligible for reimbursement when the District Court had previously ruled to the contrary]).

[21] Although infrequent, it is not unheard of for a student to remain in a pendency placement for years, even after administrative and court decisions have been issued multiple times (see, e.g., B.J.S. v. State Educ. Dep't/Univ. of State of New York, 2011 WL 3651051, *1 [W.D.N.Y. Aug. 18, 2011] [acknowledging that the student remained in a 2003-04 pendency placement despite numerous subsequent adjudications regarding the student's educational placement]).

noting that the parents were receiving full compensation for their private school expenditures and that the proceeding was brought to obtain legal fees]; J.N., 2008 WL 4501940, at *3-*4 [upholding a State Review Officer's determination that the case was moot]; Bd. of Educ. v. Steven L., 89 F.3d 464, 468-69 [7th Cir 1996] [holding that it was not necessary to determine which party would prevail on the merits when the stay put provision controlled for the duration of the dispute and the proposed public school IEP was no longer applicable to the student]; see generally New York City Dep't of Educ. v. S.S., 2010 WL 983719 [S.D.N.Y. Mar. 17, 2010]).[22] Additionally, the Ninth Circuit has explicitly rejected this rationale, holding that the stay put provision cannot be relied upon as the basis for a live controversy when the issue of liability on the substantive issues has been rendered moot (Marcus I. v. Dep't of Educ., 2011 WL 1979502, at *1 [9th Cir. May 23, 2011] [explaining that stay put provision 20 U.S.C. § 1415[j] is designed to allow a student to remain in an educational institution pending litigation, but does not guarantee a student the right to remain in any particular institution because the right to a stay put placement that stems from a given adjudicatory proceeding lapses once the proceeding has concluded]).[23]

Second, I am concerned with adjudicating rights unnecessarily, particularly when it will not affect the claims that a party alleged at the outset of the due process proceeding and especially under a statutory scheme like the IDEA, which envisions that parents and districts will continue to convene on at least an annual basis to review a student's current IEP or educational placement, share their concerns with one another, and cooperatively and affirmatively engage in efforts to develop a new appropriate plan designed to offer the student a FAPE in the public schools (see 20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). This process usually works best when it is as free as possible from acrimonious relationships that often develop after continued litigation.[24]

Third, I believe that the automatic nature of the pendency provision set forth in the IDEA (see Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]), and if necessary, the speed with which parties may obtain State-level pendency placement reviews on an interlocutory basis under New York's regulatory scheme (see 8 NYCRR 279.10[d]) strongly diminishes the need to establish future pendency placements for future school years; such determinations are better left until the proceedings under which the right arises are commenced and the issue of the student's pendency placement is actually in dispute. Lastly, while I appreciate the Court's comment that a decision on the merits in V.S. would be useful (2011 WL 3273922, at *10), I am also concerned that the decision has the effect of removing the much needed discretion

[22] I also disagree with the interpretation that the District Court in M.N. v. New York City Dep't of Educ. (700 F. Supp. 2d 356 [S.D.N.Y. Mar. 25, 2010]) ruled that the State Review Officer erred in dismissing the case on mootness grounds (V.S., 2011 WL 3273922, at *10). The Court in M.N. only acknowledged the State Review Officer issued the decision on mootness grounds and did not further comment.

[23] I also note what appears to be a discrepancy between the views of the Marcus I Court and the decision in Pawling Cent. Sch. Dist. v. New York State Educ. Dep't., (3 A.D.3d 821 [3d Dep't 2004]) regarding future pendency placements.

[24] Moreover, this is also not a case in which particularly new or novel issues have been presented on the merits. Both State Review Officers and courts have previously provided frequent guidance regarding the types of claims raised in this case.

of administrative hearing officers to focus on both fairly and efficiently resolving disputes while retaining the discretion of how best to allocate their adjudicative resources to address ever growing dockets.[25] For the forgoing reasons, I decline to find that the parent's claim for tuition reimbursement for the 2010-11 school year continues to be a live controversy.

Exception to Mootness

With respect to the mootness exception, the district argues in its answer that the exception to the mootness doctrine applies in this case because it is capable of repetition yet evading review. However, the hearing record fails to contain evidence nor was there an offer of additional evidence to support this contention. While it may be theoretically possible that the parents could challenge a subsequent school year's IEP and seek tuition reimbursement for the student during a subsequent school year at BAC, such speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or a demonstrated probability of recurrence sufficient to satisfy the requirements necessary for the exception to apply. Additionally each year the elements of a tuition reimbursement claim must be analyzed separately (see Mrs. C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Snyder v. Montgomery County Public Schs., 2009 WL 3246579, *9-*10 D.Md. Sept. 29, 2009]; Omidian v. Board of Educ., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] Application of the Bd. of Educ., Appeal No. 09-071; Application of the Bd. of Educ., Appeal No. 09-055) Accordingly, the exception to the mootness doctrine does not apply here as I do not find this matter to be capable of repetition yet evading review (see Honig, 484 U.S. at 318-23; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038).

Home-Based ABA Services

Having found that the district failed to offer the student a FAPE and that the appropriateness of BAC for the 2010-11 school year is no longer a live controversy, I turn now to the appropriateness of the student's home-based services. As previously noted, 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]). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same

[25] For example, the Second Circuit has determined that an exhaustive analysis by the impartial hearing officer is not mandated in every administrative proceeding and that in appropriate circumstances summary disposition procedures may be employed (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see Application of the Dep't of Educ., Appeal No. 10-014; Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child Suspected of Having a Disability, Appeal No. 04-059; Application of a Child with a Disability, Appeal No. 04-018).

considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]).

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

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

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

In this case, the district contests the parents' assertions that the student requires a home-based program, arguing that it is not required by the IDEA to provide home-based ABA services so that the student can generalize learning skills and learn basic self-care, daily living, and leisure skills. Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). Upon review of the hearing record, the district correctly argues that the student's home-based ABA program focused on daily living skills and was designed to generalize the skills the student learned at school, which weighs heavily against a finding that the home-based ABA services were designed to address the student's educational needs in his school based program.

At the time of the impartial hearing, the student was receiving approximately 16 hours per week of home ABA services from his home ABA instructors, who were all trained in ABA and 1:1 instruction (Tr. pp. 611-12, 661-62, 664, 717). The supervisor of the home ABA program, who is a board certified behavior analyst, testified that in addition to the individual ABA services, she provided an additional two hours per week of supervision and parent training at the student's home (Tr. pp. 593, 599, 611, 615, 667, 699-700, 720). The home ABA supervisor further testified that the home ABA program worked with the student on self-care and community skills that were more practical at home (Tr. p. 675). Skills addressed included learning how to take a break to address personal activities related to puberty, walking with an adult in the community, purchasing items with a credit card, being able to play Nintendo, washing his face and brushing his teeth, standing still for an increased amount of time, and getting a haircut in the community, (Tr. pp. 606-07; see also Tr. pp. 678-82). The home ABA supervisor testified that, other than with staying with an adult in the community, the student had been doing "really well" and had been making "nice gains" with his home ABA activities during the 2010-11 school year (Tr. pp. 608-09). The home ABA supervisor indicated that the home program sometimes based goals on what the family needed and benefited from rather than something the student would have to do while at school (Tr. p. 675). Although the home ABA supervisor indicated that she collected data for purposes of inter-observer agreement, she did not conduct any formal assessments regarding the student (Tr. pp. 686-87).

The home ABA supervisor opined that the student needed the home ABA program because of his need for generalization between school and home, and because home is where the parents are and they need training (Tr. p. 615). She also testified that since the student had very poor generalization skills, the home program worked to increase the student's generalization of his skills (Tr. pp. 610, 665-66). The home ABA supervisor testified that if the student did not have a home program she did not know how BAC would coordinate with the student's family (Tr. pp. 701-02). The educational director from BAC opined that the student needed additional services to be able to generalize what he learned in the school environment to the home environment, and to make sure his BIP was followed through at home "across the entire day" so that the student did not regress behaviorally (Tr. pp. 165-66). However, the hearing record reflects that the student's mother was the only consistent link between BAC and the home program as she participated in biweekly clinic meetings and shared information with both BAC and the home program ABA and related service providers (Tr. pp. 152, 158-59, 164, 269, 271, 318, 339-40, 362-64, 673-74, 722-23).

Accordingly, based on the foregoing, I find insufficient evidence in the hearing record to conclude that the student's home-based ABA services and accompanying supervision were appropriate since the student's home-based services were designed to address the student's daily living skills outside the educational environment.

Occupational Therapy

Turning next to the parents' reimbursement claim for private OT services, the hearing record reflects that the student has motor needs (Tr. pp. 266, 267, 377; Dist. Exs. 4 at p. 8; 10 at p. 1). For the 2010-11 school year, the student's occupational therapist recommended that the student receive OT five times a week for 30 minute individual sessions, which was a total of two and one-half hours a week (Dist. Ex. 10 at p. 1). The hearing record indicates that during the 2010-11

school year, the student received one 60-minute weekly OT session in a sensory gym (Tr. p. 758; Dist. Ex. 10 at p. 1). An OT update report indicated the student demonstrated improved self-regulation and task behavior; he required less redirection and assistance for familiar tasks; he was better able to attend to and participate in novel activities; that he required timed "breaks" of one to two minutes, whereby he engaged in sensory activities of his choice (e.g.. jumping, swinging, crawling under body pillows) between tasks to stay calm and focused; he was better able to communicate his need for a break; he was better able to complete motor/graphomotor tasks (id.). The student's mother testified that in the past, the student could not hold a pencil and did not write letters (Tr. p. 744). She also testified that the student's occupational therapist was working with the student on handwriting and typing on the keyboard (Tr. p. 744). Based on the foregoing, I find that the one hour per week of private OT services obtained for the student during the 2010-11 school year were appropriate and that equitable considerations would not preclude reimbursement for these services in this instance.

Conclusion

For the reasons discussed above, I find that the district did not offer the student a FAPE for the 2010-11 school year, that the home-based ABA services were not designed to address the student's educational needs, that the one hour per week of private OT services obtained for the student during the 2010-11 school year were appropriate, and that equitable considerations do not preclude reimbursement for the private OT services.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated May 13, 2011 that determined that the district offered the student a FAPE and ordered reimbursement for the home-based ABA services and supervision are annulled, and

IT IS FURTHER ORDERED, that if it has not done so already, the district shall reimburse the parents for the costs of the student's tuition at BAC, fifteen hours of home-based ABA services, two hours of ABA supervision, and up to five hours per week of speech-language therapy for the 2010-11 school year pursuant to pendency obligation; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the costs of one hour per week of occupational therapy services provided to the student during the 2010-11 school year upon the parents' submission of proof of payment to the district.

Dated: **Albany, New York**
September 9, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER