



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-086

### **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:**

Skyer, Castro, Foley & Gersten, attorney for petitioners, Jesse Cole Foley, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

#### **DECISION**

Petitioners (the parents), appeal from the determination of an impartial hearing officer which found that respondent (the district) had offered an appropriate educational program to the student for the 2007-08 school year and denied the parents request for tuition reimbursement for their unilateral placement of the student at the Imagine Academy (Imagine). The district cross-appeals from the impartial hearing officer's determination that the parents' program at Imagine was appropriate and further that the equities favored the parent. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Imagine (Parent Exs. A at p. 2; D at p. 1; F at p. 1; see also Parent Ex. C). Imagine has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Parent Ex. A at p. 2; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student has received a diagnosis of autism and has numerous medical conditions including strabismus, a seizure disorder, hypertonia, unequal leg length, a partially dislocated femur, and a severe anterior tilt of the pelvis (Tr. pp. 220, 222; Parent Exs. I at pp. 1, 3; J at p. 1; O at p. 1). These medical conditions affect the student's hand-eye coordination, depth perception, motor control, and balance (Tr. pp. 220, 221, 223; Parent Ex. J at p. 1; O at p. 1). The student also has episodic and grand mal seizures, acid reflux, nutrient malabsorption and restless body

syndrome, a condition which causes her body to jerk suddenly (Tr. pp. 222-25; Parent Ex. J at p. 1). The student is distractible and impulsive and may exhibit the characteristics of an attention deficit disorder (ADD) (Tr. p. 23).

The student received early intervention services including: occupational therapy (OT), physical therapy (PT), and speech-language therapy (Tr. p. 218). She attended several preschool programs, and in September 2005, began attending Imagine, a private school for students with autism (Tr. pp. 20, 218-19; Parent Ex. H at p. 1; see also Dist. Ex. 3). Imagine uses several teaching methodologies including applied behavioral analysis (ABA), discrete trial instruction; and the Developmental Individual-Difference Relationship-Based/Floortime (DIR/Floortime) model (Tr. p. 20).<sup>1, 2</sup>

The hearing record includes information regarding the student's levels of performance during the 2006-07 and 2007-08 school years (Dist. Exs. 4; 7; Parent Exs. D-J; O).

A May 8, 2006 report from the student's occupational therapist at Imagine stated that the student's OT sessions focused on sensory processing, visual perception, visual motor integration, and social-emotional skills (Dist. Ex. 4 at p. 1). At that time, the student was receiving both individual and group sessions of OT (id.). The student was noted to be cautious; avoided novel, as well as familiar, movement experiences; had difficulty with timing; difficulty planning; and difficulty processing verbal/visual instructions (id.). The report noted that the student had decreased her sensory defensive behaviors, had emerging mood stability, emerging focus and attention, improved posture, emerging praxis, improved fine motor skills, and had recently begun to initiate greetings (id. at p. 2). The therapist noted that all the gains were emerging and were expected to develop (id.).

A June 1, 2007 psychoeducational evaluation report from the student's private psychologist reflects that the student was assessed using the Vineland Adaptive Behavioral Scale: Interview Edition and the Assessment of Basic Language and Learning Skills – Revised (ABLBS) (id. at pp. 2, 4-6). The psychologist found the student to be significantly impaired across all developmental domains (id. at pp. 2-3). The psychologist also noted that the student exhibited severe deficits in gross and fine motor functioning, an inability to use a pincer grip, difficulty with manipulating small objects, difficulty with chewing and swallowing, difficulty sleeping, poor eye-hand coordination, poor muscle tone, and resistance to eating (id. at pp. 3, 7). The evaluation report indicated that the student continued to demonstrate difficulty with articulation, listening to two-syllable sounds, scanning a visual field, inhibiting her grabbing response, organizing her free time, playing independently, and accessing rewarding activities/items in her environment (id. at p. 7). The student also exhibited self-injurious biting, aggressive hitting and crying (id.). The private psychologist determined that the student needed assistance with shifting her attention to new directions; sorting; and learning basic level categories, verbs, pronouns, prepositions, opposites

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<sup>1</sup> The hearing record alternately refers to "discreet trial instruction" and "discrete trial instruction" (compare Tr. pp. 20, 30, 98, 99, with Tr. p. 550). The hearing record also provides that discrete (or discreet) trial instruction is utilized during the ABA methodology (Tr. pp. 30, 98, 550).

<sup>2</sup> Imagine's DIR/Floortime supervisor testified that DIR/Floortime is a developmental intervention methodology for children on the autism spectrum that focuses on social and emotional growth (Tr. p. 178).

and size (id.). He recommended a home-based special educator to teach daily living and socialization skills, communication skills, and play skills to the student as well address her needs for increased self-control and decreased self-injury (id.). The private psychologist recommended that the student participate in a play group or music class with typically developing peers with the assistance of a 1:1 special educator or 1:1 ABA assistant, to develop age-appropriate social skills and peer play skills (id.). The evaluator also recommended that the student participate in a summer camp program (id.).

A June 10, 2007 report from the student's physical therapist stated that the student was receiving six 30-minute individual sessions of PT per week (Parent Ex. I at p. 1).<sup>3</sup> The physical therapist noted improvements in the student's ability to walk, ascend and descend stairs using a railing, perform therapist-assisted sit-ups, and in her ability to throw a ball (id.). The therapist noted that the student's gait and balance impairments were a safety concern and increased her risk of falling and injuring herself (id.). The report included several annual goals for the student including improving balance (including dynamic balance skills and quality of movement), gross motor skills, upper and lower extremity strength and control, and walking so that she could walk straight without an uneven gait (id. at p. 2). The report also indicated short-term goals stating that the student would ambulate 300 feet with heel toe gait without loss of balance, independently walk up and down two flights of stairs step over step without the use of a railing, walk four feet on a four inch balance beam without falling off, and catch and throw a nine-inch ball four feet (id.). The therapist recommended that the student continue to receive six sessions weekly of 30-minute 1:1 PT on a 12-month basis (id.).

A DIR/Floortime progress report from Imagine dated November 2007 reported that the student had difficulty understanding ownership of personal belongings and that she was confused when an adult or peer was playing with an item that she desired (Parent Ex. H at p. 1). The report indicated that the student required assistance in communicating her needs and wants during such emotionally charged situations (id.). The report noted that the student's floortime sessions focused on fine and gross motor sequencing activities and postural control through structured and non-structured play activities (id. at p. 2). The student was noted to be working on Functional Emotional Developmental Levels 3 through 5,<sup>4</sup> was beginning to show emotional ideas in her

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<sup>3</sup> Attached and included as a part of this exhibit was a one-page undated speech-language therapy progress report (Parent Ex. I at p. 3). This report indicated that the student had a limited vocabulary, poor memory, limited auditory processing skills, poor pragmatic language skills, was easily distracted, had oro-motor delays, low oro-muscle tone, drooled excessively, and had feeding concerns (id.). The report provided goals for the student including: increase attention span, improve receptive language skills, improve oro-motor skills, increase expressive language skills, and increase overall feeding skills (id.). The report also provided short-term objectives and indicated that the student would be evaluated via formal and informal assessment, teacher and parent observations, and through class work (id.). Also attached and included as part of this exhibit were two pages of goals and short-term objectives from an undated individualized education program (IEP) (id. at pp. 4-5). These pages provided that the student's goals were to increase receptive language skills, increase receptive skills, increase expressive language skills and to increase oro-motor skills (id.).

<sup>4</sup> The report described the three different Functional Emotional Development Levels: Level 3 involved two-way purposeful interactions with gestures and intentional two-way communication and language, Level 4 involved elaborating ideas/representational capacity and elaboration of symbolic thinking, and Level 5 involved building bridges between ideas/emotional thinking (Parent Ex. H at p. 2).

pretend play and language, and was showing emerging knowledge of numbers, letters and mathematics skills (id.).<sup>5</sup>

An ABA progress report from Imagine dated November 16, 2007 indicated that the student received a full day of special education services incorporating DIR/Floortime and ABA (Parent Ex. D at p. 1). The report indicated that the student received ten hours per week of discrete trial instruction (id.).<sup>6</sup> The report also noted that the student received speech-language therapy, OT, sensory integration, music therapy and yoga throughout the school day (id.). The student was assessed using the ABLIS-R and demonstrated significant global delays across all domains (id. at pp. 2-3).<sup>7</sup> The evaluator noted that the student responded positively to ABA for academics and DIR/Floortime for socialization and generalization of acquired skills (id. at p. 3). The evaluator opined that the student continued to require intensive instruction with repetition and reinforcement strategies (id. at p. 3). The evaluator recommended that the student receive special education services through Imagine in order to work on the student's ability to independently respond to "where" and "why" questions, use descriptive language, brush her teeth, maintain attention to task for approximately 15 minutes in a group setting, and count to ten (id.).

An OT progress report from Imagine dated November 16, 2007 reported that the student was receiving five sessions of OT in both individual sessions as well as in group sessions (Parent Ex. E at p. 2). The report noted that the student was administered a continuous daily sensory diet of sensory motor, proprioceptive feedback and tactile stimulation (id.). The OT sessions included an olfactory component (using essential oils), a tactile component (with a weighted vest), a proprioceptive component (involving aerobics) and a vestibular component (using a trampoline and/or uneven surfaces) (id.). The report indicated that the student was easily distracted and impulsive at times, which contributed to her difficulties with familiar as well as with novel

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<sup>5</sup> Attached and included as a part of this exhibit was a one page description of the present levels of the student's social/emotional performance and two pages of annual goals and their corresponding short-term objectives (Parent Ex. H at pp. 3-5). The student was noted to have attentional deficits which were seen in her attention seeking behaviors and in her difficulty attending to tasks (id. at p. 3). The student was noted to be increasing her ability to remain focused, was showing improvement in attention, and was learning to problem solve (id.). However, she continued to need verbal and auditory cues (id.). The goals provided that the student would create mental representations; use words, phrases and sentences to convey emotional intention; enter into two-way purposeful communications to initiate original ideas; start on activities independently; initiate interactions; string together many circles of communication/problem solving into a larger pattern; and develop a sense of self/self esteem/independence (id. at pp. 4-5).

<sup>6</sup> The ABA director of Imagine testified that "discreet trial teaching" is a structured way of teaching children academic skills by breaking each skill into a very small component (Tr. pp. 99). The method utilizes repetition, motivational strategies and data analysis (id.). The student is given a direction, the student responds and then the consequence following the response is either a positive reinforcement or a simple correction procedure (Tr. p. 127).

<sup>7</sup> Attached to and included as part of this exhibit were two additional pages; the first page described the "ABA" academic performance and learning characteristics and the second page listed two "ABA" annual goals and their corresponding short-term objectives (Parent Ex. D at pp. 4-5). The academic performance and learning characteristics page noted that the student required consistent adult supervision to remain on task, had poor articulation, required an additional model to facilitate appropriate responding, and did not demonstrate an understanding of pronouns, prepositions or quantitative concepts (id. at p. 4). The page listing the goals and corresponding short-term objectives provided that the student would independently develop pre-reading skills and demonstrate visual performance skills (id.).

experiences (id.). The student exhibited deficits in timing, planning, and in processing verbal/visual instructions (id.). The therapist noted that the student had reduced the behavior of greeting others with hugs, had decreased her sensory overload behaviors, developed her spatial-temporal organization skills, and was now able to adapt her posture on dynamic surfaces (id. at pp. 2-3). The therapist noted that all of these skills were emerging and as such, recommended that the student continue to receive five sessions of OT (id. at p. 4).<sup>8</sup>

A speech-language progress report from Imagine dated November 20, 2007 reported that the student was receiving speech-language therapy five times per week, three sessions individually and two sessions in a group of two (Parent Ex. F at p. 1). The speech-language pathologist reported that the student had severe global delays including verbal dyspraxia, receptive and expressive language deficits, and pragmatic/social skill deficiencies (id.). The speech-language pathologist also noted that the student exhibited limited attention to tasks, required constant redirection, did not use any augmentative communication system, did not use words expressively unless accompanied with prompts, had difficulty sustaining adequate breath support for speech, was unintelligible during running speech, drooled significantly, required assistance during mealtime in order to facilitate appropriate feeding skills, and required prompts to use a fork correctly and to chew sufficiently (id. at pp. 1-3). The speech-language pathologist recommended that the frequency and duration of the student's speech-language therapy continue unchanged in order to facilitate peer interaction (id. at p. 3).<sup>9</sup>

A music therapy progress report from Imagine dated November 29, 2007 reported that the student received music therapy in a dyad one time weekly (Parent Ex. G at p. 1). The music therapy was provided for social-emotional support, and to provide non-verbal communication and regulation in lieu of counseling (id. at p. 5).<sup>10</sup> The therapist noted that the student was able to tolerate social proximity with peers (id. at p. 1). However, the therapist also reported that the student's attention span, her distractibility and her deficits in sensory modulation affected her regulation, delayed the development of joint attention and delayed her sustained engagement in pleasurable musical activities (id.). The therapist recommended that the student's music therapy be increased to one individual and one small group session per week as a non-conventional medium in lieu of counseling (id. at p. 2).

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<sup>8</sup> Attached and included as part of this exhibit were two pages, the first of which described the student's "OT" health and physical development and the second which listed two "OT" annual goals and their corresponding short-term objectives (Parent Ex. E at pp. 5-6). The page containing the two goals provided that the student would demonstrate improvement in activities which require visual motor coordination and visual perceptual skills, and improvement in activities which require fine motor coordination and manipulation of classroom materials and equipment (id.).

<sup>9</sup> Attached and included as a part of this exhibit were two pages listing four "SLP" annual goals and their corresponding short-term objectives (Parent Ex. F at pp. 4-5). The four goals provided that the student would increase her ability to respond appropriately to auditory verbal information, improve her conversation/expressive language skills, expand feeding, oral motor and articulation skills, and increase appropriate attention skills (id.).

<sup>10</sup> Attached and included as a part of this exhibit were two pages listing three goals and their corresponding short-term objectives (Parent Ex. G at pp. 3-4). The three goals provided that the student would demonstrate an increased capacity for original thinking, an increased awareness of the relationship between behavior in self and others, and an improvement in self-awareness and ability to self-regulate (id.).

On June 27, 2007, the Committee on Special Education (CSE) met for the student's annual review and to develop her individualized education program (IEP) for the 2007-08 school year (Parent Ex. K at p. 1). The CSE meeting was attended by the district's special education teacher who also acted as the district representative (id. at p. 2). The student's mother, a general education teacher (the educational director from Imagine), the student's occupational therapist, the ABA director from Imagine, and two advocates for the parents all participated by telephone (id. at p. 2). The CSE determined that the student was eligible for special education services as a student with autism (id. at p. 1). The CSE recommended a 12-month special class placement in a specialized school with a staffing ratio of 6:1+1 (id.). The CSE also recommended that the student be accompanied by a health services paraprofessional throughout the day, receive daily special education teacher support services (SETSS), four 30-minute sessions of 1:1 OT per week, one 30-minute session of 2:1 OT per week, one 30-minute session of 2:1 speech-language therapy per week, six 30-minute sessions of 1:1 speech-language therapy per week, and six 30-minute sessions of 1:1 PT per week (id. at pp. 2, 26, 27). The CSE rejected a 12:1+1 special class placement because the student's behavioral and academic delays were thought to require a smaller more structured setting (id. at p. 24). A non-public school was also rejected because it was deemed to be too restrictive (id.). For the summer 2007, the CSE recommended that the student attend the HASC Parkville summer program (id. at p. 1).

On June 28, 2007, the parents signed an enrollment contract with Imagine agreeing to pay tuition and fees for the 2007-08 school year (Dist. Ex. 6; Parent Ex. L).<sup>11</sup>

By letter dated June 28, 2007, the district advised the parents that it might be in the best interests of the student to remain in her current placement until the end of the school year and to defer placement until September 2007 (Dist. Ex. 2).

By a Final Notice of Recommendation (FNR) dated July 2, 2007, the district recommended a specialized school placement at one of the district's schools (Parent Ex. M; see also Parent Ex. A at p. 1). The student's mother visited the recommended school and returned a copy of the FNR to the district indicating that the school was inappropriate for the student, that the parents were not accepting the placement, that the student would be enrolled at Imagine, and that the parents would be requesting an impartial hearing (Tr. pp. 230, 247-48; Parent Ex. M; see also Parent Ex. A at p. 1).<sup>12</sup>

On September 6, 2007, the student started the 2007-08 school year at Imagine (Dist. Ex. 5 at p. 1).

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<sup>11</sup> An affidavit from Imagine's director of education, dated December 11, 2007, revealed that the parents paid \$10,000.00 toward tuition on July 8, 2007 (Dist. Ex. 5). The signed Imagine enrollment contract indicated that the non-refundable enrollment deposit was \$10,000.00 (Dist. Ex. 6 at p. 1; Parent Ex. L at p. 1).

<sup>12</sup> It is unclear from the hearing record when the student's mother visited the proposed placement and when the copy of the FNR was returned to the district. The student's mother testified that she first visited the proposed placement in September 2007, but the assistant principal of the proposed placement testified that the student's mother visited in July 2007 (compare Tr. pp. 230 and 247-48 with Tr. p. 406-07). On December 7, 2007, the student's mother visited the proposed placement for a second time with the educational director of Imagine (Tr. p. 35).

By due process complaint notice dated September 17, 2007, the parents, through their educational advocate, requested an impartial hearing (Parent Ex. A). The due process complaint notice asserted that the student would have difficulty in negotiating the stairs at the proposed placement, the program did not meet the student's OT and PT needs, the program did not provide home-based PT, and ABA may not be available at the placement (*id.*). The due process complaint notice also advised the district that the parents had unilaterally placed the student at Imagine and were seeking tuition reimbursement and reimbursement for the costs of the student's related services for the 2007-08 school year (*id.*). The due process complaint notice further advised that the parents were requesting reimbursement for the costs associated with six hours of SETSS, three hours of after school PT, and transportation costs to and from Imagine (*id.* at pp. 2-3).<sup>13</sup>

The impartial hearing began on December 13, 2007 and concluded on May 9, 2008, after five days of testimony (Tr. pp. 1, 496). The impartial hearing officer rendered her decision on July 11, 2008 (IHO Decision at p. 14). The impartial hearing officer determined that the district's recommended placement was appropriate (*id.* at p. 12). She found that the district's recommended placement accommodated the student's needs by providing a small (6:1+1) class environment, providing a 1:1 paraprofessional, providing for related services, providing a sensory gym, incorporating music and yoga, and by using ABA methodology, the Treatment and Education of Autistic and Related Communication Handicapped Children (TEACCH) methodology, and the Picture Exchange Communication System (PECS) methodology (*id.*). The impartial hearing officer further found that the proposed placement included classmates similar to the student in age, functional levels, social needs and management needs (*id.*). The impartial hearing officer discounted the parents' argument that the student's ambulatory needs rendered the recommended placement inappropriate because the student would have had to use stairs at the proposed placement, noting that the parents' proposed program at Imagine occurred on three floors (*id.*). The impartial hearing officer also determined that even though the evidence at the hearing indicated that the combination of ABA and DIR/Floortime methodologies proved to be helpful to the student, there was no persuasive evidence to suggest that DIR/Floortime was the only methodology that was reasonably calculated to provide the student with educational benefits (*id.*). The impartial hearing officer further excused the absence of a general education teacher at the CSE meeting because she found that the student's impairments were so severe that there was no reasonable possibility of a general education placement being considered for the student (*id.* at p. 13). As for the goals on the IEP, the impartial hearing officer found that while they could have been more detailed, reviewing the IEP as a whole, there was not sufficient confusion as to the student's educational needs and; therefore, she determined that any lack of detail in the goals provided in the June 27, 2007 IEP did not amount to a denial of a free appropriate public education (FAPE) (*id.*). As to related services, the impartial hearing officer found that the parties had separately resolved the issue of provision of PT (*id.*). The impartial hearing officer further found that, given the complexity of the student's needs, a home program of ABA was appropriate for the 2007-08 school year (*id.*). The impartial hearing officer stated that although she was not required to address the appropriateness of the parents' placement, nor was she required to address equitable considerations, "in the interest of completeness" she determined that Imagine was an appropriate

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<sup>13</sup> The district answered the parents' due process complaint notice denying the allegations and alleging that the program and recommended placement were reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 1).

placement for the student and that there were no equitable impediments to an award of tuition reimbursement (id.). The impartial hearing officer ordered that the parents' request for reimbursement for the cost of the student's tuition at Imagine for the 2007-08 school year be denied, but that the parents' request for payment for six hours of SETSS per week be granted (id. at p. 14).

The parents appeal, contending that the impartial hearing officer erred in finding that the district had provided the student with a FAPE. The parents assert that the June 27, 2007 IEP failed to include present levels of academic achievement and functional performance, failed to include measurable long-term goals and short-term objectives, and failed to identify how the student's progress would be evaluated. The parents assert further that the proposed placement lacked sufficient related service providers to provide for all of the student's related service requirements. The parents assert further that the proposed class failed to provide sufficient ABA services, failed to take into account the student's mobility limitations, and failed to take into account the level of services required for the student during mealtimes. The parents assert further that the district's placement recommendation was untimely.

The district asserts in their answer that the impartial hearing officer correctly determined that the district provided a FAPE to the student for the 2007-08 school year. The district further asserts that the parents' allegation of a denial of FAPE asserted in their due process complaint notice was premised solely on the inadequacy of the district's placement and that the parents have waived the right to raise any procedural issues regarding CSE composition, the inadequacy of the IEP or the timeliness of the FNR because these issues were not raised in their due process complaint notice nor were they raised at the hearing. The district also asserts that the parents failed to give the district proper notice before they unilaterally placed the student at Imagine. Moreover, the district asserts that the parents failed to adequately prove that they actually expended funds which would entitle them to tuition reimbursement. The district cross-appeals from the impartial hearing officer's decision insofar as it determined that the parents' established that their placement of the student at Imagine was appropriate and that there were no equitable impediments to tuition reimbursement. The district asserts that Imagine was inappropriate because the student made only minimal progress at the school, did not have a specific classroom teacher assigned to her, and was in an overly restrictive environment which did not have sufficient socialization opportunities. Regarding equitable considerations, the district asserts that the student's mother's December 2007 visit to the proposed placement with Imagine's director of education occurred long after she had decided to reject the proposed placement, and that said visit was merely an improper attempt to obtain discovery for the impartial hearing. The district also cites the parents' failure to give the district sufficient notice of their unilateral placement of the student at Imagine is an equitable impediment to reimbursement.

In their reply and answer to the district's cross-appeal, the parents assert that they specifically challenged the procedural flaws in the June 27, 2007 IEP during the hearing. The parents allege that the district had actual and constructive notice of the alleged infirmities of the IEP. The parents also assert that they provided proper notification of the student's unilateral placement at Imagine. To support this assertion, the parents attached an additional exhibit entitled "Parents [sic] Attachment A." The exhibit is a copy of a letter from the parents' advocate, dated August 28, 2007, advising the district that the parents had unilaterally placed the student at the Imagine Academy for the 2007-08 school year and planned to request an impartial hearing to seek

tuition reimbursement. The parents assert further that they had an unconditional obligation to pay the full tuition at the Imagine Academy. In addressing the district's arguments concerning the inappropriateness of Imagine, the parents assert that the student had a full-time special education teacher (the ABA director of Imagine), that the student had made significant measurable progress at Imagine, and further that Imagine allowed for socialization opportunities.

In their reply, the district objects to the parents' submission of the additional evidence, asserting that a State Review Officer should not consider this additional documentary evidence introduced after the hearing had concluded. The district further argues that even if this additional evidence is to be received by a State Review Officer, the certified mail response card indicates that the August 28, 2007 letter failed to provide the district with timely notice of the parents' unilateral placement.

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 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 (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]; 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 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 Walczak, 142 F.3d at 132).

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]), 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 Bd. of Educ., Appeal No. 08-070; 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).

In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at \*7 [2d Cir. Oct. 9, 2008]; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968 at 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the 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 (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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).

I note that the impartial hearing officer in the instant case placed the burden of persuasion on the district to demonstrate that it had offered the student a FAPE (IHO Decision at p. 13). At the time that the parents commenced this hearing, the burden of persuasion was on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005][finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).<sup>14</sup> Neither party has asserted on appeal that the impartial hearing officer misapplied the burden of proof. Accordingly, I have conducted my review of the hearing record with the burden placed on the district to show that it had offered the student a FAPE.

As a preliminary matter, I will address a procedural matter raised in the district's reply. The district objects to the parents' attempt to introduce additional documentary evidence by attaching the evidence to their answer to the district's cross-appeal. As discussed above, the additional evidence consists of an August 28, 2007 letter which advised the district that the parents had unilaterally placed the student at Imagine for the 2007-08 school year and that the parents planned to request an impartial hearing to request tuition reimbursement. Generally, documentary evidence not presented at a hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary to enable a State Review Officer to render a decision (Application of a Student with a Disability, Appeal No. 08-077; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). From the date of the letter, I find that this exhibit could have been offered at the time of the impartial hearing. Moreover in light of my decision below, I find that this additional evidence is not necessary for my review and therefore I decline to accept it.

Turning next to the merits of the case, I note that neither party has appealed the impartial hearing officer's order that the district reimburse the parents for six hours of home-based weekly SETSS services (IHO Decision at pp. 13, 14). An impartial hearing officer's decision is final and binding upon the parties unless appealed to the State Review Officer (34 C.F.R. § 300.510[a]; 8 NYCRR 200.5[k]). Consequently, this part of the decision is final and binding (Application of a

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<sup>14</sup> On August 15, 2007, New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007.

Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

I now turn to several arguments that were first raised by the parents on appeal. The parents assert on appeal that: the district's placement offer was untimely, the IEP failed to include the student's present levels of academic achievement and functional performance, the IEP failed to include measurable long-term goals and short-term objectives, and the IEP failed to identify how the student's progress would be evaluated. I note that the parents neither obtained permission from the impartial hearing officer to amend their due process complaint notice to include the claim regarding the timeliness of the district's placement, nor properly raised this issue during the impartial hearing. Moreover, the district did not consent to include this claim as a part of the impartial hearing. As such, I find that this claim is outside the scope of my review because it was not properly raised below and I therefore decline to address it (34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii], 279.12[a]; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Student with a Disability, Appeal No. 08-020; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 06-139). Regarding the remaining claims that the district argues were not properly raised, I find that these claims were raised at the impartial hearing and that the district did not object to the raising of them; therefore, I will address these issues on appeal.

I now turn to the appropriateness of the district's recommended program on the June 27, 2007 IEP. The hearing record supports a conclusion that the June 27, 2007 IEP sufficiently identified the student's academic performance levels and learning characteristics, the student's social and emotional performance levels and the student's health and physical development (Parent Ex. K at pp. 3-8). In addressing the student's performance levels and learning characteristics, the IEP indicated that the student had significant global delays; required consistent adult supervision to remain on task; was only able to communicate by using simple sentences; had poor articulation; did not understand pronouns, prepositions, or quantitative concepts; required a 1:1 setting with intensive treatment; required constant redirection and repetition; and learned best in a quiet structured environment (*id.* at pp. 3-4). In addressing the student's social and emotional performance levels, the IEP reflected that the student needed modeling and prompting to engage in appropriate interactions with peers, could be impulsive, was distracted by others, engaged in aggressive behaviors toward others, and engaged in self injurious behaviors (*id.* at p. 4). The IEP also indicated that the student demonstrated little frustration tolerance, continuously sought sensation and movement, required efforts to disengage her from self-stimulating behaviors, and required 1:1 supervision all day (*id.* at p. 5). Regarding the student's health and physical needs, the IEP revealed that due to the student's limitations she required supervision when getting in or out of chairs, entering or leaving class, or going up or down stairs (*id.* at pp. 7, 8). The IEP also reflected that the student exhibited seizures, ADD, decreased muscle strength, poor balance, motor planning difficulties, uncoordinated movements and poor impulse control, hypotonia, strabismus and was dependent for all activities of daily living (e.g. toileting, grooming, pacing food/fluid

intake, and controlling meal-time utensils) (id. at pp. 6-8). I find that the hearing record supports the conclusion that the June 27, 2007 IEP sufficiently identified the student's areas of needs (id. at pp. 3-8). The IEP revealed that the parent, the educational director of Imagine, the student's occupational therapist, the ABA director from Imagine and two parent advocates all participated at the CSE meeting (id. at p. 2). It is clear from the hearing record that these participants at the CSE meeting were familiar with the student's needs (Tr. pp. 19-81, 94-135, 136-64, 218-51, 506-07, 516). Furthermore, as noted by the impartial hearing officer, the detail which is provided in the IEP indicates that there was no confusion about this student's educational needs, her social and emotional needs or her health and physical limitations (Parent Ex. K at pp. 3-8).

After reviewing the entire hearing record, I also find that the district's recommended program sufficiently addressed the student's identified needs (IHO Decision at pp. 11-12). The CSE recommended a small 6:1+1 academic setting and a 1:1 paraprofessional for the student (Parent Ex. K at pp. 2, 26). The CSE provided twenty-seven different goals with 110 corresponding short-term objectives to specifically address the student's varied needs (id. at pp. 9-23). I find that these goals and short-term objectives were designed to address the significant aspects of the student's educational, emotional, social and physical deficits. Five goals and their corresponding short-term objectives were designated "ABA" goals and objectives (id. at pp. 9-11). These goals and objectives were specifically designed to address the student's difficulties with: reciprocating social information, transitioning to and from rooms, remaining on task, recognizing upper and lower case letters, and transitioning from one location to another (id.). Two goals and their corresponding short-term objectives were designated "teacher" goals and objectives (id. at p. 12). These goals and objectives were specifically designed to address the student's difficulties with toileting and bathroom skills, her social skills with peers, siblings and adults, and her difficulty with remaining on task (id.). Two other goals and their corresponding short-term objectives were designated "OT" goals and objectives (id. at p. 13). These goals and objectives were designed to address the student's visual coordination/visual perceptual deficits and her fine motor coordination deficits (id.). Four of the goals and their corresponding short-term objectives were designated as "SLP"<sup>15</sup> goals and objectives (id. at pp. 14-15). These goals and objectives were designed to address the student's difficulties with: the comprehension of speech, initiating conversation and verbal expression, eating, oral motor skills, articulation, structured play activities and attention skills (id.). Two more goals and their corresponding short-term objectives were designed to address the student's receptive language and comprehension skills, her completion of tasks, her ability to process and execute simple commands, her ability to engage in pretend and role playing, her ability to develop problem solving skills, and her ability to maintain a task with minimal distractions (id. at p. 16). Another goal and its corresponding short-term objectives were designed to increase expressive language skills and to assist the student with producing a greater variety of words and sentences (id. at p. 17). Yet another goal and its short-term objectives were designed to increase the student's oro-muscle tone, improve her jaw stability for sound and sentence production and to decrease her drooling (id.). Four other goals and their corresponding objectives were designed to assist the student with various aspects of her communication skills including: object identification, her ability to use word to request assistance, categorization, and receptive identification of pronouns, nouns and verbs (id. at pp. 18-19). One goal and its short-term objective addressed the student's matching skills (id. at p. 20). Another goal and its short-

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<sup>15</sup> Although unclear from the hearing record, "SLP" is presumed to mean "speech-language pathologist."

term objectives addressed the student's sorting skills (*id.*). Three other goals and their corresponding short-term objectives addressed several aspects of the student's social skills including eye contact, play skills, and greeting skills (*id.* at pp. 21-22). Two other goals and their corresponding short-term objectives addressed aspects of the student's toilet and bathroom training (*id.* at p. 23). Regarding the parents' assertion that the goals are ambiguous and/or vague, I find that some of the goals may be broad or vague when viewed alone and out of context. However, I find that the 110 short-term objectives comprehensively addressed the student's needs, were both detailed and measureable, and cured any deficiencies in the annual goals (*see M.C. v. Rye Neck Union Free Sch. Dist.*, 2008 WL 4449338, \*11 [S.D.N.Y. Sept. 29, 2008]).

The parents assert that the district's program failed to provide the evaluative criteria to measure progress toward these goals. The parents also assert that the IEP was flawed because the columns for the "coding system" to indicate the method of measurement of the annual goals were left blank for every goal. I find that these arguments lack merit. The IEP provides that the student's global developmental delays render the typical local and State assessments inappropriate for this student (Parent Ex. K at p. 26). It also provides that the student would be alternatively assessed through the use of discrete trial teaching data, teacher observation and progress reports (*id.*). The assistant principal of the proposed placement testified that the school uses data books to keep track of the students' progress, communication books to encourage parent-teacher communication regarding the students' progress and/or needs, and ABLLS to do skill assessments (Tr. pp. 401-02). Students who are being toilet trained have toilet schedules (Tr. p. 399). Data regarding these students is kept so that their water intake can be adjusted accordingly (Tr. pp. 399-400). Discrete trial instructional data is also maintained to determine whether the student will be able to move to the next level of instruction (Tr. p. 431). The lead teacher of the proposed placement testified that if the goals were set too high or too low, the student would be reassessed and the "autism team" would meet with the parent to alter the goals to more appropriately coincide with the students' needs (Tr. p. 480, *see also* Tr. p. 463).<sup>16</sup> The lead teacher also testified that determinations as to where to set the student's goals and which class to place the student in would have been determined after the school had conducted various student assessments including the reinforcement assessment, the ABLLS assessment, the Brigance assessment and the Motivational Assessment Scale (MAS) (Tr. pp. 468-70, 473, *see also* Tr. p. 428). The student in this case possesses severe deficits and has goals which address such early educational aspects as toilet training, transition to and from rooms, and maintaining eye contact (Parent Ex. K at pp. 9, 11, 12, 13, 21, 23). Under these circumstances, I find that the hearing record establishes that the proposed placement had significant evaluative mechanisms in place to assess the student, to measure the student's progress made on her goals, and to alter those goals and objectives if reevaluation indicated such a course were warranted. I also find that there is no evidence in the hearing record that the fact that the coding system was left blank would have deprived the student a FAPE.

Despite the parents' concerns, I also find that the CSE was cognizant of the student's balance issues on stairs and that the IEP reflected and addressed this area of need and recommended that the student receive a 1:1 health paraprofessional (Tr. pp. 397, 448; Parent Ex. K at pp. 6, 7, 8, 26). Additionally, as pointed out by the impartial hearing officer, there is no

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<sup>16</sup> The assistant principal further testified that the "autism team" is a group consisting of five teachers, the assistant principal and the autism coach (Tr. p. 424).

significant difference between the district's proposed placement, where the student would be required to travel between three floors, and Imagine, where the student also had to travel between three floors (Tr. pp. 398-99; see also IHO Decision at p. 12). As such, the persuasiveness of this parents' assertion that the fact that there were stairs at the proposed placement would have deprived the student of a FAPE is not persuasive.

I now turn to the appropriateness of the district's proposed placement. Both the assistant principal and the district autism coach testified that the school utilized several different teaching methodologies including the TEACCH, methodology, discrete trials, ABA methodology and PECS methodology (Tr. pp. 370, 389, 393, 401, 427-28, 439-40, 443, 446-47, 480-81, 487). The assistant principal testified that the TEACCH methodology is used to setup the physical, scheduling and organization structure of the classroom (Tr. pp. 427-28). The method uses color coding, personal schedules and different work stations with specific furniture sets (Tr. pp. 427-28, 467). The classrooms have a library area, a reading area and a math area (id.). The assistant principal also testified that discrete trial instruction and ABA are utilized throughout the day, several times per day for approximately thirty minutes (Tr. pp. 439-40, 453-54).<sup>17</sup> The assistant principal testified that the recommended school has teachers certified in TEACCH, ABA and PECS, and provides significant in-house teacher training as well as teacher training from outside consultants (Tr. pp. 389-91).<sup>18</sup>

The assistant principal for the proposed placement testified that if the student had attended class at the proposed placement, she would have been placed in one of three classrooms (Tr. pp. 372, 376). The first class was comprised of one girl and five boys (Tr. p. 392). The TEACCH and ABA methodologies were both utilized in the classroom and the students in the class worked on computers (Tr. pp. 392, 427). The teacher in the class has a Masters degree and is a licensed special education teacher who has been at the school for eight years (Tr. p. 426). Four of the students read at the first grade level and used the "Edmark Reading" program (Tr. pp. 392-93). One of students was a non-reader and was being taught using an ABA reading program to assist the student in recognizing letters (Tr. p. 392). The other student was a beginning reader and was being taught using a program called "Land of the Letter People" (Tr. p. 393). All of the students in the class worked on their activities of daily living (ADL), all the students were verbal, and all were toilet trained (Tr. pp. 393, 394).

The second class had two girls and four boys (Tr. p. 393). Two of these students were in the process of being toilet trained and were "toilet scheduled" (Tr. p. 394). Two of the students in this class used the Edmark Reading program (id.). The other four were working on sounds of the letters and on sight words (id.). These four students utilized the Land of the Letter People program (id.). Two of the students in this class were non-verbal and were utilizing PECS and photographs (Tr. p. 395). The third class had six students (Tr. p. 395). Five of the students were verbal and

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<sup>17</sup> The assistant principal testified that the ABA instruction is 1:1 direct instruction. (Tr. p. 430). The assistant principal explained that for a class of six, the teacher first instructs the class a group and then performs 1:1 instruction with individual students while the paraprofessional is working with the remainder of the class (Tr. pp. 430, 440). The ABA and discrete trial instruction occurs throughout the day (Tr. p. 439).

<sup>18</sup> From the hearing record, it does not appear that the student would be able to utilize PECS due to her vision and distractibility issues (Tr. pp. 40-41).

reading at a kindergarten or first grade level and one was non-verbal (Tr. pp. 395, 396). The one non-verbal student was "toilet scheduled" (Tr. pp. 395-96). The rest were toilet trained (*id.*). One of the students in this class was bilingual and had a 1:1 "alternate placement" paraprofessional (Tr. p. 397). This class had two paraprofessionals, one of which was an alternate placement paraprofessional (Tr. p. 441). All three of these classes either went swimming or gardening and all of the students with related services mandates received their related services (Tr. p. 396). For reading or math instruction, the students were first instructed as a group and then the classes were broken up into smaller groups so that the students could participate in their respective instructional programs (Tr. pp. 433, 435). The length of the instruction varied depending on the needs of the students (Tr. pp. 434, 436).

According to the lead teacher of the proposed program, had the student decided to attend the proposed placement, the class where the student would ultimately have been placed would have been dependent upon the student's needs, the class availability and the information obtained through a formal intake process where the teacher sits down with the parents to determine the student's likes and dislikes, her sleeping patterns, her eating patterns, and her prior educational background (Tr. pp. 467-69). Had the student attended the proposed placement, the student would also have undergone an ABLIS assessment, a Brigance assessment and a MAS in order to determine what would motivate the student to perform (Tr. pp. 470, 473). Additionally, the teacher, the lead teacher and related service providers would all have met to discuss the student, her aggressive, self-injurious, impulsive or self-stimulating behaviors, solutions to either phase out or decrease these inappropriate behaviors, her tolerance and frustration levels, and to ensure that the student would be given the "best possible instruction" (Tr. pp. 470, 473-75, 480). The lead teacher described that in order to address the student's difficulty with staying on task she would first find out the length of time the student could stay on task and then setup a curriculum for that time interval (Tr. p. 475). The student would then be assessed to determine if she could be instructed for longer time periods (Tr. pp. 475-76). To address the student's hyper-responsivity to visual and auditory information, her environment would be structured to provide more one to one instruction to give the student space and to reduce sensory distractions (Tr. p. 476). In order to accommodate the student's inability to utilize the PECS, the lead teacher testified that she would use either objects or a communication device to provide for communication (Tr. pp. 477-78). To address the student's toilet training needs, the student would be put on a toileting schedule (Tr. p. 479). Moreover, all of the steps to complete specific toileting tasks would be analyzed in order to specifically address or cover each of these skills with the student (*id.*). Social and emotional instruction would be addressed through ABA and task analysis to focus on all of the specific components of her social skills (Tr. p. 481). The scheduled and structured daily routine would also help to address the student's socialization skills (*id.*).

The assistant principal further testified about a typical day at the school (Tr. pp. 376-81). The school day starts with an instructional breakfast, designed to encourage the students to communicate their needs and wants and to make their own choices regarding food (Tr. p. 376). After breakfast, the students go to their classes for their morning routine which starts by addressing student needs in many activities of daily living such as taking off and hanging up coats, toileting, and washing hands (Tr. p. 377; *see also* Tr. pp. 479, 481). The students are encouraged to remain focused on these tasks through the use of puppets and songs (*id.*). The students discuss topics such as days of the week, weather or books (*id.*). Puppets are also utilized to reinforce positive social skills (Tr. pp. 387-88). The students receive instruction in math and reading every day (Tr. p. 377).

Science and social studies are also incorporated (Tr. p. 378). Instruction continues after lunch (id.). The proposed placement provided related services on site (Tr. pp. 377-79, 380, 415, 471; see also Tr. pp. 483-84). The related services are either push-in or pull-out, depending on what is mandated for a particular student (Tr. pp. 377-78). The school provides speech-language therapy, OT and PT (Tr. pp. 379, 415). The school has a designated OT/PT therapy room for its two occupational therapists and two physical therapists (Tr. pp. 381, 421, 471). The OT/PT therapy room equipment includes a vestibular swing, weighted vests, balls and a balance beam (Tr. p. 381). The placement also provides an adaptive physical education program, a swim program, a garden program, and music teachers (Tr. pp. 377-380). Any student not receiving all mandated related services at the school receives a related services authorization (RSA) to obtain outside services (Tr. pp. 423, 484). The assistant principal also testified that that the goal of the school was for all students with autism to be independent and to have communication skills and social skills regardless of their language skills (Tr. p. 383). She also testified that the proposed placement promotes independence by encouraging the students to follow their own schedule so that they do not have to be told what activity is coming next (Tr. pp. 383, 386).

Based upon the evidence in the hearing record, I find that the CSE sufficiently addressed the student's identified needs by recommending a small, structured 6:1+1 academic setting with significant related services. Furthermore, the hearing record establishes that the recommended 6:1+1 special class would have met the student's needs and at the time of the CSE's recommendation, was reasonably calculated to confer educational benefits to the student. Moreover, the hearing record reflects that the CSE considered whether the placement was in the LRE. The IEP notes that the CSE rejected a 12:1:1 special class placement because the student's behavioral and academic delays were thought to require a smaller more structured setting (Parent Ex. K at p. 24). A non-public school was also rejected because it was deemed to be too restrictive (id.). Additionally I agree with the impartial hearing officer's assessment that the hearing record does not provide any persuasive evidence to show that the DIR/Floortime methodology is the only methodology that would provide educational benefit to this student (IHO Decision at p. 12). The district's autism coach specifically testified that no one approach is better than any other and that the DIR methodology is not the only methodology that exists to address socially inappropriate behavior (Tr. pp. 537-38, 546).

The IEP was formulated in a manner that adequately complied with procedural requirements and with significant involvement by the parent and the student's private school service providers, and at the time that it was formulated, the district's recommended special education programs and services were reasonably calculated to enable the student to receive educational benefit in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y.] [citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386 at 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). In light of the foregoing, I concur with the district that it offered the student an appropriate program for the 2007-08 school year. Having determined that the challenged IEP offered the student a FAPE for the 2007-08 school year, I need not reach the issue of whether the parent's unilateral placement of the student at Imagine was appropriate, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child

with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

In light of my determinations herein, I need not address the district's cross-appeal. I have examined the parties' remaining contentions and find that they are without merit.

**THE APPEAL IS DISMISSED.**

**IT IS ORDERED** that upon the submission of proof by the parents to the district of the amount expended, the district shall reimburse the parents for six hours per week of SETSS services at home.

**Dated: Albany, New York  
October 29, 2008**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**