



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-091

### **Application of the BOARD OF EDUCATION OF THE LONGWOOD CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Ingerman Smith, LLP, attorneys for petitioner, Susan E. Fine, Esq., of counsel

The Law Offices of Brad H. Rosken, PLLC, attorneys for respondents, Brad H. Rosken, Esq., of counsel

#### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Gersh Academy (Gersh) for the 2007-08 school year. The appeal must be sustained.

Before turning to the merits of the instant appeal, I will address a procedural matter. In its reply, the district requested that the parents' answer be rejected because it was not verified in accordance with State regulations (see 8 NYCRR 279.7). Verification errors may be corrected by subsequent submission to the Office of State Review of a verified copy of the pleading in question (see, e.g., Application of the Bd. of Educ., Appeal No. 07-087; Application of a Child with a Disability, Appeal No. 04-081). Although the district is correct that the answer was not verified as required by the State regulations, counsel for the parents subsequently cured the defect, and accordingly, I will accept the answer.

At the time of the impartial hearing, the student was enrolled in an ungraded 6:1+1 classroom in the Behavior Academic and Social Enrichment (BASE) Institute program at Gersh (Tr. pp. 6, 735-36, 920, 999, 1044, 1153-55). The student has been described in the hearing record as exhibiting mild to moderate features of autism, and has exhibited difficulties with communication, social skills and transitions (Tr. pp. 25, 222). At times, the student has demonstrated non-compliant or aggressive behaviors and has been further characterized as

exhibiting tactile defensiveness (Tr. pp. 290, 293, 316, 318, 386, 764). Gersh has not been approved by the Commissioner of Education as a school with which school districts may contract to educate students with disabilities (Tr. p. 853; see 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 (Tr. p. 25; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The hearing record reveals that the parents first became concerned about their son's development when he was approximately 18 months of age (Dist. Ex. 7 at p. 1). On February 24, 2003 the student's mother referred her son to the district's Committee on Preschool Special Education (CPSE) due to her concerns about his delayed speech skills (Dist. Ex. 4). The CPSE's evaluation of the student revealed significant delays in his speech-language, fine-motor and sensory integration functioning (Dist. Ex. 7 at p. 1). The CPSE subsequently determined that the student was eligible for special education services as a preschool student with a disability and beginning in May 2003, the student attended a special education preschool program in a 10:1+2 self-contained classroom where he received three sessions of speech-language therapy and two sessions of occupational therapy (OT) per week (Dist. Exs. 6 at p. 1; 7 at pp. 1, 3; see Dist. Ex. 11 at p. 1). The student also received two sessions per week of private speech-language therapy, OT and physical therapy (PT) (Dist. Ex. 7 at pp. 1, 3). During the 2003-04 school year, the student continued to attend the special education preschool program and receive center-based and private related services (id.).

In August 2004, a private psychologist conducted a neurodevelopmental evaluation of the student (Dist. Ex. 7). Due to concerns that the student exhibited a pervasive developmental disorder (PDD), the psychologist administered the Autism Diagnostic Observation Scale (ADOS)/Module 1 (id. at p. 1). Results of the evaluation indicated that the student met the criteria for the diagnosis of an "autistic disorder," due to his difficulty engaging in reciprocal social interactions, his lack of spontaneous display of communicative intent with others, and his display of repetitive motor movements and self-stimulatory behaviors (id. at p. 2). The psychologist also reported that the student exhibited a very short attention span, showed a lack of focus and was highly distractible (id. at p. 3). The psychologist's evaluation report contained numerous recommendations, including the addition of ten hours per week of home-based services that utilized applied behavioral analysis (ABA) methodologies, and an increase in the student's speech-language therapy services (id.).

During the 2004-05 school year, the student continued to attend the special education preschool program and he also received center-based speech-language and OT services (Dist. Exs. 8 at p. 1; 9 at p. 1). The CPSE also provided home-based special education services, which utilized a "discrete trial format some of the time" (Dist. Ex. 10 at p. 1). The parents continued to provide additional private speech-language, OT, and PT services (id.). The hearing record indicates that by January 2005, the special education preschool program had successfully implemented a formal behavior plan which helped the student respond to adult requests, increased his ability to attend, increased his tolerance for remaining in the proximity of peers, reduced his aggressive actions and addressed his need to remove himself from classroom activities (id.).

Beginning on January 3, 2005, over a three day period, the district conducted a classroom observation of the student and reported that he exhibited difficulty with social interactions, fine-

motor delays, limited language skills, difficulty with transitions, hypersensitivities to the gym environment and overhead lighting, and task avoidance behaviors, such that 1:1 staff assistance was recommended (Dist. Ex. 11 at pp. 1-2).<sup>1</sup> During the 2005-06 school year, the Committee on Special Education (CSE) determined that the student was eligible for special education services as a student with autism and he attended kindergarten in a 12:1+1 special class at one of the district's elementary schools (Tr. p. 24; see Dist. Ex. 12 at p. 4).

On June 21, 2006, the CSE convened for a review of the student's program and to develop his individualized education program (IEP) for the upcoming 2006-07 school year (Dist. Ex. 12). The CSE reported that the student made "nice progress;" however, the June 2006 CSE believed that the student might be more appropriately placed in a smaller special education class for students with autism (id. at p. 4). For the 2006-07 school year, the June 2006 CSE recommended placement of the student in the district's 6:1+1 ABA special class program for students with autism, with a 1:1 aide, one session per week of group counseling services and one session each of individual and group OT services per week (Tr. p. 31; Dist. Ex. 12 at p. 1). The June 2006 CSE recommended that the student's speech-language therapy consist of two small group and two individual sessions per week, and one "integrated" session per week, which was conducted by the speech-language pathologist in the classroom (Tr. p. 31; Dist. Ex. 12 at pp. 1-2, 4).<sup>2</sup>

During the 2006-07 school year, the student attended first grade in the program recommended by the June 2006 CSE (Tr. pp. 30-31).<sup>3</sup> The district's autism consultant met with district staff one time per week to discuss any problems they experienced with any of the students (Tr. p. 36). In January 2007, the student's related service providers prepared reports of the student's progress and recommendations for the upcoming school year (Dist. Exs. 14-16). The school psychologist, who provided the student's counseling services, reported that the student did a "nice job" establishing eye contact in a small structured setting, and recommended continuation of socialization opportunities during the school day and behavior management strategies to reduce self-stimulatory behaviors (Dist. Exs. 14; 18 at p. 1). She recommended that the student continue to receive one group session of counseling per week (id.). The student's occupational therapist reported that the student exhibited improved management of classroom "tools" (i.e., scissors) and handwriting skills, but continued to have difficulty with texture manipulation, bilateral tasks, multi-step directions and shoe tying (Dist. Ex. 15 at p. 1). She recommended that the student receive one group and one individual session of OT per week (id.). The student's speech-language pathologist reported that although the student was able to use basic sentences to express his wants and needs, demonstrated basic knowledge of shapes and colors, answered yes/no questions and followed simple directions, he demonstrated significant impairment of his functional expressive,

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<sup>1</sup> The hearing record shows that the classroom observation took place on January 3, 7, and 18, 2005 (Dist. Ex. 11 at p. 1).

<sup>2</sup> The June 2006 IEP indicated that the student "needed" extended school year (ESY) services, but that the parents "opted" not to accept special education programming for their son for summer 2006 (Dist. Ex. 12 at p. 4).

<sup>3</sup> The hearing record indicates that the parents obtained private home-based teacher instruction services for their son during the 2006-07 school year (Tr. p. 705). The private home-based teacher services were discontinued in summer 2007 (Tr. p. 511).

receptive and pragmatic language skills (Dist. Ex. 16 at p. 2). She recommended that the student receive three individual and one group speech-language therapy sessions per week (id.).

In February 2007, the student's special education teacher prepared a summary of the student's needs and progress related to his IEP goals (Dist. Ex. 17). She reported that the student was making steady progress toward his IEP goals and provided information about his reading, writing, math and communication progress (id. at p. 2). The student's special education teacher also indicated that the student required highly motivating activities and 1:1 support to participate in group lessons and that his off-task and self-stimulatory behaviors sometimes interfered with attending and learning (id.). For the 2007-08 school year, she recommended that the student continue in a 6:1+1 special class for students with autism with a 1:1 aide and receive related services pursuant to his providers' recommendations (id.).<sup>4</sup>

On February 13, 2007, a subcommittee of the district's CSE convened for the student's annual review (Dist. Ex. 18). Participants included the CSE chairperson, school psychologist, special education teacher, occupational therapist, speech-language pathologist and the parents (id. at p. 1). The February 2007 CSE subcommittee reported that the student had demonstrated steady progress toward his IEP goals in his highly structured 6:1+1 special education class with related services (id.). However, it was also noted that the student continued to exhibit significant delays in academic, motor, language, self-help and social skills (id.). The February 2007 CSE subcommittee indicated that the student's behavior sometimes interfered with attending and learning, and that he needed close teacher support to understand directions and to provide frequent reteaching of skills (id.). The resultant February 2007 IEP offered the student a 2007 ESY program and for the 2007-08 school year, recommended continuation of his 6:1+1 ABA special class with 1:1 aide services, related services pursuant to his providers' January 2007 recommendations, and two hours per month of in-school parent training and counseling (Tr. p. 31; Dist. Ex. 18 at pp. 1-2).

By the end of the 2006-07 school year, the CSE reported that out of 50 annual goals contained on the June 21, 2006 IEP in the areas of reading, math, social/emotional/behavioral, and motor skills, the student received designations of "some progress" (SP) or "progressing satisfactorily" (PS) on 27 of the annual goals, and "achieved" (A) 16 annual goals (Dist. Ex. 12 at pp. 5-15).<sup>5</sup> In June 2007, the student's literacy report card reflected the reading designation of "2," defined as a "beginning reader" who "needs more practice and support," and the writing designation of "1," defined as an "emergent writer" who "consistently relies on teacher support, assistance and direction to work toward goals. Academic goals are often modified to help the

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<sup>4</sup> The special education teacher also recommended one "integrated" session of speech-language therapy per week in addition to the sessions that the speech-language pathologist recommended, which according to the school psychologist is "part of our program" and therefore not contained in the IEP (Tr. pp. 31, 153-54; Dist. Ex. 17 at p. 2).

<sup>5</sup> Seven annual goals were designated either "not started" (NS) or "see comment" (SC), followed by comments about the student's achievement toward the annual goal (Dist. Ex. 12 at pp. 5-15). Progress toward the student's speech-language annual goals was reported through the third marking period, and the student received designations of "SP" or "PS" on all six speech-language annual goals (id. at pp. 12-13).

student meet with success" (Dist. Ex. 13 at pp. 1-2). On a June 2007 report card that measured the student's work study habits, personal and social growth and basic academic skills, the student received mostly designations of "1" or "2" with the exception of homework completion, identification of upper/lowercase letters, colors and shapes and association of sound with letter symbols, skills designated as "4" (exceeds expectations) and name writing, a skill designated as "3" (meets expectations) (id. at p. 2).<sup>6</sup>

At the commencement of the 2007-08 school year, the student attended second grade in the program recommended by the February 2007 CSE subcommittee (Tr. p. 41).<sup>7</sup> The district's autism consultant continued to meet with staff on a weekly basis (Tr. p. 36). On a date in September 2007, not specified in the hearing record, the special education teacher, school psychologist and speech-language pathologist working with the student met and formulated an informal "plan" to reduce the student's behaviors that interfered with his learning (Tr. pp. 228-32, 256, 264; see Dist. Ex. 18 at p. 1). On or about September 7, 2007, district staff began documenting the frequency, duration, antecedents, consequences and descriptions of the student's behaviors, which included refusal to complete work, participate in activities and sit down; walking around the room; "self-talking;" banging on desks; kicking objects; hitting adults; screaming; crying and "tapping" himself (Dist. Ex. 19; Parent Exs. B; C). The student also exhibited instances of self-injurious behaviors such as hitting and biting himself (see, e.g., Dist. Ex. 19 at pp. 21-22, 24). Beginning on or about September 17, 2007, and continuing on September 18, 26 and October 1, 2, 3, 10 and 16, 2007, the district's autism consultant provided behavior management recommendations to district staff who worked with the student (Tr. pp. 46-47; Dist. Ex. 20 at pp. 4-7). On October 17, 2007, staff working with the student made changes to his informal behavior plan (Tr. pp. 626-27; Dist. Exs. 20 at p. 4; 34 at p. 1). In late October 2007, after analyzing the student's behavioral data, the school psychologist, in conjunction with the autism consultant, recommended changing the student's 1:1 aide and the format used to document the student's behaviors, and provided additional behavioral management suggestions (Tr. pp. 330-32, 394; Dist. Ex. 20 at p. 8).<sup>8</sup>

On October 25, 2007, the student's mother completed the parent version of the Functional Assessment Interview Tool (FAIT), and in early November 2007, his special education teacher and speech-language pathologist completed the staff version of the FAIT as part of the student's functional behavioral assessment (FBA) (Dist. Ex. 21). Also in November 2007, the special education teacher completed Problem Behavior Questionnaire Profiles (PBQP) and a Motivation Assessment Scale (MAS) regarding the student's classwork noncompliance and self-stimulatory behaviors (Dist. Exs. 22; 23; 24; see Dist. Ex. 25 at p. 1).

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<sup>6</sup> The special education teacher indicated that the student exhibited an increase in "behaviors" toward the end of the 2006-07 school year, which she attributed to stressors occurring in the family's home (Tr. p. 712).

<sup>7</sup> The student received private OT services during the 2007-08 school year (Tr. p. 540).

<sup>8</sup> The format of the information collected by staff in Dist. Ex. 19 changed over the course of the first half of the 2007-08 school year (Tr. pp. 194-96, 628-29, 644-45).

On November 26, 2007, the district's school psychologist prepared a report of the student's FBA and developed the student's behavioral intervention plan (BIP) (Dist. Exs. 25; 25A). The FBA summarized results from completion of the FAIT, PBQP and MAS and selected the student's noncompliant/off-task behaviors (not listening to adult directions) and self-stimulatory behaviors (tapping and self-vocalizations) as behaviors to address (Dist. Ex. 25 at pp. 1-2). Data was collected in the student's classroom over nine school days and analyzed to identify activities where the behaviors occurred (Dist. Exs. 25 at p. 2; 25A at p. 1). The FBA report identified antecedent events/conditions that both triggered and reduced instances of the target behaviors, and events or consequences that typically followed the occurrence of the behaviors (Dist. Ex. 25A at p. 1). The FBA stated that the student exhibited reduced tolerance for group activities and daily repetitive academic tasks (*id.* at p. 2). The school psychologist hypothesized that the function of the student's noncompliant and self-stimulatory behaviors was to "escape" and to receive adult attention in the form of reprimands and reminders to return to task (*id.*). The resultant BIP identified numerous strategies to be used to address the antecedents of the student's behaviors, and teaching strategies to be used to help the student learn alternate behaviors (*id.* at pp. 2-4). It was recommended that staff meet with the parents every six weeks (*id.* at p. 4). On November 28, 2007, district staff convened a "team"<sup>9</sup> meeting and reviewed the proposed BIP (Tr. p. 61; Dist. Ex. 26 at p. 4; *see* Dist. Ex. 18 at p. 1). On November 30, 2007, the school psychologist, special education teacher, speech-language pathologist and the student's mother indicated their agreement with the BIP (Dist. Ex. 25A at p. 5).

During the first quarter of the 2007-08 school year, the student's report card reflected the designation of "1" (not evident) on each goal relating to personal and social growth, one out of nine English language arts (ELA) goals, three out of eight work/study habit goals, and two out of six math goals (Tr. pp. 572-73; Dist. Ex. 40). He received the designation of "2" (needs more practice and support) on all science and social studies goals, four out of nine ELA goals, two out of eight work/study habit goals, and two out of six math goals (Dist. Ex. 40). He received the designation of "3" (meets expectations) on three out of nine ELA goals and one out of eight work/study habit goals, and the designation of "4" (exceeds expectations) on two out of nine ELA goals, two out of eight work/study habit goals and two out of six math goals (*id.*).

On December 18, 2007, the student's mother was called to pick up her son from school because his behavior was "unmanageable" and he had been removed from the classroom (Tr. pp. 1089-96). The student's mother met with the assistant superintendent for student and community services (assistant superintendent) who suggested that the parent meet with the district's behavioral consultant (Tr. pp. 1097-99). Also on that day, the student's special education teacher, TA, and speech-language pathologist convened a team meeting to discuss current concerns (Tr. p. 61; Dist. Ex. 26 at p. 2). At that time, the student exhibited aggressive/violent behaviors such as biting, kicking, punching, throwing furniture, and "targeting" staff by running after them to "attack" them (Dist. Ex. 26 at p. 2). The team discussed the student's BIP and possible revisions, but concluded

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<sup>9</sup> The hearing record reflects that there were numerous members of the student's "team," not all of whom attended each of the four team meetings referenced in this exhibit (Tr. p. 61; Dist. Ex. 26). The special education teacher indicated that the student's team consisted of herself, the classroom teacher assistant (TA), speech-language pathologist, school psychologist, autism consultant and if needed, the occupational therapist (Tr. pp. 422, 521-23).

that they needed the advice of the school psychologist who was not present at the meeting (id.). In the interim, the team agreed to remove the student or other students when safety concerns arose, and to involve administration when the student's behavior escalated (id. at p. 3). On December 19, 2007, the school psychologist revised the student's BIP by removing the use of a visual schedule, and adding the use of a "token board" during transitions, the opportunity to earn attention from a preferred adult and a procedure for when the student exhibited aggressive behaviors (Tr. pp. 51, 108; compare Dist. Ex. 25A, with Dist. Ex. 27).<sup>10</sup> On December 20, 2007, classroom staff began documenting activities that they did with the student according to his daily schedule, and in a separate document, continued to record descriptions of the student's behaviors exhibited during specific activities and the student's comments (Tr. pp. 81-82, 173-74, 197, 541-42; Dist. Exs. 19 at pp. 43-54; 29).

On January 3, 2008, the district received parental consent for the student to undergo a psychological reevaluation in preparation for his "triennial" review (Tr. p. 52; Dist. Exs. 37; 38). Over two subsequent dates in January 2008, the school psychologist evaluated the student, using the Leiter International Performance Scale-Revised (Leiter-R), the Wechsler Individual Achievement Test - Second Edition-Screener (WIAT-II Screener), the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II)-Teacher Edition, the Childhood Autism Rating Scale (CARS), behavioral observations and teacher interviews (Dist. Ex. 39 at p. 1). The school psychologist's evaluation report described the Leiter-R as a measure of the student's non-verbal cognitive abilities, administered through the use of pantomime or gestures, with occasional verbal prompts that helped the student remain focused on the task (id. at pp. 1-2). Administration of the Leiter-R yielded IQ/Composite Scores of 90 (fluid reasoning), 82 (brief IQ) and 82 (full scale IQ) (id. at p. 2). The school psychologist reported that the student's full scale IQ score fell within the below average range of cognitive functioning, with subtest scores ranging from average to low (id. at pp. 2-3). The WIAT-II Screener measured the student's word reading (standard score 88), numerical operations (standard score 77), and spelling skills (standard score 93), academic skills that the school psychologist characterized as being between the kindergarten to first grade level (id.). The student's classroom teacher completed the Vineland-II, a measure of the student's adaptive behavior, which yielded domain standard scale scores of 70 (communication), 63 (daily living skills), 64 (socialization) and 64 (adaptive behavior composite); scores that were lower than his cognitive functioning (id. at pp. 2, 4). The school psychologist described the student's adaptive behavior composite score as falling in the low range of functioning, which represented mild deficits in all domain areas (id. at p. 3). The student's classroom teacher also completed the CARS, which yielded a score within the "mildly-moderately autistic range" (id. at p. 4). Areas of strength reported included the student's ability to appropriately imitate sounds, words and movements, and the report stated that the student demonstrated progress in his communication skills during the year (id.). Results of the CARS indicated that the student "constantly taps" his body, had "sensory issues," demonstrated an abnormal response when looking at people or objects, had a difficult time

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<sup>10</sup> The school psychologist discussed the revised BIP with the student's father and the hearing record indicates that the student's mother agreed to the revised BIP (Dist. Ex. 28; Parent Ex. A; see Dist. Ex. 18 at p. 1).

with transitions, and was prone to echolalia and engagement in verbal "stim" (id.).<sup>11</sup> The school psychologist recommended that the CSE review the student's "teacher reports, his current testing, and the progress on his behavioral intervention plan" prior to making any decisions (id.).

On January 8, 2008, a behavioral consultant, for whom the district's autism consultant worked, met with the student, staff in the student's classroom and the school psychologist (Tr. pp. 52-54, 59, 93, 95). The behavioral consultant modeled different techniques to be used with the student to help improve his behavior (Tr. pp. 53, 1458-62). On January 11, 2008, the student's BIP was revised for a second time (Dist. Ex. 30). The revised BIP provided specific strategies to be used to increase the student's compliance and decrease self-stimulatory behaviors, including procedures for using his "First Then"<sup>12</sup> and transition token charts, altering his schedule of transitions, allowing for the use of headphones during work time and providing sensory activities as reinforcers (id. at p. 1). The revised BIP included modifications to the consequence-based strategies, the addition of "reactive" strategies to be used when the student exhibited aggressive behaviors, and the addition of data collection regarding the frequency/duration of time the student was removed from the classroom due to aggressive behaviors (compare Dist. Ex. 27, with Dist. Ex. 30).

On January 24, 2008, a team meeting was convened that included the student's special education teacher, TA, speech-language pathologist, school psychologist, behavioral consultant, assistant superintendent, coordinator of preschool and special education, principal and director of special education (Tr. pp. 4, 53-54, 95, 174, 256, 340, 371, 585-86; Dist. Ex. 26 at p. 1; see Dist. Ex. 18 at p. 1). The team reported that since the implementation of the behavioral consultant's January 8, 2008 suggestions, the student's aggressive behavior and duration of tantrum/off-task behavior had decreased (Dist. Ex. 26 at p. 1). Academic, behavioral and social goals were identified and it was decided that as of January 25, 2008, a different 1:1 aide would be assigned to the student (id.).<sup>13</sup>

By letter dated January 25, 2008, to the district's director of special education services, counsel for the parents stated that the parents had retained him to represent them in an impartial hearing seeking tuition reimbursement for the unilateral placement of their son at Gersh (Parent Ex. I). The parents' attorney further advised the director of special education services that the parents were rejecting the district's placement, and that on February 11, 2008, the parents planned to enroll the student in Gersh (id.). In addition, the parents' attorney stated that the district had failed to properly and appropriately deal with the student's behaviors that resulted from his disability and therefore, the district had failed to offer the student a free appropriate public education (FAPE) pursuant to the Individuals with Disabilities Education Act (IDEA) and Section

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<sup>11</sup> The hearing record describes "echolalia" as the repetition of "things [the student] has heard in the past or things that he is hearing in the present," and verbal/vocal "stim" as "making noises" (Tr. p. 25). "Scripting" behavior was described as repeating information heard in the past, i.e., part of a story or movie (Tr. p. 378).

<sup>12</sup> The hearing record did not further describe the "First Then" token chart.

<sup>13</sup> The hearing record indicates that three different staff members provided the student's 1:1 aide services while he attended the district's 2007-08 program (Tr. p. 650).



504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 701-796[1][1998]) (id.). The hearing record reveals that the district did not respond to the parents' January 25, 2008 letter (Tr. p. 908).

On January 29, 2008, a developmental pediatrician conducted a private developmental pediatric evaluation of the student (Tr. p. 815; Dist. Ex. 48). The developmental pediatrician reported that the student had "more difficulties recently related to his behavior, as well as issues with sleep" (Dist. Ex. 48 at p. 2). She further indicated that the student was described as having a high activity level, a preference for adult interaction, a short attention span, distractibility, and difficulty concentrating on/completing tasks; that he struggled with peer interactions and transitions; and that he exhibited "obsessive," self-stimulatory and ritualistic behaviors (id. at p. 3). The developmental pediatrician reported that more recently, the student had shown more "anxiety and aggression," and that he exhibited throwing, hitting and aggressive behaviors daily at school (id.). It was reported to the developmental pediatrician that the student also "melt[ed] down" at home when told "no" or when he did not get what he wanted, and that despite extensive behavior management on the part of the family, they felt that the student's behaviors were getting "out of control" (id.). The developmental pediatrician reported that the parents did not believe their son was "getting maximum benefit" out of the district's program and were in the process of enrolling him at Gersh (id. at p. 4). Although the evaluation report revealed that the parents had exhausted all behavioral management avenues and were trying their best with a "good" behavior management plan, the developmental pediatrician recommended administration of a trial of a specific medication to the student to improve his behavior (id. at pp. 4-5).<sup>14</sup> The evaluation report provided numerous recommendations, including continuing the Gersh enrollment process, and until that was accomplished, continuing in the district's program with implementation of the BIP at home and school (id. at p. 6).

On January 31, 2008,<sup>15</sup> the team convened a meeting to discuss "where we are with [the student]" (Dist. Ex. 26 at p. 5). The team reviewed the procedure to transition the student to "specials," and reported that he had demonstrated progress in all specials and during transitions over the past few weeks (id.). The team members identified academic, behavioral and social goals and strategies to be used with the student to increase the instances of positive behavior (id.).

On his January 2008 literacy report card, the student achieved reading and writing designations of "2," indicating that he was "partially meeting learning standards" (Dist. Ex. 41 at pp. 1-2). On a January 2008 report card that measured the student's work/study habits, personal and social growth and basic academic skills, the student received mostly designations of "1" (not meeting learning standards) or "2," with the exception of homework completion, name writing, identification of upper/lowercase letters, colors and shapes and association of sound with letter symbols, which were designations of either "3" (meeting learning standards) or "4" (meeting learning standards with distinction) (id. at p. 2). Report card comments revealed that the student's

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<sup>14</sup> At a point not specified in the hearing record, the parents began a trial of the recommended medication with the student (Tr. p. 1408). According to the developmental pediatrician, the effect of the medication for some children with autism is a decrease in their level of aggressive and anxious behavior (Tr. p. 826).

<sup>15</sup> Although the date is stated as January 31, 2007 on p. 5 of Dist. Ex. 26, within the context of the hearing record, this appears to be an error and the correct date appears to be January 31, 2008.

behavior was a "focus," and that he had recently exhibited improvement in his ability to transition, participate in "specials," and complete "easy" work tasks (*id.* at p. 1). Although the student continued to exhibit off-task behavior, the report card indicated that he was able to be brought back to task without "the behavior turning aggressive" (*id.*).

During the last week of January through the first week of February 2008, district staff designated the student's behavioral, academic and social functioning as "2" (needs improvement) and "3" (average/satisfactory) (Dist. Ex. 32). Narrative descriptions of the student's behavior during this timeframe indicate that his aggressive behavior decreased and although he continued to exhibit some off-task behaviors, his ability to transition appropriately and complete work increased (*id.*). The student's last day in the district's program was February 8, 2008 (Tr. p. 905).

On February 15, 2008, the student began attending the BASE Institute at Gersh (Tr. pp. 735-36, 999). According to the hearing record, Gersh's BASE program is for students "on the spectrum," most of whom use alternative assessments (Tr. pp. 735-36).

By due process complaint notice dated February 28, 2008, the parents requested an "OPEN" impartial hearing in which they sought tuition reimbursement for Gersh for the 2007-08 school year (Dist. Ex. 3).<sup>16</sup> The parents alleged that during the 2007-08 school year, the district failed to provide the student with a FAPE in the least restrictive environment (LRE) (*id.* at p. 2). The parents further maintained that the February 2007 IEP failed to place the student in an appropriate special education environment with a properly trained 1:1 aide (*id.* at p. 3). Next, the parents contended that the district failed to provide the student with ABA therapy or any other methodology to address the student's behaviors (*id.*). In addition, the parents alleged that the February 2007 IEP failed to provide the requisite amount of speech-language therapy, transitional support, and parent counseling and training pursuant to State regulations (*id.*). The parents also argued that the district had made inconsistent, if any, progress in addressing the student's IEP goals as they related to his speech-language needs as well as his social and emotional skills (*id.* at p. 4). Lastly, they alleged that the district failed to place the student in the regular education physical education class, opted him out of State and local assessments, failed to appropriately address the student's language skills, and that the district placed the student on track for "merely a local diploma" (*id.*).

By letter dated March 10, 2008, through its attorney, the district responded to the parents' due process complaint notice and denied the allegations which the parents had raised (Dist. Ex. 1). The district further stated that the parents' requests for relief as indicated in their due process complaint notice should be denied in all respects (*id.* at p. 3). According to the district's March

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<sup>16</sup> The parents' due process complaint notice requested an order that Gersh be designated as the student's placement for the 2007-08, 2008-09, and 2009-10 school years (Dist. Ex. 3 at pp. 3-4). The hearing record does not indicate whether the district's CSE had conducted the student's annual review for the 2008-09 school year, nor does it show that the CSE had recommended a program for the student's 2009-10 school year. A student's IEP is required to be reviewed periodically, but not less frequently than annually (20 U.S.C. § 1414[d][4][A][i]; 34 C.F.R. § 300.324[b][i]; Educ. Law § 4402[1][b][2]; 8 NYCRR 200.4[d][2][xi],[f]). As such, the parents' claims with respect to 2008-09 and 2009-10 school years are premature, and therefore, the impartial hearing officer appropriately did not address claims related to those school years (see Application of a Student with a Disability, Appeal No. 08-028).

10, 2008 response, a resolution meeting also took place that same day, "which did not prove successful" (id. at p. 4).

An impartial hearing convened on April 8, 2008 and after seven days of testimony concluded on May 8, 2008 (IHO Decision at p. 1). By decision dated July 30, 2008, the impartial hearing officer concluded that during the 2007-08 school year, the district had failed to offer student a FAPE, and that it had also failed to implement the student's educational program (id. at p. 11). Specifically, the impartial hearing officer made the following findings with respect to the challenged February 2007 IEP: (1) that the goals did not accurately reflect the results of evaluations that identified the student's needs in the academic or social/emotional/behavioral domains; (2) that although the student presented with significant social/emotional/behavioral needs, the goals relating to the aforementioned areas were underdeveloped, and the district failed to explain why it had decreased the number of goals in this area from five to two; (3) that the challenged IEP was based on insufficient evaluative material relating to the student's academics; (4) that speech-language services should have been provided to the student in accordance with 8 NYCRR 200.13[a][4]; and (5) that the district failed to explain the need for the provision of adapted physical education (id. at pp. 12-17). Based on the foregoing, the impartial hearing officer determined that "the [February 2007] IEP was poorly designed to provide meaningful benefit" (id. at p. 17).

The impartial hearing officer went on to find that the district failed to implement the student's February 2007 IEP (IHO Decision at p. 11). With regard to this issue, the impartial hearing officer focused his analysis on the testimony of the student's special education teacher and speech-language therapist from the district (id. at p. 19). In reviewing their testimony, the impartial hearing officer opined that the student's behaviors had prevented the introduction of new academic material since June 2007, and therefore, the district failed to demonstrate that the student achieved "positive academic and non-academic benefits" (id. at p. 20). He further noted that without a "program book,"<sup>17</sup> there was no academic baseline by which to judge the student's progress and he concluded that the student regressed on three of his goals (id. at pp. 20-21). Likewise, the impartial hearing officer placed an emphasis on the district's speech-language therapist's testimony that the student's noncompliant and aggressive behaviors persistently interfered with his learning (id. at p. 22). Next, the impartial hearing officer opined that the district was simply unable to deliver an appropriate ABA program to the student, given that the student's behaviors impacted his educational opportunities, which in turn, resulted in the introduction of little or no new academic material (id. at p. 23). He ultimately concluded that without a cohesive plan in place to meet the student's behavioral needs, the district failed to implement an essential element of the student's IEP that was necessary for him to receive an educational benefit (id. at p. 24).

With regard to the parents' unilateral placement of the student at Gersh, the impartial hearing officer concluded that based on the testimony and documents contained in the hearing record, the education and services provided there met the student's unique needs (IHO Decision at pp. 25-31). Lastly, the impartial hearing officer found in favor of the parents with respect to

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<sup>17</sup> The hearing record reveals that a "program book" is a tool employed as part of the ABA methodology whereby academic materials are compiled so that a baseline can be obtained and progress can be tracked (Tr. pp. 601-05; see IHO Decision at p. 20).

equitable considerations finding that the parent had filed a "removal letter" with the district on January 25, 2008 in conformity with 20 USC § 1412(a)(C) (*id.* at p. 31).

The district appeals and requests that the impartial hearing officer's decision be reversed in all respects. Specifically, the district asserts that the impartial hearing officer erred by making a sua sponte finding that the social/emotional and academic goals enumerated in the February 2007 IEP were not appropriate because this issue was not raised in the parents' due process complaint notice. In the alternative, the district maintains that the goals listed in the student's IEP were based on sufficient evaluative data, and therefore, were appropriate. Moreover, the district maintains that the February 2007 IEP was reasonably calculated to confer a meaningful educational benefit on the student and that this issue was not raised in the parents' due process complaint notice. Next, the district claims that the February 2007 IEP met the speech-language requirements for autistic students prescribed by 8 NYCRR 200.13[a][4]. The district also argues that the impartial hearing officer's finding that the student should not have been placed in adapted physical education was erroneous and contrary to law. Regarding the impartial hearing officer's finding that the student's program was not implemented, the district asserts that the recommended program was properly implemented, inasmuch as an FBA/BIP was conducted in a timely fashion and that the student demonstrated appropriate progress while enrolled in the district's program. Lastly, the district contends that Gersh was not an appropriate placement for the student and that the equities do not lie in the parents' favor.

In their answer, the parents allege that the impartial hearing officer properly held that the district failed to offer the student a FAPE during the 2007-08 school year and that the district failed to implement the student's educational program. The parents argue that it is undisputed that the district failed to comply with the speech-language requirements set forth in 8 NYCRR 200.13. They also assert that the student was not offered a FAPE, and that the evidence adduced at the impartial hearing shows that the student made little, if any, progress in reading, math, or counseling while enrolled in the district program. Additionally, the parents claim that the district's most egregious error was its failure to conduct a timely FBA. The parents further maintain that the student's placement at Gersh was appropriate and that equitable considerations favor an award of tuition reimbursement.

Two primary purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE<sup>18</sup> 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

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<sup>18</sup> The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

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, 179-81, 200-01 [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]). A student's educational program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[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 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 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).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

As discussed supra, the impartial hearing officer found that the February 2007 IEP did not offer a FAPE to the student (IHO Decision at p. 11). A thorough review of the hearing record demonstrates that the district adequately complied with the necessary procedural requirements in developing the February 2007 IEP and that the special education program and related services recommended by the district in the February 2007 IEP were reasonably calculated to confer educational benefits to the student and were offered in the LRE. Thus, as discussed more fully below, at the time it was formulated, the February 2007 IEP offered the student a FAPE for the 2007-08 school year (see Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006] citing to J.R. v. Bd. of Educ., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]; Antonaccio v. Bd. of Educ., 281 F. Supp. 2d 710, 724-25 [S.D.N.Y. 2003]).

I will first address the district's contention that the February 2007 CSE subcommittee developed appropriate goals based on sufficient evaluative information. As a threshold matter, the district claims that the impartial hearing officer erred by making a finding on this issue. The hearing record supports this contention. A review of the parents' due process complaint notice reveals that they did not raise any specific challenges to the appropriateness of the goals listed in the February 2007 IEP, rather, the parents asserted that the district made inconsistent, if any, progress, in addressing the speech-language and social/emotional/behavioral goals (Dist. Ex. 3 at p. 4; Answer ¶ 76). Accordingly, the impartial hearing officer should have confined his determination to issues raised in the parents' due process complaint notice and erred by making a finding regarding the goals (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3],

300.511[d]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; Application of the Bd. of Educ., Appeal No. 08-070). However, even if I were to find that the impartial hearing officer correctly made a finding regarding the appropriateness of the goals, as set forth in greater detail below, a review of the hearing record reveals that the goals contained in the February 2007 IEP were appropriately drafted based upon input of the student's related service providers, as well as sufficient evaluative information (Dist. Ex. 18). A review of the hearing record establishes that the present levels of academic achievement and functional performance contained in the February 2007 IEP indicated that the student functioned below his chronological age in the areas of cognitive ability and language development, in that he exhibited limited verbal expression (id. at p. 4). The February 2007 IEP indicated that the student demonstrated basic reading and math skills (id.). The February 2007 CSE subcommittee identified that the student needed appropriate adult language modeling, re-teaching of concepts, frequent reinforcement and encouragement to work independently (id.). Academically, the student needed to develop math operational skills and to improve written expression and reading comprehension skills (id.). Regarding the student's social development, the February 2007 CSE subcommittee indicated that the student functioned below his chronological age in the areas of social development and pragmatic/social speech development (id.). The IEP noted that the student's communication skills affected his ability to socialize with peers/adults and that he did not display "appropriate social, adjustment to school, family and/or community environment skills" (id.). The February 2007 IEP stated that the student was a passive participant in class, was responsive to adult praise and/or disapproval, and that he followed classroom routines (id.). The February 2007 CSE subcommittee reported that the student exhibited needs in the areas of social interaction, development of awareness of cooperative play skills and turn-taking skills, and his ability to relate appropriately to peers in and outside the classroom (id. at pp. 4-5). The student also needed to learn how to communicate effectively in social situations (id. at p. 5). The February 2007 CSE subcommittee indicated that the student's physical levels and abilities were within age appropriate expectations, except for the area of fine motor skills, which it determined he needed to improve (id.). Finally, the February 2007 CSE subcommittee determined that the student's management needs were "moderate" in order to meet academic and social goals (id.). The February 2007 IEP indicated that the student required a predictable, established routine to reduce class disruptions (id.).

The February 2007 CSE subcommittee developed annual goals and short-term objectives in the areas of study skills, reading, writing, math, speech-language, social/emotional/behavioral, motor and basic cognitive/daily living skills (Dist. Ex. 18 at pp. 5-11). The impartial hearing officer determined that with respect to the annual goals contained in the February 2007 IEP, they did not accurately reflect the results of the evaluations that identified the student's needs in these areas, and specifically, that the social/emotional/behavioral goals were "underdeveloped" (IHO Decision at pp. 12-14). Although the IEP does not specifically refer to the January 22, 2007 counseling annual review report (Dist. Ex. 14) or the February 13, 2007 educational annual review report (Dist. Ex. 17), I note that the authors of those reports, the school psychologist who provided the student's counseling service and the special education teacher, attended the February 2007 CSE subcommittee meeting (Dist. Exs. 14; 17; 18 at p. 1). Information reported by the special education teacher in February 2007 provided the basis for the statement in the IEP that the student demonstrated "basic math" and "basic reading" skills, and identified areas of weakness addressed by the February 2007 IEP's academic annual goals and short-term objectives (Dist. Exs. 17 at p. 2; 18 at pp. 4, 6-8). At the time that the February 2007 IEP was developed, the school psychologist

reported that the student exhibited self-stimulatory behaviors, was impulsive and she recommended continuing socialization opportunities (Dist. Ex. 14). The CSE subcommittee recommended the use of refocusing and redirection throughout the school day as a program modification and the IEP offered annual goals to improve the student's ability to attend to tasks, improve the number of social interactions with peers, improve sharing skills with peers, and reduce/eliminate self-stimulatory behaviors, all of which directly related to the student's weaknesses reported by the school psychologist (Dist. Exs. 14; 18 at pp. 2-3, 8-10). Additionally, in testimony, the school psychologist and special education teacher stated that during the 2006-07 school year, the student demonstrated progress toward his counseling and academic goals (Tr. pp. 37-38, 439-40, 444). The student's 2006-07 annual goals contained in his student's June 21, 2006 IEP reflected foundational skills necessary for the student to progress toward the annual goals and short-term objectives that were developed for the 2007-08 school year and were contained in the February 2007 IEP (compare Dist. Ex. 12 at pp. 5-15, with Dist. Ex. 18 at pp. 5-11). Based on the circumstances presented above, the hearing record shows that the February 2007 CSE subcommittee developed an IEP that accurately reported the student's present levels of performance based on sufficient and current evaluative data and that also contained appropriate goals and short-term objectives related to the student's primary areas of need.

Furthermore, contrary to the impartial hearing officer's determination, the district correctly argues that the hearing record establishes that the program was reasonably calculated to confer an educational benefit on the student.<sup>19</sup> The February 2007 CSE subcommittee determined that the student required a structured 6:1+1 special class and additional personnel to benefit from instruction and for the 2007-08 school year, recommended that the student continue in the 6:1+1 special class with 1:1 aide services, and receive one group counseling session per week, one individual and one group session of OT per week, three individual and one group speech-language therapy sessions per week and two hours per month of in-school parent training and counseling (Tr. p. 31; Dist. Ex. 18 at pp. 2, 5). The student's 6:1+1 special class program was "specialized" for students with autism and based on the principles of ABA methodology (Tr. pp. 31-35, 427). According to the hearing record, district staff implemented "programs," which attempted to change students' behaviors related to academics, social and language skills (Tr. p. 427). The student's special education teacher testified that in the ABA program, data was collected "to see what is working and what is not working" (Tr. p. 427). Other components of the ABA program included naturalistic and incidental teaching opportunities and utilization of discrete trial methods (Tr. pp. 427-28).

The school psychologist and special education teacher stated that they recommended the special education program on the February 2007 IEP in part because of the progress he had demonstrated in the same program during the 2006-07 school year (Tr. pp. 37, 439-40, 447-48). The school psychologist testified that although the student did not achieve his counseling goals during the 2006-07 school year, he was making "really nice progress" and that he "did a good job"

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<sup>19</sup> The district contends on appeal that the parents did not raise the issue of whether the February 2007 IEP was reasonably calculated to confer educational benefits to the student in their due process complaint notice. I disagree and find that, although those exact words were not used in the parents' due process complaint notice, it is clear that from the notice that they were challenging the February 2007 IEP and whether it provided a FAPE to the student (Dist. Ex. 3).



(Tr. p. 37; see Dist. Ex. 12 at pp. 13-14). The special education teacher testified that during the 2006-07 school year, the student demonstrated "steady progress" (Tr. pp. 439-41). The speech-language pathologist testified that the student's progress during the 2006-07 school year was "satisfactory" and that "definitely there was progress throughout the year" (Tr. pp. 217-18). As detailed above, I find that the hearing record sufficiently demonstrates that the student had made meaningful progress during the previous (2006-07) school year in the district's 6:1+1 program (see generally Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir. 2008] [noting that although not dispositive, an IEP that is modeled upon an IEP that generated some progress in the past is likely to continue to confer educational benefit]). As such, I find that the February 2007 CSE subcommittee's program recommendation was tailored to meet the student's special education needs.

Next, I will consider the district's argument that the February 2007 IEP met the speech-language requirements set forth in 8 NYCRR 200.13(a)(4). As expressed herein, I agree. The impartial hearing officer determined that the district did not comply with the "speech and language requirements" (IHO Decision at p. 16). The district argues that they met the speech-language requirements set forth in 8 NYCRR 200.13(a)(4) which provide that "instructional services shall be provided to meet the individual language needs of a student with autism for a minimum of 30 minutes daily in groups not to exceed two, or 60 minutes daily in groups not to exceed six" (8 NYCRR 200.13[a][4]). The hearing record reflects that during the 2007-08 school year, the student received three individual 30-minute sessions of speech-language therapy per week, and one 30-minute group session of speech-language therapy per week, where the group consisted of "three or four" students (Tr. pp. 236, 244-45). The student also received one 30-minute session per week of "integrated" speech-language therapy, wherein the speech-language pathologist designed and implemented a language-based lesson plan in the classroom, which was comprised of five students (Tr. pp. 67-68, 257-58). The hearing record indicates that outside of the student's speech-language therapy sessions, he received language instruction from his special education teacher in the classroom "all day long" (Tr. pp. 430, 510-11, 1307-08). The special education teacher testified:

So we are working on language instruction all day long in everything that we do. Transitions, requesting. During all my academic lessons we are modeling for the children on the correct way to answer. If they are requesting for a snack or to go to the bathroom or for a preferred reinforcer, we are working on language. We use a lot of incidental teaching – natural, naturalistic teaching in order to elicit language from the students.

(Tr. p. 430).

The assistant superintendent also testified that "language is part of everything that they do in that classroom" [referring to the student's 6:1+1 classroom] (Tr. pp. 868-69). I note that the district's behavioral consultant, qualified by the impartial hearing officer as an "expert in the field of educating children with autism," testified that the student's 6:1+1 special class was a "language-based" and "language enriched" class (Tr. pp. 1448, 1549). Although not specifically delineated on the student's IEP, as a whole, the hearing record reflects that the student's program, including

specific speech-language therapy and in-class language instruction, did meet the regulatory requirements for language instruction for students with autism and was appropriate to address the student's individual speech-language and communication needs (see Application of the Bd. of Educ., Appeal No. 07-028).

I now turn to the district's argument that the impartial hearing officer erred in finding that there was no justification for the February 2007 CSE subcommittee's recommendation of adapted physical education for the student (IHO Decision at pp. 16-17). As detailed herein, the hearing record supports the district's assertion. In his determination, the impartial hearing officer cited the February 2007 IEP that the student's "physical levels [we]re within age appropriate expectations except for the area of fine motor skills" and relied on testimony, which led him to conclude that the student's gross motor skills "seemed to be intact" (*id.* at p. 17). State regulations describe adapted physical education as "a specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitations of students with disabilities who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program" (8 NYCRR 200.1[b]). According to the 2006-07 IEP, the student participated in adapted physical education during that school year (Dist. Ex. 12 at p. 2). In January 2007, the student's physical education teacher reported that the student demonstrated satisfactory skills, performed to the best of his ability, and although disruptive, exhibited satisfactory behavior and that his ability to follow directions, fitness and motor skills were improving (Dist. Ex. 17 at p. 4). The February 2007 CSE subcommittee subsequently recommended continued placement in adapted physical education, which had previously provided meaningful education benefit to the student, for the upcoming 2007-08 school year (Dist. Ex. 18 at p. 2). There is also no indication in the hearing record that the parents objected to the recommendation at the February 2007 CSE subcommittee meeting or had objected to adaptive physical education the year before. In addition to the student's success in adapted physical education during the 2006-07 school year, although the hearing record does not suggest that the student had gross or fine-motor needs such that he could not participate in a regular physical education program, the evidence adduced at the impartial hearing shows that his behavioral and management difficulties would preclude placement in such a program (see Dist. Exs. 17 at p. 2; 18 at p. 5).

Finally, I note that the hearing record does not reflect that the parents disagreed with the CSE subcommittee's February 2007 recommendations at the time the IEP was developed (Tr. pp. 38, 453-55, 1032). The hearing record reflects that the CSE developed the February 2007 IEP based upon: (1) the delivery of educational services that produced meaningful benefit and progress the year before; (2) due consideration of new evaluative data; (3) participation from the student's parents; and (4) significant input from teachers and service providers who were familiar with the student and his needs. Moreover, the hearing record does not demonstrate that there were procedural infirmities that rose to a level which impeded parental participation or denied the student educational benefits or opportunities (see Matrejek, 471 F. Supp. 2d at 419 [S.D.N.Y. 2007]), rather, the hearing record shows that the district communicated with the parents in developing the student's educational program (Tr. pp. 445-46).

Based on the hearing record before me and for the reasons stated above, I conclude that the student's February 2007 IEP, at the time it was developed, was reasonably calculated to provide the student with meaningful educational benefit.

Next, I will consider the district's argument that the student's educational program, as implemented, was appropriate. At the impartial hearing, the parents did not argue that specific facets of their son's February IEP were not implemented; rather, they argued that "the way in which the district has implemented the [February 2007] IEP was inappropriate" (Tr. pp. 6-7).

In order to prevail on a claim that a district failed to implement a student's IEP, resulting in a denial of a FAPE, a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). Accordingly, in reviewing failure to implement claims under the IDEA, it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material," (Van Duyn v. Baker Sch. Dist. 5J, 481 F.3d 770 [9th Cir. 2007] [holding that a material failure occurs when the services a school provides to the disabled student fall significantly short of the services required by the IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

As stated above, the February 2007 IEP offered the student a 6:1+1 special class with 1:1 aide services, one group counseling session per week, one individual and one group session of OT per week, three individual and one group speech-language therapy sessions per week (Tr. p. 31; Dist. Ex. 18 at pp. 2, 5). The hearing record reflects that from September 2007 until his removal from the district's program in February 2008, the student received the special education services delineated in his IEP (Tr. pp. 26, 236-37; Dist. Ex. 18; see Dist. Ex. 35).

In reaching his conclusion that the district failed to implement the student's IEP, the impartial hearing officer determined that the district did not have a "cohesive plan" in place to address the student's behavioral needs, and that the student failed to make sufficient academic and non-academic progress (IHO Decision at pp. 20, 22-24).

The district first asserts that the impartial hearing officer's conclusion that the student's IEP was not properly implemented due to a lack of a cohesive behavior plan is erroneous. As detailed below, the hearing record substantiates the district's assertion. In the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider, when appropriate, strategies, including positive behavioral interventions, and supports 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 W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with

a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120).<sup>20</sup> Additionally, under State regulations when considering more restrictive programs or placements as a result of the student's behavior a CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]).<sup>21</sup> In the instant case, the hearing record reveals that toward the end of the 2006-07 school year and during the summer 2007 ESY program, the student exhibited self-stimulatory behaviors that interfered with his progress (Tr. pp. 39-40, 564-66). The student's special education teacher testified that the student did not require an FBA during that timeframe because it was not warranted (Tr. p. 710). She stated that it was not uncommon for students with autism to exhibit behaviors that interfered with progress at one time or another, and that district staff were "managing" the student's behaviors (Tr. pp. 710-11). The special education teacher also testified that there were challenges at the beginning of a school year due to the transition back to school (Tr. pp. 461-62).

At the beginning of the 2007-08 school year, district staff including the special education teacher, TA, school psychologist and speech-language pathologist worked to address the student's behaviors (Tr. p. 464).<sup>22</sup> District staff collected data regarding the student's behaviors and determined that he had difficulty during group activities (Tr. pp. 460-61). At the end of September 2007, district staff decided against requiring the student to work in a group, and instead provided him with 1:1 instruction (Tr. pp. 461, 463). In September and October 2007, the student began exhibiting aggressive behaviors directed at staff who put demands on him (Tr. p. 45). District staff and the autism consultant working with the student decided to remove some of the newer, difficult tasks and replace them with easier, mastered items to improve the student's outlook on school and classwork (Tr. p. 463). The autism consultant provided district staff with classroom modification strategies to use with the student including use of a "surprise box," "break cards," social stories, and token charts (Tr. pp. 46-47; Dist. Ex. 20 at pp. 3-8). Other recommendations for the student included specific "sensory-time" sessions, and changing his individual aide and the staff's data

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<sup>20</sup> In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, as presented in the instant case, State regulations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

<sup>21</sup> In New York, a BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; 8 NYCRR 201.2[a]). An FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]). An FBA shall be conducted as part of an evaluations or reevaluations, in the consideration of "special factors" during the recommendation process to the board of education, or as part of disciplinary actions (see 8 NYCRR 200.4[b][1][v], 200.4[d][3][i], 200.22[a][1]).

<sup>22</sup> The hearing record reveals that during the 2007-08 school year while the student attended the district's program, the student's special education teacher and the student's mother were in frequent contact (Tr. pp. 1056-58; Dist. Ex. 32; Parent Ex. C).

collection system (Dist. Ex. 20 at p. 8). The special education teacher testified that at a point in October 2007, district staff working with the student determined that he needed an FBA, but prior to that point in time, they were "still trying out different things" and the student's behaviors did not warrant an FBA (Tr. pp. 567-68).

As stated previously, in late October and early November 2007, the school psychologist collected information from district staff and the student's parents for the purposes of conducting an FBA (Tr. p. 48; Dist. Exs. 21; 22; 23; 24). The behavioral consultant, after reviewing the district's FBA, testified that it was "appropriate" (Tr. pp. 1475-78, 1515-16).<sup>23</sup> At the end of November 2007, the school psychologist reviewed the resultant BIP with the parent, special education teacher, and speech-language pathologist, who indicated their agreement with the BIP, which was subsequently implemented (Tr. pp. 49-50; Dist. Ex. 25A at p. 5).<sup>24</sup> The behavioral consultant testified that the district's initial BIP was a "good starting point" and also stated that BIPs are "at best, a work in progress and they are constantly tweaked and updated" (Tr. p. 1478). The school psychologist testified that the effect of the student's initial BIP was "inconsistent" and that it needed to be revised (Tr. p. 50). In mid to late December 2007, the student exhibited an increase in aggressive behaviors and on December 19, 2007, the school psychologist revised specific portions of the student's BIP to address the student's needs that were not met under the initial BIP (Tr. pp. 50-52; compare Dist. Ex. 25A, with Dist. Ex. 27).

On January 8, 2008, the district's behavioral consultant spent three and a half to four hours working with the student (Tr. pp. 1459-61). Prior to his interaction with the student, the behavioral consultant looked briefly at the student's BIP and what was indicated as the "presenting problem" (Tr. p. 1459). The behavioral consultant recommended that the student's "breaks" become interactive and that district staff reduce demands on the student "down to a level where the demand would not be the cause of problem behavior," which included academic demands (Tr. pp. 1461-65). On January 11, 2008, the student's BIP was revised for a second time (compare Dist. Ex. 27, with Dist. Ex. 30).

On January 24, 2008, the behavioral consultant met with district staff and the autism consultant reported that the student was "responding well" to the behavioral consultant's January 8, 2008 recommendations (Tr. p. 1471). Also on that date for approximately three hours, the behavioral consultant worked with the student and observed district staff working with the student (Tr. p. 1472). During the January 24, 2008 session, the behavioral consultant observed that the

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<sup>23</sup> At the impartial hearing, the student's mother testified that during the 2007-08 school year while in the district's program, the student "slept about two hours per night" (Tr. pp. 1076, 1393; see Tr. p. 825). The hearing record contains three notes written by the parent to district staff regarding the student's difficulty with sleep on three separate nights (Dist. Ex. 36). One of the notes is dated "10/15" and one is dated "1/3" (id.). A third note is undated (id.). These notes do not state that the student had continual trouble sleeping every night. Aside from these notes, the hearing record does not reflect that the parent informed the district about the degree of her son's sleep difficulties, and the behavioral consultant testified that if the district had known about the student's lack of sleep, the FBA could have included that information as a precursor to his behaviors (Tr. pp. 1466-67; Dist. Ex. 21).

<sup>24</sup> Additionally, between November 28, 2007 and January 31, 2008, the student's team met and discussed the student four times (Dist. Ex. 26).

student was "much more responsive when transitioning back to ... tasks" and that the student was "very responsive to staff within the interactive break" (id.). During the January 24, 2008 meeting, the behavioral consultant also provided district staff with strategies to address the student's avoidance of working in a group (Tr. pp. 1472-74). The behavioral consultant opined that given the progress the student exhibited between January 8 and January 24, 2008, "it looked like things were on the right track" (Tr. p. 1480). Although the behavioral consultant also stated that he could not be definitive about the long-term effectiveness of his recommendations, the behavioral consultant added "that is part and parcel to developing interventions, both teaching strategies and behavior management strategies, that you literally have to be able to flex with a youngster and modify as you go" (Tr. pp. 1480-81).

The school psychologist testified that "towards the end of January" 2008, the student's episodes of aggressive behavior "really went to zero, zero minutes a day" and that his self-stimulatory behavior also decreased "tremendously" (Tr. p. 54; Dist. Ex. 31 at p. 6). As reflected in the hearing record, in February 2008, while still attending the district's program, the student continued to exhibit low incidences of aggressive and noncompliant/self-stimulatory behaviors (Dist. Ex. 31 at p. 7). The school psychologist testified that prior to his removal from the district, the student reached a "stabilization of the behaviors" and the plan for the student going forward was to gradually increase the academic demands placed on him (Tr. p. 54). The special education teacher testified that at the end of January/beginning of February 2008,

[the student] started to make progress. We saw a big difference in -  
- the aggression had decreased, he was completing more work. We  
started -- we were able to start to introduce him to harder tasks and  
not so much some of the things he mastered. He was happier. He  
started to transition more easily to special areas and related services.

(Tr. p. 506).

Finally, although the school psychologist testified that the team was "worried" about the student's behaviors in December 2007, they did not take any "formal steps" to try and change his placement (Tr. p. 55). Referring to the student's ability to be successful in the district's program and the progress the student exhibited in January 2008, the behavioral consultant testified that he did not "really see anything at the time that would make [him] feel that a more restrictive placement would be recommended" (Tr. p. 1481). Based on the foregoing, although the parents claim that the district's most egregious error was its failure to conduct a timely FBA, the hearing record establishes that the district first attempted a number of classroom interventions with the student to address his behaviors, and when that approach proved unsuccessful, it conducted an FBA and developed a BIP. Moreover, as noted above, district staff continued to work on the student's behaviors by seeking the input of the autism consultant and an outside behavioral consultant and twice modified the student's BIP. Given the above set of circumstances, the parents' allegation that the district failed to conduct a timely FBA and thus failed to implement the student's educational program during the 2007-08 school year, and thereby denied the student a FAPE, lacks merit.

I now turn to the impartial hearing officer's determination that the district's focus on skill maintenance rather than the introduction of new academic material was inappropriate (IHO Decision at pp. 20-23). The special education teacher testified that between the end of the 2006-07 school year and October 2007 the student demonstrated progress in his reading comprehension and oral reading skills, sight word vocabulary and his ability to tell time (Tr. p. 576). The special education teacher stated that in October 2007 the autism consultant recommended that the student's academic tasks be made easier and to "go back to mastered items" (Tr. p. 577). The special education teacher determined that the "most important thing" was the student's behavior, and in October 2007 "academics, you know, were put on hold as far as new material" (*id.*). She explained that beginning in October 2007 in addition to addressing the student's behaviors, she worked on maintaining the student's skills (Tr. p. 578). She testified that although the student did not receive instruction on new material on a "regular basis," she did "at times" work on new skills "when the behavior allowed" (*id.*). The behavioral consultant testified that reducing the demands placed on the student did not render the district's program inappropriate, and stated that it was "common practice to look at demands as a way of helping a youngster with their problem behavior" (Tr. p. 1468).

The special education teacher testified that during the 2007-08 school year, she developed an academic "program book" for the student that contained new material to be worked on, but that she did not use the program book to collect data regarding the student's academic performance because she was collecting data about his behaviors (Tr. pp. 600-05, 698-702). The special education teacher also explained that although she did not keep a program book for the student, as per the February 2007 IEP, his progress would be evaluated, in part, by class participation, which would in turn, allow for more of a group focus (Tr. p. 701; Dist. Ex. 18 at pp. 5-8, 11). While I do not condone the failure to document the student's academic progress when, as stated in the hearing record, data collection was "part of the ABA method" used in the student's program, given the evidence that the student exhibited some progress in the district's 2007-08 program, the absence of an academic program book for the student does not constitute a substantial or material deviation from the student's otherwise appropriate program, thereby amounting to a claim that the district failed to implement the student's educational program, which in turn, resulted in a denial of a FAPE.

I will now address the district's argument that the student made sufficient progress while enrolled in the district's program. As expressed below, the hearing record demonstrates that the student received educational benefit. During the 2007-08 school year, the school psychologist testified that the student demonstrated progress in the areas of play skills, turn-taking skills and in his ability to work cooperatively with the other student in the counseling group (Tr. p. 41; *see* Dist. Ex. 42 at p. 5). By the time he left the district's program in February 2008, the student had mastered greeting peers and saying goodbye with occasional prompts, skills he had not mastered by the end of the 2006-07 school year (Tr. pp. 42-43; Dist. Ex. 12 at p. 13). The speech-language pathologist testified that during the 2007-08 school year she continued to work on skills that the student had worked on during the previous year, but with a higher degree of accuracy and difficulty (Tr. p. 219). She indicated that the student's rate of progress was variable; in that at times he made "slow progress, at times there were periods of maintenance, and at times he was making more quick progress" (*id.*). She testified that the rate of progress during the second quarter of the 2007-08 school year was not as "great" as during the first quarter, but that the student continued to progress

and maintained the majority of his skills between those two timeframes (Tr. pp. 272-73). The speech-language pathologist stated that the student made appropriate progress toward his speech-language goals during the 2007-08 school year (Tr. p. 224).<sup>25</sup>

The special education teacher testified that during the 2007-08 school year, the student demonstrated progress toward his IEP math and reading annual goals, and that he had difficulty with annual goals related to attention, behavior and phonics (Tr. pp. 457-58). Although still within the kindergarten reading level, the student advanced to the next "level" of books (Tr. p. 506). The special education teacher testified that between September 2007 and the beginning of February 2008 the student improved his ability to spell consonant-vowel-consonant words, identify coins and their amount and was working on completing basic addition problems with prompts (Tr. pp. 507-08). By the end of the second marking period, the district reported that out of approximately 50 annual goals/short-term objectives in the areas of study skills, reading, writing, math, speech-language, social/emotional/behavioral, motor and basic cognitive/daily living skills, the student received designations of "SP" or "PS" for 26 of the annual goals/short-term objectives, and that he achieved two annual goals (Dist. Ex. 42).<sup>26</sup> I note that 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) but they must offer a program that is reasonably calculated to confer educational benefit. Given the above circumstances, and considering that approximately four months of the 2007-08 school year remained when the student was removed from the district's school and that he was showing an increased rate of progress prior to his removal, when reviewed as a whole, the hearing record reveals that the student demonstrated an adequate degree of progress on at least half of the annual goals and short-term objectives enumerated in the February 2007 IEP by February 2008.

In summary, although the district failed to maintain an academic program book for the student, the evidence adduced at the impartial hearing otherwise suggests that the district implemented a variety of classroom management strategies, conducted an FBA, developed a BIP that was implemented and revised when necessary, and that the student achieved some progress toward his February 2007 IEP goals. Moreover, there is no indication in the hearing record that at any time, the student was deprived of any services delineated in his February 2007 IEP. Based on the circumstances presented herein, the hearing record does not support a finding that the district failed to implement significant or substantial portions of the student's IEP, thereby giving rise to a claim that the February 2007 IEP was not properly implemented, thereby resulting in a denial of a FAPE.

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<sup>25</sup> The speech-language pathologist's "notes" reflect that in September 2007, a primary focus of the speech therapy sessions was to reduce the student's self-stimulatory behaviors and on at least three occasions in December 2007, she was not able to conduct sessions due to the student's aggressive and non-compliant behaviors (Dist. Ex. 34). However, the notes also reflect multiple occasions where the student did participate in speech-language therapy and completed activities related to his IEP goals (Dist. Exs. 18 at pp. 8-9; 34; see Tr. p. 257).

<sup>26</sup> The IEP goals progress report indicated that the student did not progress satisfactorily on four annual goals/short-term objectives, and seven annual goals/short-term objectives were not started (Dist. Ex. 42). Six annual goals/short-term objectives were designated as "SC" with corresponding comments and five annual goals/short-term objectives did not receive any designation (id.).



In conclusion, I do not find that the impartial hearing officer's determination that the district failed to offer the student a FAPE during the 2007-08 school year is supported by the hearing record. Having determined that the district offered the student a FAPE in the LRE for the 2007-08 school year, I need not reach the issue of whether Gersh was appropriate, and the necessary inquiry is at an end (M.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).

I have considered the parties' remaining contentions and find that I need not reach them in light of my conclusions herein.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED**, that the impartial hearing officer's decision is annulled in its entirety.

**Dated:**            **Albany, New York**  
                         **November 13, 2008**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**